

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20449

IN THE MATTER of The Territorial  
Constituency of  
Satupaitea

IN THE MATTER of an Election Petition

BETWEEN: ASIATA SALEIMOVA VAAI of  
Siusega and Vaega, Matai

Petitioner

A N D: TAVUI LENE of Pitonuu  
and Tafuna, Matai

First Respondent

A N D: FAUATEA SALE of Vaega  
and Tafuna, Matai

Second Respondent

A N D: MASE TOIA of Apia, Chief  
Returning Officer and  
Registrar of Electors  
and Voters

Third Respondent

Counsel: A S Vaai and T Malifa for petitioner  
T R S Toailoa for first respondent  
H Schuster for second and third respondents

Hearing: 20, 21, 24, 25, 26, 27, 28 June 1996 & 2 July 1996

Judgment: 11 July 1996

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JUDGMENT OF SAPOLU, CJ

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A general election for Western Samoa was on 26 April 1996 and the official results were publicly notified by the Chief Electoral Officer on 14 May 1996

after the preliminary results had been announced over Radio 2AP on election night. The result of the poll for the territorial constituency of Satupaitea was publicly notified and declared by the Chief Electoral Officer as follows :

<u>Candidates</u>	<u>Votes Received</u>
Asiata Saleimoa Vaai	374
Fauatea Sale	93
Tavui Lene	405
Tuimaseve Fuea	<u>112</u>
Total number of valid votes	984
Number of votes rejected as informal	2

The candidate Tavui Lene was therefore declared to be elected.

By an election petition dated 19 May 1996, the candidate Asiata Saleimoa Vaai sought from this Court the following declarations :

- (a) That the first respondent, Tavui Lene, was guilty of the electoral corrupt practice of undue influence and therefore her election be declared void and the petitioner be declared as having being duly elected.
- (b) That the first respondent was not qualified to be a candidate for election and that her election was void and the petitioner be declared as having being duly elected.
- (c) That the second respondent Fauatea Sale was not qualified to be a candidate for election and his participation had affected the result

of the election and that the election of the first respondent was therefore void.

In respect of the petition against the second respondent Fauatea Sale, that was dismissed on 31 May 1996 as the petition had not been served against the second respondent within the time allowed under the Electoral Petition Rules 1964. The Court will therefore not be concerned in this judgment with the declaration sought in respect of paragraph (c) above. Perhaps I should also add here that there was no evidence in these proceedings to suggest that the votes polled by the second respondent would have gone in sufficient numbers to the petitioner to cause him to be elected if the second respondent had not been a candidate for election at the Satupaitea territorial constituency.

I turn now to the allegations of corrupt practices to which the first declaration sought by the petitioner relates. The particular kind of corrupt practice complained of is undue influence. Section 98 of the Electoral Act 1963 as amended by section 30 of the Electoral Amendment Act 1995 provides insofar as it is relevant for the purpose of the present proceedings as follows :

"(1) Every person is guilty of a corrupt practice who commits the offence  
"of undue influence.

"(2) Every person commits the offence of undue influence who -

"(a) Directly or indirectly, by himself or by any other person on his  
" behalf, makes use of or threatens to make use of any force, violence  
" or restraint, or inflicts or threatens to inflict, by himself or by  
" any other person, any... injury, damage, harm or loss upon or  
" against any person, in order to induce or compel that person to vote  
" for or against a particular candidate...

"(b) .....

"(c) By himself or any other person on his behalf withholds a certificate of identity belonging to another elector or voter and in doing so induces that elector or voter to vote for a particular candidate, or prevents that elector or voter from voting for a particular candidate or from voting in that election".

The first allegation of undue influence contained in the original petition as amended by the amended petition dated 19 June 1996 is that the first respondent by herself or through her agents Faasalafa Vaifale, Faalogo Milo, Faleao Lagi and Faleao Salevao withheld the certificates of identity (IDs) of up to 200 electors which were returned on the day before election day or immediately before the votes were cast on election day and included the IDs of certain electors who are specifically named in the petition. Obviously this particular allegation of undue influence relates to section 98(2)(c) of the Act. Even though the present allegation of undue influence is expressed in general terms, it is clear from the evidence in these proceedings that it refers to the withholding of IDs of electors who cast their votes here in Apia at the polling booth for Satupaitea special votes which was at Taufusi and the electors who cast their votes at the polling booths at Satupaitea.

I will deal first with the present allegation as it relates to the withholding of IDs which were given out to electors at the polling booth for Satupaitea for special votes at Taufusi. For the petitioner, the witness Folasa Ieremia gave evidence that he had worked in support of the candidacy of the first respondent in the last general election and he was chosen to the first respondent's committee to help out in Apia with the election. According to Folasa Ieremia, those persons who were picked to come to Apia gathered at Vini, Satupaitea, on 24 April 1996 and he observed the first respondent giving out of

her handbag a packet of IDs to her son Faasalafa Vaifale for the electors in Apia. Those IDs were brought to Apia on the same day and Folasa Ieremia testified that in the evening while their group from Satupaitea were staying at the first respondent's house at Matautu, he observed Faasalafa Vaifale checking through the IDs. Faasalafa Vaifale returned to Savaii on 25 April and in the morning of polling day, 26 April, before the booths were opened, Folasa Ieremia's evidence was that he observed Faleao Lagi, Faleao Saleao, Lia Faatamalii and Fio Taualii checking the same IDs again. He estimated the number of IDs to be about 150. Lia Faatamalii and Fio Taualii were amongst the group that came with Folasa Ieremia and Faasalafa Vaifale from Satupaitea to assist with the candidacy of the first respondent in Apia.

According to Folasa Ieremia the aforesaid IDs were distributed to electors on election morning by Faleao Lagi, Faleao Saleao, Lia Faatamalii and Fio Taualii at the polling booth for Satupaitea special votes at Taufusi. Amongst the electors of Satupaitea who were given out IDs at the Taufusi polling booth were Paese Tavui Toatasi, Leaoa Kolio and Alaimalo Faleao. Folasa Ieremia also testified that there were many other electors of Satupaitea who were given IDs at the Taufusi polling booth by the first respondent's committee but he could not recall their names.

Other witnesses were also called by the petitioner and they also testified that they observed IDs being given out by supporters of the first respondent to electors of Satupaitea at the Taufusi polling booth immediately before and during the hours of polling. The witness Selesele Eliala gave evidence that when he came at about 10.00am to cast his vote at the Taufusi polling booth, he observed

Faleao Lagi, Faleao Salevao and Lia Faatamalii giving out IDs to electors and he was able to recognise one such elector to be Tiafau Teta. During the time he was at the Taufusi booth, Selesele Eliala said he observed more IDs being given out to electors by the supporters of the first respondent. In cross-examination Selesele Eliala said that of the persons he observed giving out IDs to electors, he knows only Faleao Salevao.

Selesele Eliala also testified as to what was said by one Naoupu Faleao to the petitioner on 28 May 1996 more than a month after the election. Naoupu Faleao did not give evidence and therefore this part of Selesele Eliala's evidence is hearsay. I do not propose to rely on that part of the present witness's evidence notwithstanding submissions from the petitioner that that part of Selesele Eliala's evidence should be admissible under the provisions of section 115 of the Electoral Act 1963.

The witness Nai Fualaga gave evidence that he was at the Taufusi polling booth on polling day from about 9.00am in the morning until closure of the poll at 3.00pm in the afternoon and he observed Faleao Lagi, Faleao Salevao, Lia Faatamalii, Fio Taualii and Folasa Ieremia giving out IDs inside the house where the Taufusi booth was located to electors of Satupaitea, namely, Segia Peniamina, Fala Tavui, Romeo Selesele Fale, Tavui Tamotu, Naoupu Faleao, Tiafau Teta, Vaalepu Iosefa, Filo Leao Laupau, Nuufuli Pule and Lia Lafoga.

The witness Milo Tusao gave evidence that on polling day he observed Faleao Lagi, Faleao Salevao and Lia Faatamalii giving out IDs to many electors of Satupaitea at the Taufusi polling booth. He was able to recognise Fala Tavui,

Romeo Selesele Fale and Tiafau Ausitini as some of the electors to whom Faleao Salevao gave out IDs. Milo Tusao also gave evidence that on 31 May 1996 he went with Tuugalii Agafili and Polo Alaelua to Malie to see Vaalepu Iosefa who told them they had received their IDs from the first respondent's committee on election morning when they went to cast their votes at the Taufusi polling booth.

The witness Tiafau Iosefa who was scrutineer for the petitioner at the Taufusi polling booth also gave evidence that Faleao Lagi, Faleao Salevao, Lia Faatamalii and Fio Taualii were at the Taufusi polling booth on polling day.

The witness Toelau Talopau gave evidence that he went to cast his vote at the Taufusi polling booth on polling day at about 1.00pm in the afternoon and there he observed Faleao Lagi, Faleao Salevao and Lia Faatamalii with the support of Fio Taualii and Folasa Ieremia giving out IDs to electors inside the house where the polling booth was located. Toelau Talopau also gave evidence as to what he heard Naoupu Faleao saying to the petitioner inside the petitioner's office on 28 May 1996. As Naoupu Faleao did not give evidence, this part of Toelau Talopau's evidence is hearsay and I do not propose to act on that evidence.

The witness and elector Moeleoi Toleafoa gave evidence that his ID was withheld by the first respondent and her committee when it was issued in February 1996 and it was only given back to him at the Taufusi polling booth on polling day.

As for the witness Faleao Tipasa I found his affidavit evidence to be so

inconsistent with the oral testimony he gave in cross-examination that it would be unsafe to accept any part of his evidence.

Likewise the witness Vasega Leaoa's evidence was so unsatisfactory that it must be rejected. This witness when pressed by counsel for the first respondent in cross-examination did not know the people whose names are in his sworn affidavit. His explanation was that he had been away from Satupaitea for about 20 years. I put aside this witness's evidence.

The evidence called for the first respondent to rebut the allegation concerning the withholding of electors IDs and the distribution of those IDs to electors at the Taufusi polling booth on polling day consisted almost entirely of a joint affidavit signed by all witnesses called for the respondent on this aspect of the case except for the witness Vaalepu Iosefa who swore and signed a separate affidavit. The same joint affidavit also contains signatures of several persons who did not appear to give evidence as well as the names of a number of people without any signatures and who did not appear to give evidence. Why the joint affidavit is in such a state was not clear from the evidence. The Deputy Registrar of this Court who had the joint affidavit sworn also wrote at the end of the affidavit that this affidavit was sworn separately in groups, but each of the witnesses who signed the affidavit and was called to testify in these proceedings stated that he or she was sworn separately and individually.

The gist of the evidence in this joint affidavit is an outright denial that the first respondent withheld electors IDs which were only given to the electors on the day before election day. The witness Alaimalo Faleao who signed the joint



affidavit testified to having kept her own ID and denied the evidence of the witness Folasa Ieremia who testified that he observed Alaimalo Faleao as one of the electors whose ID was given out by Faleao Lagi, Faleao Salevao, Lia Faatamalii and Fio Taulii on polling day at the Taufusi polling booth. Alaimalo Faleao also testified that Faleao Lagi and Faleao Salevao were at the Taufusi polling booth on polling day but he did not see any IDs being given out to electors.

The witness Toeupu Gafa who also signed the joint affidavit denied that any IDs were given out to electors by the respondent's supporters at the Taufusi polling booth on polling day and did not see Faleao Lagi or Faleao Salevao at the Taufusi booth. This witness also testified to having kept her ID and denied her ID was withheld by anyone including the first respondent.

The witness Tiafau Ausitini who also signed the joint affidavit gave evidence that she made her own ID and kept it herself. She denied the evidence of Milo Tusao who said that Tiafau Ausitini was one of the electors to whom Faleao Salevao gave out her ID at the Taufusi polling booth on polling day. This witness also testified that when she went to the Taufusi booth to cast her vote she did not observe Faleao Salevao who was at the booth at the time giving out any IDs to electors.

The witness Leaoa Kolio who also signed the joint affidavit denied that anyone withheld his ID which he kept himself and which he brought with him from Satapuala when he came to cast his vote at the Taufusi polling booth on polling day. This witness also denied that any IDs were given out to electors at the

Taufusi booth on polling day.

The witness Fala Tavui gave evidence that he had always kept his ID until polling day when he went to the Taufusi polling booth to cast his vote. While he testified that he saw Faleao Lagi at the Taufusi booth he said that he did not observe Faleao Lagi giving out any IDs to electors.

The witness Elikapo Pule gave evidence that he went to the Taufusi polling booth at about 8.00am on polling day and when the booth was opened he was the first elector to cast his vote. He testified that he did not see any person giving out IDs at the Taufusi polling booth on polling day.

The witness Nuufuli Pule gave evidence that he kept his own ID and no one of the first respondent's committee withheld his ID. He also testified that he arrived from Afega at the Taufusi polling booth at about 2.00pm in the afternoon to cast his vote and while he saw Faleao Lagi, Faleao Salevao, Lia Faatamalii and Folasa Jeremia at the Taufusi booth, he said that none of those persons was giving out IDs to electors.

The witness Tiafau Teta gave evidence that she is the wife of Vaalepu Iosefa and that neither the first respondent nor Faasalafa Vaifale, Faleao Lagi, Faleao Salevao or any other person had the custody of her ID or gave her ID to her on election day. She testified that she always had her ID with her and she brought it with her to the Taufusi polling booth to cast her vote on polling day.

The witness Vaalepu Iosefa gave evidence that he had the custody of his ID

up to election day and he denied that the first respondent withheld his ID. He further denied that he admitted to Tuugalii Agafili and Milo Tusao when they came to him at Malie that his ID was only given back to him on the morning of polling day. This witness also denied the evidence of Vasega Leaoa who testified that he saw the first respondent's committee giving out to Vaalepu Iosefa his ID at the Taufusi polling booth on polling day.

The witnesses Mataomaile Talanai of Faleasiu who cast her special vote at Faleasiu as well as the witnesses Emele Vaalepu of Malie and Lalovi Gafa of Vaitele who cast their votes at the Taufusi polling booth, all denied that their IDs had been withheld by the first respondent or her supporters. There was no evidence from the petitioner to prove that the IDs of those electors were in fact withheld by the first respondent or her supporters. The allegation of undue influence insofar as it relates to those electors is therefore dismissed.

Now I have given careful consideration to the conflicting evidence given by the witnesses for the petitioner and the witnesses for the first respondent and I have decided to accept the evidence given by the petitioner's witnesses that Faleao Lagi, Faleao Salevao, Lia Faatamalii and Fio Tualii were giving out IDs to a number of electors of Satupaitea at the Taufusi polling booth on polling day, particularly during the hours of polling. I have also decided to accept the evidence of Folasa Ieremia that those IDs were the IDs given by the first respondent to her son Faasalafa Vaifale at Vini, Satupaitea, on 24 April 1996 to be brought to Apia when Faasalafa Vaifale, Lia Faatamalii, Fio Tualii and Folasa Ieremia came to Apia the same day. Those were the same IDs that Folasa Ieremia testified that he observed Faasalafa Vaifale checked at the house of the first

respondent at Matautu in the evening of 24 April and which were checked again by Faleao Lagi, Faleao Salevao, Lia Faatamalii and Fio Taualii on the morning of polling day before the booths were opened for polling.

Given the involvement of Folasa Ieremia with the IDs alleged to have been given by the first respondent to her son Faasalafa Vaifale and the evidence of the witnesses Nai Fualaga and Toelau Talapau that they observed Folasa Ieremia giving out IDs to electors at the Taufusi polling booth on polling day, Folasa Ieremia must be regarded as an accomplice. In law it can be dangerous for the Court to act solely on the uncorroborated testimony of an accomplice. However there is nothing to prevent the Court from so acting if it is satisfied of the truth of the evidence of an accomplice. And if the Court decides to act on such testimony, it must do so bearing in mind the warning that it can be dangerous to act solely on an accomplice's uncorroborated testimony. Bearing that warning in mind, I have decided to accept the testimony of Folasa Ieremia as to the connection of the first respondent to the IDs which were given out to the electors at the Taufusi booth on polling day.

It is clear from the evidence of Folasa Ieremia that the first respondent had in her custody a very large number of IDs for electors in Apia, estimated at 150. I draw the inference from the withholding of those IDs by the first respondent to be given out to electors on polling day that the reason for the withholding of IDs was for the purpose of inducing the electors concerned to vote for the first respondent, or to prevent those electors from voting for another candidate at the election.

Of the electors which the witness Nai Fualaga testified to have been given IDs by the supporters of the first respondent at the Taufusi booth on polling day, Segia Peniamina, Romeo Selesele Fale, Tavui Tamotu, Naoupu Faleao, Filo Leaoa Laupau and Lia Lafoga did not appear to give evidence to deny the allegation affecting them. Of the electors that the witness Milo Tusao testified to have been given IDs at the Taufusi booth on polling day, only the witness Romeo Selesele Fale did not appear to give evidence to deny the allegation affecting him. Of the electors whom the witness Folasa Ieremia testified to have been given IDs at the Taufusi booth on polling day, Paese Tavui Toatasi did not appear to give evidence to deny the allegation affecting her.

I find as a fact that those electors I have just referred to and whose names were mentioned in the evidence for the petitioner but did not give any rebuttal evidence had their IDs withheld by the first respondent for the purpose of inducing them to vote for the first respondent or to prevent those electors from voting for another candidate at the election.

Of those electors who appeared and testified, I am satisfied from the evidence of the witnesses Selesele Eliala and Nai Fualaga that Tiafau Teta was given her ID by the supporters of the first respondent at the Taufusi booth on polling day. I am also satisfied from the evidence of the witnesses Nai Fualaga and Milo Tusao that elector Fala Tavui had his ID given to him by the supporters of the first respondent at the Taufusi booth on polling day. I am also satisfied from the evidence of the witness Folasa Ieremia that the IDs of electors Leaoa Kolio and Alaimalo Faleao were given to them by the supporters of the first respondent at the Taufusi booth on polling day. I would also accept the uncon-

contradicted evidence of the witness and elector Moeleoi Toleafoa that his ID was withheld by the first respondent and her committee when it was issued in February 1996 and his ID was only given back to him at the Taufusi booth on polling day.

I find as a fact that those electors I have just referred to in this part of my judgment had their IDs withheld by the first respondent for the purpose of inducing those electors to vote for the first respondent, or to prevent those electors from voting for another candidate at the election.

In all then, I am satisfied that the allegation of undue influence against the first respondent has been proved beyond reasonable doubt but only in respect of those electors I have found to have been given their IDs by the supporters of the first respondent at the Taufusi polling booth on polling day.

I turn now to the allegation of undue influence in relation to the withholding of IDs by the first respondent of electors who cast their votes at Satupaitea on polling day. I must say that the evidence for the petitioner in respect of this part of the case was really provided by only one witness, namely, Taataai Faagutu. He testified that he was present at a meeting of the sub-village of Pitonuu which was held at the house of the first respondent on 25 April 1996. During that meeting the first respondent gave out bundles of IDs to be given to the electors who were present at that meeting.

Many of the electors of Pitonuu who were named by Taataai Faagutu to have been present at that meeting of Pitonuu and were given IDs by the first respondent appeared and testified in these proceedings. They included Nuufuli

Sevesi, Vaeoso Savea, Aliimaifiti Faalilo, Vasa Nelu, Faleao Samuelu, Talaia Matamua, Taalili Selesele, Fetauai Sailasa and Lafuniu Tanielu. They all denied that a meeting of the sub-village of Pitonuu was held on 25 April 1996 in which the first respondent gave out any IDs to electors. Other witnesses like Talafu Akeripa, Tavui Ioane and Tavui Laupisi who were called for the first respondent also gave evidence that their sub-village of Pitonuu did not hold a meeting during election week. No other witness was able to confirm the evidence by Taataai Faagutu that a meeting of the sub-village of Pitonuu was held during election week. In these circumstances I am not prepared to accept the evidence given by Taataai Faagutu.

The witness Foese Fauatea gave evidence that at the Satufia polling booth on polling day he asked one Toiata Levao at 2.00pm on polling day why she had not voted and Toiata Levao replied the first respondent had her ID. Foese Fauatea then testified that he asked the committee for the first respondent and they replied the ID of Toiata Levao was with the first respondent.

I find the evidence given by Foese Fauatea to be hearsay. In any event I was not impressed with this witness's evidence during cross-examination. I do not accept his evidence.

I am therefore not satisfied that it has been proved beyond reasonable doubt that the first respondent withheld IDs of some of the electors who voted at the booths in Satupaitea for the purpose of inducing those electors to vote for the first respondent or to prevent those electors from voting for another candidate at the election.

I turn now to the allegation that the village council of Pitonuu and principally Talafu Akelipa, Leaoa Talavai, Tavui Ioane and Tavui Laupisi had during election week imposed a village ban on electors of Pitonuu from voting for any other candidate at the election but the first respondent. The evidence in respect of this allegation was that the sub-village of Pitonuu did not have a meeting during election week.

Tavui Ioane also gave evidence that Pitonuu was united in its support of the candidacy of the first respondent and the will of Pitonuu was to vote for the first respondent. He also denied that the village council of Pitonuu imposed a ban during election week on electors of Pitonuu from voting for any candidate other than the first respondent.

The witness Tavui Laupisi also gave similar evidence to that of Tavui Ioane. He said that Pitonuu simply decided that the first respondent was their candidate for the election just as the other sub-villages Vaega and Satufia of Satupaitea had also decided on their own candidates.

The witness Talafu Akelipa also gave evidence that the village council of Pitonuu did not during election week impose a ban on electors of Pitonuu from voting for any candidate other than the first respondent.

It is clear that the real and admissible evidence the petitioner is relying on to support the allegation that Pitonuu imposed a ban during election week on electors of Pitonuu from voting for any candidate other than the first respondent is the evidence of the witness Taataai Faagutu. That witness gave evidence that



he was present at the meeting of Pitonuu held on 25 April and in that meeting Talafu Akelipa declared a ban on electors of Pitonuu from voting from any candidate other than the first respondent and Leaoa Talavai spoke in support of the ban. No other matai at the meeting spoke in opposition to the ban.

On this very conflicting evidence, and particularly as no other witness apart from Taataai Faagutu testified as to a meeting being held of Pitonuu on 25 April or during election week. I am not satisfied to the required standard of proof that the allegation against the village council of Pitonuu has been made out. I have also noticed that there is no declaration sought in respect of the alleged ban against the village council of Pitonuu either in the original petition or in the amended petition.

I turn now to the counter-allegations made by the first respondent against the petitioner. I deal first with the counter-allegation that on 20 April 1996 the petitioner gave \$20 to elector Leute Selesele for the purpose of inducing that elector to vote for the petitioner.

Leute Selesele who is a blind old lady gave evidence that on 20 April 1996 the petitioner who was accompanied by Nuu Vili and Tuugalii Agafili came to her house and Nuu Vili introduced the petitioner to her. Afterwards Tuugalii Agafili gave her \$20 and told her that it was a gift from the petitioner. According to Leute Selesele she replied that she could not accept the \$20 as the first respondent was her "sister", but because the petitioner's party insisted that she took the money, she then told them to give the money to her children who were fixing the drinks.

Nuu Vili gave evidence that the petitioner and members of his campaign committee Tuugalii Agafili, Seupule Tuafono, Seupule Ropati and himself called at the house of Seupule Tuafono and Leute Selesele was there. Leute Selesele is a sister of Seupule Tuafono and all the other members of the petitioner's campaign committee who were present were in one way or another related to Leute Selesele. When they arrived at Leute Selesele's house, refreshments were served to the visitors and according to Nuū Vili, the petitioner and Tuugalii Agafili spoke and the committee advised the petitioner to give something to the old blind lady and the petitioner gave \$20 to Tuugalii to give to the old lady as a gift which was willingly accepted. Nuū Vili also denied the evidence by Leute Selesele that she rejected the money and said the first respondent was her sister; and that or to give the money to her children. Nuū Vili said Leute willingly accepted the money and thanked the petitioner for the gift.

The petitioner in his evidence admitted to giving Leute Selesele \$20 but said that he was moved by compassion as being with this old blind elector revived for him memories of his mother's blind aunt who stayed with his family when he was young. He also said that they were in a household which strongly supported his candidacy and that Leute thanked him for the money. The petitioner denied that Leute refused to accept the money as the first respondent was her "sister" and said to give the money to her children who were fixing the drinks.

Having considered the evidence in respect of the present allegation, I am of the clear view that given the imminence of the election and the fact that the petitioner and his campaign committee were out campaigning for the petitioner by introducing him to every household in the constituency, the giving of \$20 to

Leute Selesele, without a request for that money, was for the purpose of inducing Leute Selesele to vote for the petitioner. I am unable to accept the explanation given by the petitioner that he was moved by compassion because of memories of his mother's blind aunt. Nuu Vili on the other hand says it was the committee who advised the petitioner to give Leute some money. There was also no customary obligation on the petitioner to give money on this occasion. I am also unable to accept the assumption that because Leute Selesele was a sister of Seupule Tuafono and related to other members of the petitioner's campaign committee, she was therefore necessarily a supporter of the petitioner at the election. If on the basis of the evidence for the petitioner, Leute should be regarded an accomplice, there is sufficient corroboration of her evidence in the evidence of Nuu Vili and the petitioner that money was given to her. I accept Leute's evidence.

In all I find this counter-allegation of bribery to have been proved against the petitioner beyond reasonable doubt.

I turn now to the second counter-allegation which is one of treating and bribery against the petitioner, namely, that on 2 and 3 April 1996 the petitioner gave three cartons of beer and two crates of soft drinks as well as \$1,000 to six matais of Satupaitea for the purpose of inducing those electors to vote for the petitioner. From the evidence it is now clear that about forty rather than six matais were involved.

The evidence of the witness Asiata Peniamina who was called by the first respondent was that on 2 April 1996, a delegation of matais from Satupaitea came

to lodge the nomination of the petitioner as a candidate in the election. After the petitioner's nomination was lodged in the late afternoon the delegation went by invitation from the petitioner to the homestead of the petitioner's father at Vaivase where they were provided with three cartons of beer and two cartons of soft drinks. One carton here means a dozen. After the drinks the petitioner's family served food for the group. Asiata Peniamina further testified that the following morning after they had breakfast provided by the petitioner, the petitioner handed him a cheque for \$1,000 saying that was an insignificant sum of money for each person to buy something to take home (faaoso) and for fares (pasese). According to Asiata Peniamina he then thanked the petitioner on behalf of the delegation for the "holy money". This witness also testified that he received \$30 out of the money given by the petitioner and that it was not a condition of the petitioner's "monotaga" to the village that he was to provide for the people of the district when they came to Apia.

The evidence of the witness Sootao Solomona is much the same as the evidence of the witness Asiata Peniamina as regards the drinks, food and money provided by the petitioner to the delegation which came from Satupaitea to lodge the nomination of the petitioner as a candidate in the election. However, he also said that he was not an original member of that delegation. What happened was that he was coming to Apia for a family wedding when he met with members of the petitioner's campaign committee on the wharf at Salelologa and they persuaded him to come with them to support the nomination of the petitioner as an election candidate. That was how he joined the delegation. This witness received \$28 from the money which was given by the petitioner.

The evidence of the witness Savea Lavilavi who was also called by the first respondent was much the same as the evidence of the last two witnesses as regards the delegation from Satupaitea for the petitioner's nomination as an election candidate and the provision of drinks, food and money made by the petitioner. This witness received \$28 from the money given by the petitioner and he was one of the electors who nominated the petitioner as a candidate for election.

The witnesses called by the petitioner to rebut the evidence given by the witnesses called for the first respondent were Nai Fualaga, Lautafi Palota, Foaese Fauatea, Fio Lotomau and Leaoa Fiti. These witnesses signed a joint affidavit which was produced in evidence.

Essentially what they said was that a delegation consisting mainly of matais and untitled men from the sub-village of Vaega and a few from the sub-villages of Pitonuu and Satufia came to Apia to lodge the nomination of the petitioner as a candidate in the election. Sootao Solomona and Savea Lavilavi who were two matais from Pitonuu had indicated their support for the petitioner's candidacy and they freely joined the delegation. These witnesses' evidence in respect of the provision of drinks, food and money by the petitioner for the delegation is substantially the same. They also said that the petitioner in giving the money to the delegation had said that giving of money might be seen as corrupt practice but because he was Asiata he was obliged to give them some fares (pasese).

These witnesses also said that in accordance with Samoan custom the village of Satupaitea expected to be accomodated and led by Asiata, and when they

returned home to Satupaitea they also expected to be given some faaoso and pasese by Asiata as he is one of the paramount title holders of the village. As supporters for the petitioner's candidacy they also expected some manifestation of the petitioner's gratitude for their support for his candidacy. It is also clear from these witnesses evidence that every member of their delegation received same money from the \$1,000 which was given by the petitioner.

The evidence of the petitioner is very much consistent with the evidence which was given by his witnesses. He also said that when he gave the cheque for \$1,000 to the delegation from Satupaitea, he told them that giving of money at that time might be interpreted as inducement but the money he was giving them was a humble sum and is not an inducement because they were all his supporters and as the holder of the title Asiata it was part of his "monotaga" and customary obligation to give them some "pasese" and "faaoso". The petitioner also stated that when he gave the delegation food, drinks and money he was simply reciprocating and fulfilling his "monotaga" according to Samoan custom and the arrangement with his village council. He also considered the delegation to have been his supporters and the things that he gave them were an expression of his gratitude for their support and the lodging of his nomination.

It must be said at once that the presentation by an election candidate of drinks, food or money to electors during a period of election is prohibited by the provisions of the Electoral Act 1963 as amended by the relevant provisions of the Electoral Amendment Act 1984 and constitutes an illegal practice. It does not matter whether such a presentation is required by custom, or whether the purpose of the candidate in making the presentation was to comply with Samoan

custom. The only exception which is permitted is a presentation which is made for a funeral ceremony.

I am satisfied that what the petitioner did by giving a delegation of electors from his village drinks, food and money on 2 and 3 April 1996 constituted an illegal practice. The next question is whether the same presentation amounted to the corrupt practices of treating and bribery.

In view of the evidence which has been adduced, I must make two matters clear. Samoan custom is not an excuse for committing a corrupt practice such as treating or bribery. The question is not whether the provision or presentation of drinks, food or money by a candidate to an elector is in accordance with Samoan custom. The real question is what was the purpose or intention of the candidate in making the presentation. If the purpose for making a presentation of drinks, food or money was to comply with Samoan custom then the mens rea required for a corrupt practice is absent. If the purpose for making such a presentation is to induce or influence electors to vote for a candidate, then the mens rea for a corrupt practice has been established.

I also do not accept that it is legally impossible for a candidate to treat or bribe his own supporters. To give drinks, food or money to one's supporters for the purpose of maintaining and not losing their support for one's candidacy can be treating or bribery. It is no different from inducing an elector who is not a supporter of a candidate to become a supporter of that candidate and to vote for that candidate. To cultivate the support of such an elector by giving him drinks, food or money to ensure the continuance of his support until he has

cast his vote is clearly a corrupt practice.

After consideration of the relevant evidence in this case, I have come to the conclusion, not without some difficulty, that there is a reasonable doubt whether the petitioner's real purpose in providing drinks, food and money to the delegation which came from Satupaitea was to comply with Samoan custom or to induce these electors to continue their support for the petitioner and to vote for the petitioner at the election. The present counter-allegation of corrupt practice against the petitioner is therefore dismissed.

I come now to the question whether the petitioner and the first respondent had satisfied the residential requirement needed to qualify as a candidate in the last general election.

Section 5(3) of the Electoral Act 1963 as amended by section 4(2) of the Electoral Amendment Act 1995 provides :

"A person shall be disqualified for being a candidate for, or being elected as a member of Parliament representing a constituency if he loses any qualification required to enable him to be registered as an elector of that constituency or that person has not resided in Western Samoa for a period equalling or exceeding 12 months ending with the day on which the nomination paper is lodged with the Chief Electoral Officer".

Section 4(4) of the Electoral Amendment Act 1995 then goes on to provide :

"Nothing in subsection (2).... of this act applies to -

"(a) A person who is appointed to a post under the Foreign Affairs Act 1976 and is outside of Western Samoa during the course of that



" appointment.

"(b) A person who is the spouse of the person so described".

It appears to me upon first reading of these provisions that the effect of section 4(2) of the Electoral Amendment Act 1995 is to provide a general rule of disqualification, namely, that a person who has not resided in Western Samoa during the required period of time is not qualified to be a candidate in an election. Section 4(4) of the Act then goes on to provide the exemptions to that general rule of disqualification.

The crucial words in the statutory provision are the words "has not resided" and raise in a more narrow form the question of what the word "reside" means. For assistance in resolving this question I turn to some of authorities in which the question of residence has been discussed. In the case of *Re Wairarapa Election Petition [1988] 2 NZLR 74* the full High Court of New Zealand when dealing with the provisions of the New Zealand Electoral Act 1956 equated "place of residence" with "usual place of abode" and stated :

"A place of abode is, we think, a place where a person for the time being, "other than for a very brief stay, sleeps and eats and which in general he "uses as a base for his daily activities. That a place of abode can be "temporary only is clear.... 'Usual in this context we think connotes a "degree of regularity and frequency not necessarily continuous in the "'sence of being uninterrupted, but at least continual in the sense of "'being repetitive'".

In the case of *Fox v Stirk [1970] 3 All E R 7* Lord Denning MR said at p.12 :

"I think that a person may properly be said to be 'resident' in a place

"when his stay there has a considerable degree of permanence. So I would apply the simple test : was there on 10th October 1969, a considerable degree of permanence in the stay of the appellants in Bristol or Cambridge? I think there was. They were living there and sleeping there. They were there for at least half the year - as a minimum. Many of them were there for much more, especially the science students, because they have to work in the vacations in the laboratories. There was certainly a sufficient degree of permanence to make them 'resident' in Bristol or Cambridge, as the case may be".

Lord Widgery in the same case said at p.13 :

"It is imperative to remember in this context that 'residence' implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into 'residence'".

In the field of private international law or conflict of laws there has been a tendency to reject the concept of domicile as a connecting factor in favour of residence and the concepts of "ordinary residence" and "habitual residence" appear to have been used for that purpose. In *Cheshire and North's Private International Law* 12th edn it is said at p.169 :

"The words 'ordinary residence' should be given their natural and ordinary meaning which will be the same regardless of the context, unless it can be shown that the statutory framework requires a different meaning. Ordinary residence does not connote continuous physical presence, but physical presence with some degree of continuity, notwithstanding occasional temporary absences. There must, however, be some physical presence. Intention to reside is not, alone, sufficient.... Each case must, of course, depend on its own peculiar facts, but the authorities show that even absence for a considerable period of time will not terminate a person's ordinary residence if it is due to some specific and unusual cause, as for instance when a wife accompanies her husband

"during his employment in a foreign country".

As regards "habitual residence" *Cheshire and North's Private International Law* says at p.169 :

"Habitual residence could be summed up as a regular physical presence which must endure for some time. It does not require continual physical presence and can continue despite considerable periods of residence".

It was suggested in the present case that the word "reside" should be accorded the common law meaning given to the concept of domicil. I am unable to accept that suggestion. If the legislature had intended to use the word domicile, it could easily have used the words "has not been domiciled" in the Act instead of the words "has not resided". Secondly the concept of domicil is not synonymous with the concept of residence. Domicil of choice goes beyond residence and requires not only the fact of residence in a certain country but also the intention of remaining in that country permanently.

Coming back to the words of our own legislation, it must first be noted that section 5(3) of the principle Act as amended by section 4(2) of the Electoral Amendment Act 1995 does not use the words "has not *ordinarily* resided" or the words "has not *habitually* resided". It simply uses the words "has not resided". That being so, the use of the concepts of "ordinary residence" and "habitual residence" as guides to the question the Court has to resolve in this case must be viewed with caution.

Based on the authorities cited and bearing in mind we are interpreting the

words of a particular statute, I am of the view that the word "reside" connotes living or staying in a place with some degree of permanence or continuity. It does not mean continuous physical presence in a place. There may be occasional or temporary periods of absence. It is also clear to me that the question of whether a person resides at a particular place would therefore be a question of fact.

Turning now to the evidence, I accept the evidence of the witness Valasi Gaisoa that since the first respondent married her late husband Lavatai Natia Seanoa in 1983, she has always lived with her husband in Tafuna, American Samoa. The first respondent's husband died in 1992 and the first respondent has continued to live and stay in American Samoa where she has an established home.

From the evidence given by the matais of Pitonuu it is clear that the first respondent has been performing her monotaga to the village and the church. She has also given much assistance to her village and the church. She also visits her family at Pitonuu but I am satisfied that those visits were usually for a few days from time to time and she always returned to American Samoa afterwards.

The first respondent also has a house built at Matautu-uta where she sometimes stays on her visits to Western Samoa but I am satisfied that she does not live there permanently at least until she came to Western Samoa for the general election and won the election for the Satupaitea constituency. There was some evidence that the first respondent has been living in Western Samoa for six months immediately preceding the election.

In those circumstances I find that the first respondent had not resided in Western Samoa for a period of not less than 12 months ending with the day on which her nomination paper was lodged with the Chief Electoral Officer.

As for the petitioner, he left Western Samoa in 1992 to do post-graduate legal studies in the Australian National University in Canberra. He did not return to Western Samoa to stay until 24 December 1995. He did make some trips to Western Samoa during the course of his studies and he did visit Western Samoa in March and in August 1995. However, most of the time the petitioner was living and staying in Australia for his postgraduate studies.

In those circumstances and for the purpose of the Electoral Act 1963, I am of the view that the petitioner had not resided in Western Samoa for a period of not less than 12 months ending with the day on which his nomination paper was lodged with the Chief Electoral Officer. It is also clear that the petitioner does not come within the exemptions provided in section 4(4) of the Electoral Amendment Act 1995.

As for the allegation against the third respondent who is the Chief Electoral Officer that she was wrong in accepting the nomination of the first respondent, I find that the third respondent acted with total propriety on the basis of the information that was given to her.

As I have found the allegation of undue influence against the first respondent to have been proved, and as she had not resided in Western Samoa for not less than 12 months ending with the day her nomination paper was lodged, I

therefore declare the election of the first respondent void. I will report my findings to the Honourable Mr Speaker of the Legislative Assembly.

I make no order as to costs between the petitioner and the first respondent. Counsel for the third respondent is allowed seven days to file a memorandum as to costs if he wishes to do so.

*TFM Sapshe*.....  
CHIEF JUSTICE