

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIA

IN THE MATTER of the Elec-
toral Act 1963
concerning the
Territorial
Constituency of
SAFATA:

A N D: TAII MIKAELE
ROPATI MALO of
Mulivai Safata,
Planter; SIO
MALO of Mulivai
S a f a t a ,
Planter; NATAPU
SUA of Vaiee
S a f a t a ,
Planter; KALAPU
TEO of Vaiee
Safata, Planter
and PALU MANO
of Fausaga
S a f a t a ,
Planter:

Petitioners

A N D: PALUSALUE FAAPO
of Sataoa
Safata and
Siusega, a
Candidate for
Election:

Respondent

Counsel: R.T. Faaiuso for petitioners
L.S. Kamu for respondent

Hearing: 19 & 20 December 1994

Judgment: 23 December 1994

JUDGMENT OF SAPOLU, CJ

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This election petition arises from the by-election held on 29 October 1994 for one of the two parliamentary seats for the territorial constituency of Safata. After the close of polling and the official count, the Chief Returning Officer on 31 October 1994 declared the result of the poll as follows :

| | |
|--------------------------|-------------------|
| Lesa Farani Posala Manua | 574 |
| Palusalua Faapo II | 1,087 |
| Taala Rapiti | <u>124</u> |
| Total | 1,985 valid votes |
| | 11 invalid votes |

After the above declaration of the result of the poll, His Highness the Head of State declared Palusalua Faapo II, the respondent in the present proceedings, elected as a Member of Parliament for the territorial constituency of Safata.

On 7 November, the petitioners filed their election petition alleging bribery and treating under sections 96 and 97 of the Electoral Act 1963 respectively, asking this Court to declare the respondent not to have been duly elected and his election to be void. The allegations of bribery were as follows :

- (a) On Monday, 10 October 1994, the respondent gave \$100 to Reverend Alama Alama at Fusi, Safata, to pay for the hire of a bus by the Youth Group of Fusi and Reverend Alama Alama admonished the Youth Group to remember the

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respondent for the election as he had contributed greatly to the Youth Group; and

- (b) On Wednesday, 12 October 1994, the respondent gave one Misa Paino, a member of the respondent's campaign committee a sum of money and after the respondent left, Misa Paino gave the petitioner Taii Mikaele Ropati Mano \$20 and the petitioner Sio Malo \$10 and told them to bear in mind the election.

The allegations of treating were as follows :

- (a) On Saturday, 1 October 1994, in the presence of the petitioners Natapu Sua and Kalapu Teo, one Suluga Taiti gave the Vaiee rugby team four bottles of hard liquor and told them the liquor was from the respondent and to remember the election;
- (b) On Sunday, 16 October 1994 at Fusi Safata, one Molesi Taumaoe, a member of the respondent's campaign committee, told the Youth Group of Fusi in the presence of the respondent, that the respondent will buy a lawn mower for them after the election; and

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- (c) On polling day, 29 October 1994, the respondent and his family provided food and drinks to electors at Sataoa before the close of polling, and the petitioners Natapu Sua and Kalapu Teo were personally invited by the respondent to go to Sataoa and have something to eat.

At the conclusion of the evidence for the petitioners, counsel for the petitioners sought leave from the Court to withdraw both allegations of bribery and one allegation of treating, namely, the allegation of treating that on Sunday, 16 October 1994, Molesi Taumaoe told the Youth Group of Fusi in the presence of the respondent that the respondent will buy a lawn mower for them after the election. This was because of the insufficiency of evidence to prove those allegations.

With the withdrawal of both allegations of bribery and one of treating, only two allegations of treating remain for the Court to deal with. The evidence in support of these remaining allegations were given by the petitioners Natapu Sua and Kalapu Teo. According to Natapu, on 1 October the rugby team of his village of Vaiee had a get-together and Suluga Taiti came with four bottles of vodka and gave them to the Vaiee rugby team saying that the bottles were from the respondent for their team but remember the election. Present at that get-together were Meleifua Lutu, Toafa Tulaga, Pou Teo, Pepe Iafeta, Isale Motaaga and Kalapu Teo from his village of

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Vaiee. Natapu denies that the occasion in which Suluga gave the four bottles of vodka was on 24 September when he and the same boys of his village (except for Kalapu Teo) whose names have been mentioned cut trees to build Suluga's faleoo (hut). He also denies that the liquor was given to them by Suluga as reward for the work they did in cutting trees for his faleoo.

Natapu further testified that on polling day after he had cast his ballot at the Nuusuatia polling booth, he went to the respondent's place at Sataoa. He went there three times, and it is clear from the oral evidence that he was not personally invited by the respondent to his place. At the respondent's place, Natapu says he observed a queue of people being served with food. He, himself was not served with any food contrary to what is stated in his sworn affidavit that he was served with food. All this, according to Natapu happened at about 11.00am before polling was closed at 3.00pm.

The evidence by the petitioner Kalapu Teo was that the rugby team of his village Vaiee, had a party on 1 October when Suluga came with four bottles of vodka and said the liquor was from the respondent and to remember the election. Kalapu says that he remembers the date was 1 October as that was the day the plantations of his village were inspected. He knows that work was done for Suluga's faleoo on 24 September but that was not the

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occasion the liquor was given out by Suluga. He also says that on polling day before the booths were closed, he went to the respondent's place at Sataoa and stood in the queue of people who were being served with food. He, himself, was not given any food as the respondent's family ran out of food. He further says that he was not invited by the respondent to the respondent's place and the respondent was not present at his place while the food was served.

At the close of the evidence for the petitioners and after the withdrawal of the two allegations for bribery and one for treating, counsel for the respondent submitted that the evidence for the petitioners does not establish a prima facie case in respect of the remaining allegations of treating. Counsel for the petitioners made submissions in reply. At the conclusion of the submissions by both counsels, I decided that the submission of no prima facie case must substantially succeed. I pointed out to counsel that my reasons, which were then delivered orally will be reduced to writing in due course. I give those reasons in writing now.

It is clear from the way in which the petition was framed and the manner in which the case for the petitioners was conducted, that they proceed on the basis that the giving of food or drink to an elector with the corrupt intent of influencing his vote is treating in terms of section 97 of the Electoral Act 1963. That

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being so, the petitioners must therefore prove that the recipients of the food and drink were electors at the Safata by-election to which the petition relates. In this regard no evidence was adduced to show that the recipients of the bottles of vodka given out by Suluga were electors at the Safata by-election. Nor was there evidence to show that those persons who were served with food at the respondent's place at Sataoa were in fact electors. The only exception is the petitioner Natapu whose evidence that he voted at the Nuusuatia polling booth, shows that he was an elector at the by-election. But he was not given nor offered any food at the respondent's place on polling day. So there could not be any treating at the respondent's place insofar as Natapu was concerned. Apart from that, the evidence by the petitioner Kalapu was that the respondent was not at his place at Sataoa while the food was served. But even if an inference is to be drawn against the respondent because the food was served at his place, the difficulty still remains that there is no evidence to show whether those people to whom the food was served were all electors, or only some of them, or none of them. The evidence on this aspect of the case is very vague. Even the number of people who were at the respondent's place and the quantity of the food given out are not clear. It is to be remembered that the essence of the allegations of treating, is the giving of food or drink to an elector with the corrupt intent of influencing his vote. Giving food to a non-electors for personal consumption per se is not treating. But

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giving food to a proven elector in the circumstances of an election can amount to treating.

For those reasons, the Court decided that there was no prima facie case in relation to the allegation of treating concerning the incident at the respondent's place at Sataoa and that allegation was accordingly dismissed. Likewise the allegation in relation to the giving of liquor by Suluga to the Vaiee rugby team had to be severed and that part of the allegation relating to Natapu as the only proven elector remains, while the rest of the allegation insofar as it relates to other people who were at the party was also dismissed.

In relation to the allegation that hard liquor were given by Suluga to Natapu and other members of the Vaiee rugby team at a get-together of that rugby team on 1 October, two witnesses were called for the respondent. These were Suluga and Toafa Tulaga, both from Vaiee. The evidence shows that Suluga is the treasurer of the Vaiee rugby club as well as the captain of the Vaiee senior A rugby team. Toafa on the other hand plays for the Vaiee rugby team. Suluga denies that the Vaiee rugby team had a get-together or party on 1 October and that he gave four bottles of vodka to such a get-together and told the Vaiee rugby team that the liquor were from the respondent and to remember the election. He says that the respondent is his first cousin and he requested from him

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at the HRPP birthday celebration held on 23 September some liquor for the building of his faleoo at Vaiee. The respondent then gave him four bottles of vodka and he took that liquor with him to Vaiee. The next day, which was Saturday, 24 September, Toafa Tulaga, Pepe Iafeta, Meleifua Lutu, Pau Teo, Isale Motaaga and Natapu Sua, all from Vaiee cut trees for building his faleoo and he gave the four bottles of vodka to those boys to drink because of the work they had done for his faleoo. Suluga says he never told these boys that the liquor was from the respondent and to remember the election. He also says that the occasion in which the liquor was given took place on 24 September and not 1 October as alleged by Natapu and Kalapu. Why he recalls the date as 24 September is because that was the same day that Malua Theological College celebrated its 150th birthday and his village of Vaiee prepared and made contributions to the Malua Theological College celebration on the same day. Suluga further says that the respondent did not have an election committee and he was not a member of a respondent election campaign committee as alleged by the petitioner Kalapu

The witness Toafa, who was also called for the respondent, testifies that he was not aware of any election campaign committee for the respondent in the Safata by-election. He also says he is a member of the Vaiee B rugby team and there was no party or get-together of their rugby team on 1 October. What happened was that on 24 September, he and other boys namely, Pepe Iafeta, Pau Teo,

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Natapu Sua, Isale Motaaga and Meleifua Lutu cut down trees to build Suluga's faleoo. He remembers the day as 24 September as that was the same day for the celebration of the Malua Theological College 150th birthday and his village had made contributions to the celebration. After their work, Suluga gave them four bottles of vodka to drink. The petitioner Kalapu joined the drinking session which followed. Toafa further says that Suluga did not tell them that the bottles of vodka were from the respondent and to remember the election.

As it may be apparent from what has already been said in this judgment, much time was spent in the course of this hearing in trying to establish the various dates when the alleged occasions of bribery and treating took place. It became clear from the submissions by counsel at the close of the petitioner's case, that the real purpose for the attempts to establish the precise dates when the alleged bribery and treating took place was not to show whether the election was imminent at the time when the alleged bribery and treating occurred, but to show whether those allegations took place within or outside of the "period of election" as defined in section 99 A of the Electoral Act 1963. If, as counsel argued, the alleged bribery and treating occurred outside of the period of election, then they are permitted by the Act and therefore not unlawful; but if they occurred within the period of election then they are prohibited by the Act and

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therefore unlawful. A period of election is defined in section 99 A to mean the period commencing on the day after the Chief Returning Officer gives public notice of the polling day for an election and ending at the closure of polling on polling day.

It must be said that section 99 A of the Electoral Act 1963 does not apply to bribery or treating or any other corrupt practice pertaining to the election of a Member of Parliament; nor does it permit bribery or treating or any other electoral corrupt practice to be committed outside of an election period but prohibit those committed within an election period. Section 99 A was introduced by the Electoral Amendment Act 1984 to make it an illegal practice for any candidate for election to give out any money, foodstuffs or other valuable consideration to an elector or voter at a ceremony or activity (except a funeral) during a period of election. It also makes it an illegal practice for an elector or voter to obtain from a candidate for election any money, foodstuffs or other valuable consideration at a ceremony or activity (except a funeral) during a period of election. It should be clear from this that section 99 A is aimed at making certain acts committed by a candidate or elector or voter during a period of election illegal practices; it does not deal with corrupt practices which include bribery, treating, personation and undue influence. The distinction between corrupt practices and illegal practices pertaining to an election is shown by sections 95 to 98 of the Act which provide

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for certain acts which can amount to a corrupt practice and section 99 which provides for acts which can amount to an illegal practice. The same distinction is again shown in section 101 which provides for different penalties on conviction on a corrupt practice or illegal practice, and in Part X of the Act which provides for the method of questioning an election by way of an election petition as well as the trial of such a petition.

It should therefore be borne in mind that section 99 A when referring to the commission of an illegal practice during a period of election is not referring to bribery, treating, personation or undue influence which are corrupt practices and therefore different from illegal practices. It follows section 99 A does not apply to corrupt practices to which the principles of common law evolved by the Courts still apply.

Now in election petition proceedings, the burden of proving any allegation of bribery or treating or any other election corrupt practice lies on the petitioner. I accept counsels submissions that it is for the petitioner to prove every allegation of election corrupt practice beyond reasonable doubt : Election Petition re Gagaifomauga No.2 Territorial Constituency [1960-1969] WSLR 169; and Election Petition re Safata Territorial Constituency [1970-1979] WSLR 239. In this case it is for the petitioners to prove the remaining allegation of treating in respect of the elector

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Natapu beyond reasonable doubt; and it is clear that there are marked conflicts between the evidence for the petitioners and that for the respondent in relation to that allegation of treating.

Looking at the relevant evidence as a whole, both petitioners Natapu and Kalapu agree that work was done for Suluga's faleoo on Saturday, 24 September. Where their evidence differ from that for the respondent is the date and occasion when Suluga gave out the liquor. They say it was at a party and get-together of the Vaiee rugby team held on 1 October. If that is true, only seven people were at that party namely, Toafa Tulaga, Pou Teo, Pepe Iafeta, Isale Motaaga, Meleifua Lutu and the petitioners Natapu and Kalapu. That is not even more than half the number of a rugby team. But it appears from the evidence that Vaiee has an A as well as a B rugby team. Suluga is the captain of the A team and Toafa plays for the B team. If one were to put together the Vaiee A and B rugby teams for a party, one would expect a total of thirty players not including any reserves. But there were six people to whom Suluga gave the liquor not counting Kalapu who joined in the drinking session later. It is the same six people Natapu says who cut trees for Suluga's faleoo on 24 September.

Apart from the question as to the date and occasion where the liquor was presented by Suluga, the petitioners rely on the statement alleged to have been made by Suluga that the liquor was

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from the respondent and to remember the election. Suluga denies making such a statement and Toafa maintains no such statement was made. Whether or not Suluga made such a statement, I think his denial in Court has considerably weakened any link of the respondent to the remaining allegation of treating. The only link of the respondent to any corrupt presentation of liquor to Natapu and others is through the statement alleged to have been made by Suluga that the liquor was from the respondent and to remember the election. But Suluga denies having made such a statement and he is supported by the evidence of Toafa in that regard. So what evidence is there to support the remaining allegation of treating against the respondent. It is the evidence of Natapu and Kalapu as to a statement alleged to have been made by Suluga which is denied by Suluga and Toafa. The respondent was also not present at the alleged incident; it was not him who gave out the liquor, and there is no evidence that he knew or authorised Suluga to make the statement he made, if indeed such statement was made. There is also insufficient evidence to show whether Suluga was an election agent for the respondent so as to make the respondent liable as principal for the acts of his agent. Suluga's evidence was that the respondent had no election committee and he was not a member of a campaign committee for the respondent as alleged by Kalapu. I accept Suluga's evidence on that point. In fact I found Suluga's demeanour as a witness in the stand much more impressive than any of Natapu or Kalapu who did not impress me at all.

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In all, I am not satisfied that the petitioners have proved the remaining allegation of treating in respect of the elector Kalapu beyond reasonable doubt. Accordingly the election petition is dismissed.

Costs will follow in the normal way against an unsuccessful litigant. The petitioners will pay costs to the respondent which I fix at \$400.

I will certify the determination of the trial of this election petition to the Honourable Speaker of the Legislative Assembly.

T. F. M. S. S. S.
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CHIEF JUSTICE