

RE ELECTION PETITION AND ALEIPATA (ITUPA I LALO)
Territorial Constituency No. 19

TAFUA KALOLO v LETIU TAMATOA

Supreme Court Apia
19, 20, 23, 24 April; 10 May 1979
Nicholson CJ

ELECTIONS (Corrupt practices) - Bribery and treating - ss 96(3) (a) and 97(1) (b) of the Electoral Act 1963 - Presentation by candidate of relatively lavish gifts of food and money to matais present at unusual meetings at a time when the Election was imminent leading only to the inference that his intention was to bribe and treat and not merely to comply with the Samoan custom of gift presentation by a visiting matai to his host.

EVIDENCE (Corroboration) - Evidence of two accomplices considered mutually corroborative: DPP v Hester [1972] 3 All ER 1056 applied.

PETITION for a declaration that the Election of 24 February 1979 was void.

Chief Returning Officer joined as second respondent.
Petition granted.

Epati for petitioner.
Enari for respondent.

Cur adv vult

NICHOLSON CJ. As a result of the General Elections held in Western Samoa on the 9th of March, 1979 the Chief Returning Officer declared the results of the Aleipata (Itupa i Lalo) Territorial Constituency Election result as follows:-

Amoa Tausilia	29
Letiu Tamatoa	78
Tafua Kalolo	71
Tuiavi'i Sefo	<u>26</u>
Total	= 204 Valid Votes
	1 Informal vote was cast

In this petition the Court is not concerned with the candidates Amoa and Tuiavi'i, the petitioner being Tafua Kalolo and the first respondent being the successful candidate Letiu Tamatoa, and the Chief Returning Officer second respondent. The lengthy evidence recorded in this matter in the main revolves around incidents occurring on three days, the petitioner alleging that on the 5th of February, 1979, the 20th of February, 1979, and on Election Day, the 24th of February, 1979

the first respondent did commit bribery in terms of the Electoral Act 1963 by having money distributed to voters for the purpose of inducing these voters to cast a vote in the first respondent's favour. In addition, the petitioner alleges that the first respondent committed the offence of treating by providing food to voters on those same three days for the purpose of inducing voters to vote in favour of the first respondent. The prayer of the petition is to declare the Election void and that a new election be carried out.

The petitioner's evidence shows that on the 5th of February, 1979, the first respondent, who was the sitting Member for the constituency, came to the village of Mutiatele in the constituency in the company of Tu'isila, a high matai of that village. He made a speech of a campaign nature and asked for support in the Election. He made a presentation through the Pulenu'u, Va'ili, who was present, of two kegs of beef, three cartons of biscuits, and \$60.00, and these food items were distributed among the ten to fifteen matais present, and the money was distributed among all the matais of the village, numbering some twenty-two, including those who were not actually present.

On the 20th of February, 1979 the first respondent visited the village of Pu'ē in the same constituency. The evidence is conflicting as to whether or not he made an election speech, but he did ask for the support of his candidature from the thirteen or fourteen matais present, and he distributed two kegs of beef and \$70.00 among those present, but the division of money included two elderly matais who were not present at the meeting.

On Election Day, the 24th February, 1979, the evidence shows that two kegs of beef, two cartons of biscuits, and a large fish were delivered to the Committee House at Pu'ē village in the name of the first respondent, and these were shared among the villagers after the Election. There is some evidence to suggest also that \$10.00 was delivered and distributed there on Letiu's behalf. On an unknown date in January, or February, 1979, one Tiumalu and other matais, who had been expelled from the village of Saleaamua, were met by Letiu at the house of Savea Gali and were given a 6-lb. keg of beef, a bottle of beer each, and \$20.00 to distribute among themselves. It was understood that these gifts were made to them because they had not been present at the meeting of the whole district held in January, 1979 at the house of the petitioner Tafua, as high chief for the district, at which time the seat was formally handed back to the electorate by the first respondent and he announced his renewed candidature. At this time, he had made a large presentation of gifts and money for distribution throughout the district as a measure of thanks for the support he had received in the past three years, and Tiumalu and his companions had not received any share of that presentation.

There is further evidence that on Election Day at the Saleaamua polling booth, soft drinks were served to the voters queueing at the polling booth by women folk of the first respondent's family, free of charge.

The first respondent in his evidence has made it clear that he does not dispute the giving of the gifts and money at the two village meetings described by the witnesses of the petitioner. To some small extent he disputes the facts surrounding his attendance at the two meetings in question saying that he went to these villages at the request of members of the village while the petitioner's witnesses say that he came of his own volition. Whatever is the truth of that matter, it is clear from the evidence, and in particular from the first respondent's own evidence, that he attended these two village meetings for the purpose of electioneering. In addition he wished to thank them for their support in the past.

The first respondent explains the gifts of food and money as being a matter of complying with Samoan custom, and that there was no intention on his part to offer bribes to the matais he met on these two occasions. The evidence indicates that only matais, that is only voters, were present at these two meetings and the simple issue for this Court to decide is whether or not the petitioner has proved beyond reasonable doubt that the intention of the first respondent in making these

presentations of food and money was a corrupt one of offering bribes to induce voters to vote for him in the Election, or whether it was a simple intent on his part to comply with Samoan custom in presenting gifts when coming to meetings.

It is clear that "these were not formal meetings" in the sense that formal presentations were being made. The meetings occurred on the morning when the normal village council meeting would be held in any event, and the kava ceremony, which was performed on each of these occasions, was the normal kava ceremony, which would attach to the weekly village council meeting. Conflicting evidence has been given by the matais who were present at these two meetings as to whether or not the presentation of gifts was in accordance with Samoan custom or not, but the true issue is not whether the gifts were in accordance with Samoan custom but whether or not it was the intention of the first respondent merely to comply with Samoan courtesy in making the presentations or was it an intention to bribe. Again the evidence which I accept shows that, although he was the Member of Parliament for the constituency for the previous three years, the first respondent had not met with either of the two village councils in question at all during that three years.

I think it inescapable to attach significance to the fact that this meeting and presentation occurred at Election time. I refer to Parker's Powers Duties and Liabilities of an Election Agent and Returning Officer at Parliamentary Elections in England and Wales, 6th Edn., at page 288. Now, it is obvious that in England and Wales there would be no parallel situation with that pertaining to elections in Western Samoa when the question of compliance with the fa'a-Samoa arises. But, the learned author comments in relation to the question of charitable gifts made by a sitting member as follows:-

The imminence of the election may have a considerable effect upon the decision whether or not a particular act of charity amounts to bribery. Thus it was said that a charitable design may be unobjectionable so long as no election is in prospect yet, if circumstances alter and an election becomes imminent the candidate if he then goes on with that design will do so at the risk of being found guilty of bribery.

Earlier at page 286, the author observed, "it is obvious that what are called charitable gifts may be nothing more than a specious and subtle form of bribery, a pretext adopted to veil the corrupt purpose of gaining or securing the votes of the recipients. And if this is found to be the object of the donor it matters not under what pretext, in what form, to what person or through whose hands the gift may be bestowed or whether it has proved successful in gaining the desired object or not". I think those views are apt for the situation here.

After careful consideration of this very delicate matter, I conclude that the presentations made to the matais of these two villages on the occasions of the 5th of February, 1979 and the 20th of February, 1979 were given with the corrupt intention of inducing those voters present to vote for the first respondent in the Election. I reach this serious conclusion upon these grounds:-

- (1) the imminence of the Election at the time the presentations were made;
- (2) the fact that each of these meetings was an unusual meeting on the part of the respondent with the matais and was not part of a pattern of regular meetings at which gifts were presented; and
- (3) the relative lavishness of the gifts supplied.

The Court accepts that it may be traditional at formal meetings between matais for gifts of a symbolic nature to be exchanged, but to characterise these quite large gifts of food and money in the circumstances of these meetings as being intended simply as compliance with Samoan courtesy is in my respectful opinion to denigrate the dignity and significance of the Samoan tradition of gift presentation.

However, I can conceive of some occasions where it would be Samoan custom for a visiting matai who wishes a favour from his host matais to bring gifts to induce his hosts to consider his request favourably. But, if that is done in an election campaign by a candidate to gain votes it amounts to corrupt practice under the Electoral Act 1963, whether it is fa'a-Samoa or not. The Electoral Act 1963 does not allow Samoan custom to be offered as an excuse for bribery or treating and candidates offering substantial gifts to voters at election time run a grave risk of being accused of corrupt practices under the Act. The precise intent with which the presentation is made is all important in such cases.

I do not accept the explanation of the first respondent that he had the pure intention of complying with Samoan courtesy in making these substantial gifts in these circumstances. I find that in terms of section 96(3)(a) the first respondent committed the offence of bribery in giving money to electors on these two occasions in order to induce them as electors to vote for him at the Election. I find that in terms of section 97(1)(b) the first respondent was guilty of treating by providing food to the matais at these two meetings for the purpose of corruptly procuring himself to be elected.

Turning to the allegations of bribing and treating on Election Day, the first respondent acknowledges that the treating occurred, but says that it occurred without his personal knowledge. He states that he would have approved of it had he known of it at the time it occurred. Again, he considered that it was not in breach of the terms of the Electoral Act 1963. I conclude that there was treating, but there is in my view no evidence that the petitioner knew of it at the time it occurred, or that he organised it. Therefore, I find that the allegations of treating on Election Day are not proved. There is a conflict of evidence before me as to whether or not \$10.00 was passed on Election Day, and again no evidence that first respondent knew of it, and I must reject that allegation of bribery against the first respondent. I do not concern myself with the allegations regarding payments and gifts to the three banished matais, since it is not clear when these alleged incidents occurred, and there is a good deal of doubt as to what the intention was behind the gifts and presentation, a doubt which must be resolved in favour of the first respondent.

A number of counter-allegations of bribery and treating were made by the first respondent against the petitioner Tafua Kalolo as follows:-

- (1) an allegation by one Fiu that he was called to the house of Tafua and given money by Tafua prior to the Election and was admonished to bear in mind the Election;
- (2) an allegation by Lio that he, along with two other matais, visited Tafua's office in Apia just prior to Election and received food, liquor, and money from him with an admonition to bear in mind the Election;
- (3) an allegation that one Fa'agase had had his fare paid by Tafua from Pago Pago to come to Western Samoa and cast his vote;
- (4) an allegation that Tafua's son Tauā had distributed money to Maulupe and Tanoafofola by way of a bribe in the period just prior to the Election;
- (5) an allegation by one Luamanuvae that he has been informed that food had been supplied through Mata'afa from Tafua on Election Day; and
- (6) an allegation that Tafua provided food for voters at his house on Election Day.

Dealing with (1), Fiu told the Court that on Sunday, the 18th of February, 1979 Tafua, who is the highest chief for the district, called upon him to come to see him. Fiu said that it was the first time that he had ever been called to Tafua's house. They did not discuss the Election but talked about things concerning themselves. Tafua then gave him \$10.00 saying it was for sugar. As Fiu was about to leave, Tafua said to bear in mind the Election. Fiu said that he felt that

the money was being given to him to induce him to vote for Tafua. By way of rebuttal, the petitioner called one Tautolo Fa'avalea, who says that by tradition he is present every Sunday in attendance on Tafua and that he was present on the occasion of Fiu's visit. The discussion centered around the High School enrolment of Fiu's daughter, and when Fiu left nothing was said about the Election, nor did Tafua give \$10.00 to Fiu. Tautolo said that under Tafua's direction he personally handed over a piece of pork to Fiu in accordance with customs, but did not assign any particular reason to the gift.

The evidence on this subject consists of these two directly contradictory accounts. Tafua himself did not give evidence on this or any other matter. On the other hand Fiu's evidence must be looked at as that of an accomplice because on his own account he accepted this alleged bribe, and, traditionally, the Court would look for some corroboration for his evidence before accepting it, except in extraordinary circumstances. I was not so thoroughly impressed with Fiu's demeanour and account as to warrant my disregarding the normal rule that I should find some corroboration for such a serious allegation by an accomplice, and bearing in mind the contradicting evidence on the subject given by Tautolo, I conclude that this allegation of bribery has not been proved beyond reasonable doubt.

Turning now to allegation (2) by the witness Lio, he told the Court that in the week before the Election he met with Tafua Kalolo at his home in Apia. He said that the orator Vaomalulu had told him and his companion to go with him to Tafua's house because Tafua wanted to meet them. He said Tafua welcomed them and that Vaomalulu, Sola Fogavai and Lio were given a bottle of gin, which they drank there, and food, which they ate there, and then each of them was given \$5.00 by Tafua. He said Tafua told them to bear in mind the Election as they were about to leave. Lio said it was his first visit to Tafua's place and that he never received any invitation from him before, nor had he ever received any gifts of money or liquor before. In cross-examination he said that the date of the visit was the 15th of February, a Thursday. He said that Sola did not ask for the spirits or the money, and that it is customary to give food to visitors, and it would be customary for a chief in Tafua's position to give fares to visitors, who had come a long way. He also said that Tafua at the time he handed over the money told them that the money was for their fares.

The petitioner by way of rebuttal called Vaomalulu Fiamatai, who was in Lio's company at the time of the visit with Sola to the house of Tafua in Apia. He denied that he had told Lio that Tafua wanted to see him. He explained that it was his habit to call on Tafua in Apia for refreshments whenever he was there, that he owned a fishing boat and that he quite often brought a fish to Tafua as a gift when he visited. He said he happened to meet these orators in Apia, and it was their desire to accompany him to Tafua's house. He acknowledged that they were given gin and food and money. He said he asked for some gin because it was usual for him to do so and it was usual for Tafua as the top chief of their district to provide it. Tafua is not a drinker of spirits himself. Vaomalulu said that he did not know whether the other two received money or not, but he often received money. He was not told to bear in mind the Election, and he did not hear the others being told of that either. He acknowledged that he said goodbye to Tafua and went out first and may not have heard any parting words from Tafua to Lio. He denied that he had been sent out by Tafua to find other matais of the district to bring to Tafua. He said he did not know why the others wanted to come with him to Tafua's house.

Again I am obliged to examine the evidence of Lio as that of an accomplice in view of the fact that he admitted to accepting the alleged bribe and treating and I look for corroboration for his evidence. To some extent Vaomalulu does corroborate Lio's account in that he agrees that there was gin and food given to all three of them by Tafua and money given at least to himself. Vaomalulu himself must be treated as an accomplice also, but there is no rule against mutual corroboration by two witnesses each of whose evidence requires corroboration. In this respect I refer to the decision of the House of Lords in Director of Public Prosecutions v. Hester, [1972] 3 All E.R. 1056. I accept

Vaomalu's evidence as corroboration in material particulars of Lio's testimony. Vaomalu takes the attitude that these gifts were nothing more than what he would normally expect from his customary visits to Tafua. But bearing in mind the imminence of the election at the time these gifts were made, my conclusion is that the account given by Lio that on 15th February, 1979 he personally received money from Tafua with an admonition to bear in mind the Election is to be accepted. I infer from the surrounding circumstances that the provision of gin and food when the Election was imminent was for the purpose of corruptly influencing Lio to vote in terms of section 97(a) of the Electoral Act 1963. I infer also that Tafua bribed Lio, a voter in his electorate, by providing him with money on this same date with the corrupt intention of inducing Lio to vote for him in the Election in terms of section 96 (3) (a) of the Act.

As for allegation (3) regarding the paying of Fa'agase's fare from Pago Pago, the only evidence in support of this is hearsay and quite inadequate to sustain a finding beyond reasonable doubt that the allegation is true. I therefore reject it.

The allegation (4) that Tafua's son Tauā distributed money on his behalf during the Election involves the evidence of two witnesses. The first witness, Maulupe Viliamu, an elderly, frail matai of Tiavea in the Aleipata constituency told the Court that Tauā Maluelue came to his house in the week prior to the Election. He had not been sent for. Maulupe said Tauā told him he was an officer of the Prime Minister's Department and the son of Tafua. He gave him \$5.00 for cigarettes, but gave no reason for the gift, nor did he say who it was from. He had never spoken to Tauā before, he said. This witness was unable to identify Tauā in the Courtroom, although Tauā was seated in the front row of the gallery, I was informed by counsel. The second witness Tanoafofola Tasipale, a matai of Samusu in Aleipata constituency, said he met Tauā Maluelue, whom he identified in Court, in front of the Methodist Church house in the week prior to the Election. He stopped his vehicle and gave \$2.00 to the witness saying it was to buy cigarettes. He did not say why he was making the gift. Tanoafofola said it was their first meeting, but he knew him as a matai of Saleaamua, the village of Tafua. In cross-examination he admitted he was related to Tauā, that Tauā had been working in New Zealand, and that it was customary for returnees from overseas to make gifts to relatives. He said that Tauā had since been back to New Zealand and returned to Western Samoa again, but he had had no further gifts from him.

Tauā was present throughout the hearing and was available to be called in rebuttal by the petitioner but he was not called. He made no application on his own behalf to be heard, but on the other hand the Court did not specifically offer him the opportunity of being heard in terms of section 119(2) of the Act. I now direct that he be served with notice in terms of that section before I deal with the allegations as they affect him.

As far as the petitioner is concerned there is no evidence that Tauā's action had his approval or authority, and I reject this evidence insofar as it amounts to an allegation against the petitioner.

The allegation (5) consists of evidence of a double hearsay nature and is rejected as quite insufficient to establish the serious charge of treating.

The allegation (6), that food was laid out at Tafua's house on Election Day, I conclude must also be rejected. It is clear from all of the evidence that Tafua was the ranking chief in the district, and that on any important occasion it would be customary for the district to gather at Tafua's house, and that Tafua and the village of Saleaamua would provide refreshments for the people gathered there. I am satisfied too that this practice has always occurred on Election Day, although not necessarily the whole of the district would gather at Tafua's house on that day, and that this practice was adhered to regardless of whether the holder of the title Tafua was a candidate in the Election or not. That being so, I draw the inference that the provision of food at Tafua's house was with the intent to comply with

that custom, having regard to the position of the title Tafua in the district, and that no corrupt intent can be attributed to Tafua for following this practice on Election Day, the 24th of February, 1979.

In view of my findings that both the first respondent and the petitioner have been guilty of corrupt practices in terms of Electoral Act 1963, I formally declare that the Election for the Aleipata (Itupa i Lalo) Territorial Constituency held on the 24th of February, 1979 was void, and I will report accordingly to the Honourable Speaker of the House.

I make no order as to costs.