IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NOS. S.233/93

BETWEEN : THE POLICE

Informant

A N D : PIO SIOA of Matautu & Toomatagi, Samoa Sports Newspaper Editor

Defendant

Counsel : M.B. Edwards for Prosecution
T.K. Enari for Defendant

Hearing : 20 July 1993

Decision : 9 August 1993

DECISION OF SAPOLU, C.J.

This is a prosecution brought under section 3(1)(b) of the Indecent Publications Ordinance 1960 alleging that the defendant printed or cause to be printed in the Samoa Sports newspaper an indecent document, namely, an editorial headlined "WHERETHEFUCKAREWE".

Now section 3(1) (b) provides:

"Every person commits an offence who prints or causes to be printed "an indecent document".

Section 3(2) upon which the prosecution relies as indicated by counsel then provides :

"Every person who commits an offence against subsection (1) of this "section is liable on conviction to a fine not exceeding $50".

Mr Edwards for the Prosecution submits that the word "indecent" as used in section 3(1)(b) must be given its ordinary and popular meaning. He also says that the test to be applied here in this case in determining

whether a document is indecent is that accepted by the New Zealand Court of Appeal in the case of R v. Dunn [1973] 2 NZLR 481. In that case, the test which appears to have been accepted by the Court in determining whether a matter is indecent is whether it offends against a reasonable and recognised standard of decency which ordinary and reasonable members of the community ought to impose and observe in this day and age. The Court then went on to say that indecency must always be judged in the light of time, place and circumstances.

I have given due consideration to this submission and I do not accept it. In Dunn's case what the Court was concerned with was a prosecution for an indecent performance brought under section 124(1)(c) of the New Zealand Crimes Act. That section reads :

> "Every one is liable to imprisonment for a term not exceeding "two years who, without lawful justification or excuse exhibits "or presents in or within view of any place to which the public "have or are permitted to have access any indecent object or "indecent show or performance".

Subsection 6 of the same section then reads :

> "Nothing in this section shall apply to any document or matter "to which the Indecent Publications Act 1910 relates, whether "the document or matter is indecent within the meaning of that "Act or not."

Now sections 124(1)(c) and 124(b) of the New Zealand Crimes Act 1961 are almost identical in terms to sections 43(1)(b) and 43(b) of our Crimes Ordinance 1961. If, therefore, the present prosecution was brought under section 43 of our Crimes Ordinance, Dunn's case would have been of great assistance in the interpretation of the word indecent as used under that section. But the present prosecution is not brought under the Crimes Ordinance but under the Indecent Publications Ordinance. It is also clear from section 124(b) of the New Zealand Crimes Act and section 43(b) of our Crimes Ordinance that the sections wherein those subsections are

contained , do not apply to any document or matter to which the respective Indecent Publications legislations of the two countries apply. But a more cogent reason for not applying Dunn's case to the present prosecution, is that, under the Indecent Publications Ordinance 1960, the words "indecent document" ~~and~~ are defined in the Ordinance itself which also prescribes the test to be applied and the factors to be considered in determining whether a document is indecent or not. However in the Crimes legislations already mentioned, the word indecent is not statutorily defined and so it is left to the Courts to decide what meaning is to be ascribed to the word indecent as used in the Crimes legislations. I think great caution is required when applying cases decided on the meaning of a word used in one statute to the same word when used in a different statute especially where the former statute does not define that word but the latter statute does.

I should also refer to the case of Police v Drummond [1973] 2 NZLR 263, another decision of the New Zealand Court of Appeal, because the four letter word complained of in that case is the same as the four letter word which forms the essence of the present prosecution. More importantly, it is to show the difference in the test to be applied when a prosecution for indecency or obscenity is brought under an Act like the New Zealand Police Offences Act 1927 which does not define those words.

In Drummond's case the prosecution was brought for use of a four letter word, the same as the four letter word complained of in this case. The charge was preferred under section 48 of the New Zealand Police Offences Act. That section provides :

> "Every person who uses any profane, indecent, or obscene language "in any public place or within the hearing of any person in such "public place is liable to imprisonment for any term not exceeding "one hundred dollars."

As it appears from Drummond's case, the amount of the maximum fine under the Act must have been increased by the time that case came before the Court of Appeal. Apart from the amount of the fine, it appears that the words used in section 48 of the New Zealand Police Offences Act are identical to the words of section 4(a) of our Police Offences Ordinance 1961. The defendant was convicted for use of obscene language under section 48 of the New Zealand Act and on appeal the Court of Appeal dismissed his appeal. McCarthy J in his judgment stated the test to be applied as follows : "But what standard "then should a Court determine whether the particular language used is "sufficiently offensive to decency. The standard which must be taken is "the current standard of the community. The statute is not concerned with "morality; it is directed towards public behaviour; it prohibits the use "of obscene or indecent language as a breach of decorum when that language "offends against contemporary standards of propriety in the community. In "any particular case whether it does so offend is not to be decided in the "abstract, but must be viewed against the circumstances and the setting in "which the words are used." Without deciding the point because it does not arise in this case case, the test propounded by Mc Carthy J could very well have been applied in this case if this prosecution was a prosecution under our Police Offences Ordinance. But that is not the situation here.

The present prosecution is a prosecution under the Indecent Publications Ordinance and the test applied by Mc Carthy J in Drummond's case is not the test to be applied to a prosecution like the present one, which is brought under the Indecent Publications Ordinance where the test to be applied is expressly provided. In Drummond's case, the relevant statute does not define indecency or obscenity or provide a test for determining indecency. So it was open to the Court to lay down the test which it did.

Coming now to the real question in this case whether the words used by the defendant are indecent in terms of the Indecent Publications Ordinance, I think the starting point of our enquiry should be the famous statement of Lord Cockburn CJ in R v. Hicklin [1868] LR 3 QB 360, 371 which is a well known case in this area of the law. He said :

> "I think the test of obscenity is this, whether the tendency of "the matter charged as obscenity is to deprave and corrupt those "whose minds are open to such immoral influences, and into whose "hands a publication of this sort may fall."

The common law test as pointed out by Cockburn CJ in Hicklin's case, found favour in some Courts in the English speaking world at different times. However it was subjected to judicial criticism by Windeyer J in the High Court of Australia in the case of Crowe v Graham [1969] 121 CLR 375. The New Zealand Court of Appeal also declined to follow the Hicklin test in the cases already cited of Dunn and Drummond in relation to the statutory provisions in issue in those cases. In the United States, the Hicklin test has also been generally rejected, as pointed out by Windeyer J in Crowe v Graham. However, the fact remains that the Hicklin test has been incorporated into divers specific pieces of legislation, including the Western Samoa Indecent Publications Ordinance, and still forms part of our legislation. It also appears from the judgment of North J in the New Zealand Court of Appeal decision in In re Lolita [1961] NZLR 542 that at the time of that decision, the Hicklin test was still incorporated into the New Zealand Indecent Publications Act 1910 and in some Australian legislations like the Queensland Objectionable Literature Act 1953 and the Victorian Police Offences Act 1957. Likewise the English Obscene Publications Act 1959 had also up to that time still retained in substance the Hicklin test.

In the case of In re Lolita, the Court dealt with the provisions of the New Zealand Indecent Publications Act 1910 which were substantially similar to the provisions of our Indecent Publications Ordinance. There were minor differences between the New Zealand Act and our Ordinance, but I regard those differences as immaterial for the purpose of this case. Section 2 of the New Zealand Act defines what is an indecent document, the same definition for an indecent document is contained in our Ordinance except that the words "or which unduly emphasise matters of sex, horror, crime, cruelty, or violence" are added to that definition. But if one turns to section 6 of the New Zealand Act which provides for certain documents deemed to be indecent, one finds the words "or unduly emphasise matters of sex, horror, crime, cruelty or violence" are used in that section. Turning to section 3 of the New Zealand Act which is the offence provision, one finds that the acts prohibited by that provision are identical to the acts prohibited under section 3 of our Ordinance but the penalties are different. Section 5 of the New Zealand Act which deals with the considerations for determining whether a document is indecent is substantially the same as section 5 of our Ordinance except that the word 'Magistrate' is used in the New Zealand Act but the word 'Court' is used in our Ordinance. The comparison can go on, but I am satisfied that the provisions of the New Zealand Indecent Publications Act 1910 and our Ordinance are substantially the same and any differences between the two are immaterial for our present purpose. It follows in my view that In re Lolita's case is relevant and a highly persuasive authority in the application of the provisions of our Ordinance. Perhaps I should mention, before going further, that the New Zealand Indecent Publications Act 1910 was repealed by the New Zealand Indecent Publications Act 1963 making substantial changes to the law as contained in the 1910 Act. One very substantial and significant change is that the Hicklin test does not reappear in the 1963 Act. So In re Lolita's case must be of little or

of no relevance to the law relating to indecent publications in New Zealand now, but it is still relevant to the application of the provisions of our Ordinance.

Upon reading the judgments of North J and Cleary J in that case, it appears clear to my mind that the use of the words "and the tendency of the matter or thing to deprave or corrupt any such persons" in section 5(1)(d) of the 1910 Act incorporates the Hicklin test into that Act and the Courts would have to consider that test amongst other matters listed in that section when determining whether a document is indecent or not. Cleary J in his judgment puts the matter in this way:

> "The test of obscenity was long ago laid down by Cockburn CJ in "R v. Hicklin [1868] LR 3 QB 360 as being 'whether the tendency "of the matter charged as obscenity is to deprave and corrupt "those whose minds are open to such immoral influences and into "whose hands a publication of this sort may fall'. The word used "in our legislation is 'indecent' and not 'obscene', and although "the two words may not be synonymous the shades of difference "between them must be slight. At all events, section 5 of our "Act reproduces words used by Cockburn CJ when it directs that "the tendency of the matter to deprave or currupt must be "taken into consideration in determining whether a publication is "indecent. It has been said often enough that it is not sufficient "to satisfy the test laid down in Hicklin's case that the "publication should be shocking or disgusting, ... There must also "be a tendency to deprave and corrupt."

It should also be mentioned that in the judgments of both North J and Cleary J they were of the clear view that the use in section 6 of the 1910 Act of the words "unduly emphasises matters of sex etc" extended the common law test laid down in Hicklin's case so that the 1910 Act not only incorporated the Hicklin test but added on to that test.

Another matter which was dealt with in the judgment of North J is the question that a defendant shall not be convicted unless his 'act' was of an 'immoral or mischievous tendency'. On this question North J said :

"I pass, then, to consider the various matters referred to in "section 5. While this is not a prosecution, I am of the "opinion that section 5(1)(b) and section 5(2) are of considerable "importance. Section 5(2) does not say that a defendant shall "not be convicted unless the Court is of opinion that the 'act' "of the defendant was of an 'immoral or mischievous tendency.' "On the contrary, it says that the document (in this case the "book) shall not be held to be indecent unless the 'act' of the "defendant was of an 'immoral or mischievous tendency'. It would "appear to me, then, that the Legislature, in enacting these two "provisions, did so for the purpose of ensuring that the Court "paid due regard to the nature of the 'act' of the defendant that "brought the matter before the Court. As the Lord Justice-General "said in Galletly v Laird, 1953 J.C. 16 :

" 'A book or picture, however indecent 'or obscene, will create no " 'social evil of the type sought to be repressed so long as it is " 'kept in proper custody and under responsible control.

" 'The mischief resides not so much in the book or picture per se " 'as in the use it is put'.

"If in the present case, the appellant society had imported the book "with the object of securing its circulation among a limited section "of the community, I do not myself think that the 'act' of the "appellant society could be said to have an immoral or mischievous "tendency. Obviously the book may be of interest to criminalogists "and persons interested in psychology. That, however, was not the "purpose of these proceedings which were taken as a test case to

"to determine whether the book should be made available to the "public generally".

It appears to me from what North J says that no document should be held indecent unless the act of the defendant was of an immoral or mischievous tendency. Whether or not the act of the defendant has such a tendency depends on the use of the document intended by the defendant, the extent of the circulation of the document and the kind of persons into whose hands the document will be received.

There is one other observation of North J that I would like to refer to because of its relevance in this area of the law. He said in his judgment :

"But the fact that a novel has literary merit, is not more than a "'consideration' to be taken into account by the Court in "determining whether the book is to be regarded as an indecent "document. I think the intention of the Legislature was that the "merits of the book were to be weighed against any tendency it may "have to deprave or corrupt the persons or classes of persons "referred to in paragraph (d). It is to be noticed that paragraph "(c) speaks of not only the literary or artistic merit of a book "but also of the medical, legal, political or scientific "character or importance of the book. I would think that in the "case of medical, legal, political or scientific books, the Court "would be unlikely to hold that they should be banned or that any "bookseller should be prosecuted for having them on his shelves, for "in respect of serious literature like this, it is essential that "the books should be admitted into New Zealand. Therefore, any risk "that they might get into wrong hands might deprave or corrupt young "persons would require to be accepted having regard to the wider "interests of the community".

I have referred to this passage, even though it refers to a book and not a newspaper, for two reasons. Firstly, to show that whatever the literary merit of a document like a novel or newspaper article, that has to be weighed against the tendency of such document to deprave or corrupt. Secondly, Mr Enari for the defendant, submits that the editorial in question is of a political character. If that is in fact so, and it comes within the words of North J just quoted, then the defendant stands a good chance of being acquitted.

This brings me to the word 'WHERETHEFUCKAREWE' which is the subject of this prosecution. It is really several words joined together to appear as one word and not one word. But the sting really arises from the use of the word 'fuck'. As already meantioned, this four letter word appears in the heading of the editorial of the 1st of October 1992 issue of the Samoa Sports newspaper. The word does not appear in any other part of the editorial. This is now a well known weekly newspaper, at least in the Apia area. But I assume that because it deals with sports and features prominently stories and articles about rugby and especially our Manu Samoa rugby team as no other local newspaper does, I think the popularity with the public of this particular newspaper is now without doubt. It follows that it must now have a very wide circulation around the country even though it is sold mainly, if not exclusively, in the Apia area. Because of its comprehensive coverage of rugby and in particular our Manu Samoa, I would think that this newspaper's popularity and circulation is not restricted to any particular class of persons in the country, given the nationwide commitment and support the country is giving to its national rugby team. So I am of the opinion that there is no doubt about the very wide circulation of this newspaper within the counrty. The evidence adduced by the prosecution also satisfies me that the defendant caused to be printed the words complained of.

Mr Enari for the defendant, who is the editor of the newspaper in question, submits that the purpose of the heading of the editorial was to grab the attention of the public and focus it on the contents of the editorial. I do not agree with this submission. The heading as I see it, when read together with the rest of the editorial, clearly suggests to my mind, that the editorial heading used, was chosen out of a feeling of anger and protest. In essence, the editorial is a criticism of the so called demands made by the Apia Park stadium. The editorial then goes further and puts the blame on the Government and also severely criticised the Government when the so called demand for free VIP tickets was from the Apia Park Board and not from the Government is beyond me. It is perhaps debatable whether from a layman's point of view, the Apia Park Board is part of Government; but in law, such statutory bodies like the Apia Park Board are not part of Government.

Coming back to the editorial heading complained of, some people in our community may find the use of the four letter word in that heading to be in very bad taste; other people may find it highly offensive; while others may find it shocking or disgusting. However the question for determination is not whether the editorial heading is in very bad taste, or highly offensive, or shocking or disgusting as people may think. The real question is whether the editorial heading is indecent within the meaning of the Indecent Publications Ordinance.

That leads me to the relevant provisions of the Indecent Publications Ordinance. Section 2, insofar as it is relevant for our present purpose, defines an indecent document to mean any newspaper which has printed any indecent word, or which unduly emphasises matters of sex. The definition seems to be twofold. Firstly, if a newspaper prints an indecent word then it is an indecent document. Secondly, if a newspaper unduly emphasises matters of sex then it is also an indecent document. I find this an

unsatisfactory definition because a newspaper may use a word, or words, to unduly emphasise a matter of sex. And if that is so, then the word may become indecent because of its undue emphasis on sex. On the other hand, a newspaper may be said to be unduly emphasising a matter of sex because of the indecent words used to describe and emphasise that matter although it is not a serious matter of sex. It does appear to me then that the two parts of the definition overlap. The second matter to be mentioned in relation to this definition is that in In re Lolita's case, North J adopted the meaning ascribed by the Australian Courts to the words "unduly emphasising matters of sex" which is, "dealing with matters of sex in a manner which offends against the standards "of the community."

The two parts of the definition of an innocent document may be applicable to the editorial heading in this case. I will deal with the second part of the definition in order to dispose of it now. The four letter word used in the editorial heading is without doubt intrinsically sexual in meaning. But does that mean that the editorial heading unduly emphasise matters of sex. I do not think so. The four letter word is lumped together with the words "where the are we". So it is not conspicuous in its setting. Any person reading the editorial heading will not be instantly hit in the eye by the four letter word used. In fact, I am of the opinion that any person seeing the editorial headline will at first pause and wonder what is this unusual word. Not only is it so long bvut it also looks unfamiliar. Granted, that the four letter word is used in the headline and is in capital letters, but its place in the editorial heading does not suggest that it unduly emphasises any matter of sex. Viewed in the context of the whole editorial which is about the so called demands of the Apia Park Board for free VIP tickets, I am satisfied that there is no undue emphasis on matters of sex. More to the point, I think there is no "dealing with a matter of sex" at all because

of the use of one four letter word as in this case, in order to attract the meaning adopted by /North J from the Australian cases. Thus, the editorial heading does not fall within the second part of the definition of an indecent document.

That leaves only the first part of the definition, that is, whether the word is indecent. Now section 5 which provides the considerations to be taken into account in determining whether any document is indecent applies generally to all prosecutions for indecency under the Indecent Publications Ordinance. And whatever ordinary or popular meaning the word 'indecent' may have, or whatever meaning the wrod indecent has been given under another statute, it is clear that the Legislature had intended, that for the purposes of the Indecent Publications Ordinance, the considerations listed in section 5 are to be applied in determining whether a document is indecent or not.

I deal now with the matters listed in section 5.

(a) **Nature of the document:**

As already stated we are here dealing with a newspaper editorial. The editorial criticises the Apia Park Board for "demanding" free VIP tickets for Members of Parliament and politicians. It goes further and criticizes the Government.

(b) **The nature and the circumstances of the act done and the purpose for which the act was done:**

This is a weekly newspaper which published in its 1st of October 1992 issue an editorial with a heading containing the four letter word already mentioned. As to the purpose of the editorial heading, I have already said that I am of opinion that it was chosen out of a feeling of anger and protest against the Apia Park Board for asking for free VIP tickets.

(c) **The literary or artistic merit or medical, legal political or scientific character or importance of the document or matter:**

I do not say that this editorial has literary or artistic merit, although it is well written. But even if it has, such merit ought to be weighed against any tendency it has to deprave and corrupt. Mr Enari

submits that this editorial is of a political character. Even if that is true, unless it is a serious work on politics, or a political classic, I think the character of the editorial heading in this case must be weighed against any tendency it has to deprove and corrupt. I must say that this editorial is not a serious work on politics. As already mentioned, I do not see why the Government should be so severly criticized in the editorial when it was the Apia Park Board that asked for free VIP tickets. In the last paragraph of the editorial, it says that in terms of rugby this means the next Manu Samoa will be selected by the Prime Minister and his Cabinet. Such a possibility is so remote and unreal, that I do not think any reasonable Samoan would believe it will happen. So I do not think the editorial in this case can be described as a serious work on politics.

(d) The persons, classes of persons, or age groups to or amongst whom the document or matter was or was intended or was likely to be published, distributed, sold, exhibited, given, sent, or delivered, and the tendency of the matter or thing to deprove or corrupt any such persons, class of persons, or age:

As I have already said, this is a sports newspaper. The manner in which this newspaper deals with sports, especially rugby and the Manu Samoa, has made it popular with every class of persons & age group that can read. So it cannot be said that its circulation is restricted to any particular group within the community.

The next question, and is the most important question under section 5 for the purposes of this case, is whether the editorial heading has a tendency to deprave or corrupt those persons, or a group of them, who read the editorial. As I have said, the four letter word complained of, does not stand out conspicuously so that any person reading the editorial will be instantly hit in the eye by it. The rest of the editorial deals with matters already mentioned, which are not indecent. I also do not think that the one use of this four letter word in the context of the whole editorial

would stimulate any sexual feelings or excite any dirty, immoral or corrupt thoughts in the minds of those who read it, including young children who are able to read and understand the editorial. The theme of the editorial is also not about sex or something immoral and there is no repetition of the four letter word in the editorial apart from its one use in the heading. So I have come to the view that the editorial heading complained of does not have the tendency to deprave or corrupt. As I have also stated, some people may find the editorial heading to be in very bad taste, other people may find it highly offensive, and others may find it shocking or disgusting. But that alone does not make it indecent within the meaning of the Indecent Publications Ordinance.

Weighing all these considerations under section 5, bearing in mind the view I have formed that the editorial heading does not have the tendency to deprave or corrupt, I do not think that the words complained of are indecent within the meaning of the Indecent Publications Ordinance. The charge is therefore dismissed.

T F M Syaka

CHIEF JUSTICE