

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20452

IN THE MATTER of The Electoral Act  
1963 and its amendments

A N D

IN THE MATTER of the Territorial  
Constituency of Aana  
Alofi No.2

BETWEEN: OPEMAT LIU AUSAGE of  
Nofoa'ali, a candidate  
for election

Petitioner

A N D: TOLOFUATAI VALELEI FALEMOE  
LEIAPAUA of Leulumoega,  
a candidate for election

First Respondent

A N D: THE CHIEF ELECTORAL  
OFFICER

Second Respondent

Counsel: A Frame for petitioner (New Zealand bar)  
T R S Toailoa for respondent

Hearing: 10, 11, 12 & 13 September 1996

Judgment: 17 September 1996

---

JUDGMENT OF SAFOU, CJ

---

The preliminary results of the general election held on 26 April 1996 were announced by the Chief Electoral Officer over Radio ZAP on the night of the

election. After the official count of the votes from all the territorial constituencies including the individual voters, the Chief Electoral Officer publicly notified and declared the official results of the poll on 14 May. The official result of the poll for the territorial constituency of Aana Alofi No.2 was declared as follows :

<u>Candidates</u>	<u>Votes Received</u>
Aniata Sio	48
Muagututia Samuelu	303
Otemai Liu Ausage	288
Tolofuaivalelei Falemoe Leiataua	<u>547</u>
Total number of valid votes	1,186
Number of votes rejected as informal	2

The candidate Tolofuaivalelei Falemoe Leiataua who is the respondent in these proceedings was therefore declared to be elected.

By an election petition dated 20 May 1996, the unsuccessful candidate Otemai Liu Ausage who is the petitioner in these proceedings sought orders from this Court to have the election of the respondent declared void and for the petitioner to be declared as duly elected. The election petition is based on two allegations of bribery under section 96 of the Electoral Act 1963 and one allegation of treating or alternatively illegal practice under sections 97 and 99A of the same Act respectively.

At the commencement of the hearing of these proceedings both counsel for the petitioner and the present respondent agreed that the Chief Electoral Officer

who has been cited as one of the respondents in the petition should be struck out as a party as there is no allegation in the petition against her. Accordingly the order was made omitting the Chief Electoral Officer from being a party to these proceedings.

Now at the conclusion of the evidence adduced for the petitioner in support of his petition, counsel for the respondent submitted that there was no prima facie case in respect of all three allegations against the respondent. The Court ruled that there was no case to answer in respect of only one of the allegations against the respondent, which is an allegation of bribery. That particular allegation was therefore dismissed which leaves only one allegation of bribery and one allegation of treating or illegal practice against the respondent.

Before dealing with those remaining allegations, I will refer briefly to the burden of proof in this case. The burden of proving the allegations in the petition rests on the petitioner who has brought those allegations. The required standard of proof is the criminal standard of proof which is that the petitioner must prove his allegations against the respondent beyond reasonable doubt.

Evidence of witnesses in this case were given partly by way of sworn affidavits and partly by way of oral testimony as it was done in all other election petition hearings before this Court in relation to the 1996 general election. The purpose for this practice was in order to expedite the hearings of election petitions.

Turning now to the remaining allegations in the petition, I will deal with

them in the order they appear on the petition. The first allegation alleges that :

"On 17 April 1996 at Nofaalii, the respondent gave the sum of \$40 to one Tanuvasa Lefafao, a matai of Nofaalii for the purpose of influencing the said elector and his family to vote for him on election day".

To prove that allegation counsel for the petitioner called as witnesses Tanuvasa Lefafao, his wife Leagatasia Tanuvasa and his daughter Lotesa Tanuvasa.

The evidence in chief by Tanuvasa Lefafao was essentially that on the morning of 17 April 1996 the respondent came to his house at Nofaalii. After the respondent made reference to the trip by the village of Nofaalii to American Samoa, they talked about the up-coming general election. Tanuvasa said that the respondent then told him that he had come because the election was near and he wanted Tanuvasa to vote for him at the election. Tanuvasa's reply was that he would only support a candidate for election who goes to the SNDP political party and the tama-a-aiga meaning of course Tupua Tanasēse Efi. Nearing the end of their conversation and as the respondent was about to leave, Tanuvasa said that the respondent placed \$40 on the table and stated that money is for your illness but if you love me vote for me. Tanuvasa also testified that that was the only time that the respondent had visited him or given him any money. The respondent did not visit him again after the election except on 19 July when he came with other matais of Leulumoega in relation to these proceedings.

In cross-examination by counsel for the respondent, Tanuvasa said he had

been a matai since 1952 and since Independence in 1962 he had always supported candidates from Leulumoega at the elections. He was also a staunch supporter of the SNDP political party and the tama-a-aiga. He further testified that he had been a sick person since 1992 and was at times since that year up to now admitted to the hospital but this was the first time the respondent had visited him. Tanuvasa further stated that he believed that the purpose of the respondent's visit to him was to induce him to vote for the respondent at the election and he knew the money which was given to him by the respondent was a bribe. Eventhough he admitted that he is related to the respondent through the matai title Vaa of Leulumoega, Tanuvasa denied that the respondent's visit to him was in relation to any family matter.

In considering the evidence by Tanuvasa, he must be regarded as an accomplice for having received an alleged bribe. His evidence, however, is corroborated by the evidence given by his wife Leagatasia Tanuvasa and his daughter Lotesa Tanuvasa.

According to Leagatasia the visit by the respondent to her family's house on 17 April 1996 was an unusual occasion as the respondent had hardly ever visited her house before. She said that she was present with her husband Tanuvasa and her daughter Lotesa when the respondent visited their house. She instructed her daughter Lotesa to make drinks for the respondent and Tanuvasa. She also said that she heard the respondent saying to Tanuvasa that he had come because Nofaalii had gone on a trip to Tutuila and the election was near. The respondent and Tanuvasa then continued in their conversation but she could not hear what they were talking about as she has some hearing problems and she was

also sitting towards the back of the house. Leagatasia further testified that as the respondent was about to leave their house, he placed some money on the table which she picked up and gave to Tanuvasa. When the respondent was outside the house, he stood and Leagatasia stated the respondent called to her family to bear in mind the election.

Lotesa in her evidence stated that when the respondent visited her family on 17 April 1996, she was instructed by her mother Leagatasia to prepare drinks for the respondent and Tanuvasa. She described the respondent's visit as unusual as he had hardly visited her family's home before. Lotesa also stated that most of the time while Tanuvasa and the respondent were talking, she and her mother were sitting behind a sofa which was behind Tanuvasa. From there she heard the respondent requesting her father Tanuvasa if he could consider voting for the respondent because Tanuvasa and his family were related to the respondent. It seems Tanuvasa's reply was that if the respondent goes to the SNDP he will vote for him. And later as the respondent was leaving, Lotesa said the respondent gave Tanuvasa \$40 and he also said bear in mind the election.

The evidence of Leagatasia and Lotesa are clearly capable of providing corroboration of Tanuvasa's evidence. The question now is whether they do in fact amount to such corroboration. In my view they do. Having observed the respective demeanour of those two witnesses in the stand and having listened to their evidence, I have decided to accept what they told the Court. There is of course some discrepancy between the evidence of Leagatasia and that of Lotesa as to where Leagatasia was sitting inside the house while the respondent and Tanuvasa were talking inside Tanuvasa's house. However that discrepancy has not

persuaded this Court to disbelieve the material and more significant parts of those witnesses testimony. It was also pointed out that what Leagatasia and Lotesa told the Court about the respondent saying to them to bear in mind the election is not contained in their sworn affidavits. However that part of their evidence came out in cross-examination rather than in examination-in-chief. Leagatasia also testified that she did tell that part of her evidence to the lady who took her affidavit but the lady has not put it in the affidavit.

So I accept that the evidence of Leagatasia and Lotesa do in fact provide corroboration of Tanuvasa's evidence in material particulars. Indeed I also found Tanuvasa's evidence on its own to be very convincing and I was impressed with his demeanour while giving evidence.

On the question whether Tanuvasa has been proved to have been an elector for the Aana Alofi No.2 territorial constituency in the 1996 general election, it is clear that he has been a matai since 1952. According to his own evidence he has been "supporting" candidates from Leulumoega in all elections since Independence in 1962. In addition there is also the request by the respondent to Tanuvasa on 17 April 1996 to vote for him. And then there is the evidence which I accept of the respondent saying to Tanuvasa and his family to bear in mind the election. The clear inference from all this is that Tanuvasa was an elector for the Aana Alofi No.2 territorial constituency in the 1996 general election and I am satisfied to the required standard of proof that was in fact so.

With respect to the respondent, I have after careful consideration been

unable to accept his evidence that the money he gave Tanuvasa was not for any purpose of inducing Tanuvasa to vote for him. On the evidence of Tanuvasa, Leagatasia and Lotesa which the Court has decided to accept, I am satisfied beyond reasonable doubt that the money the respondent gave Tanuvasa on 17 April 1996 was for the purpose of inducing Tanuvasa to vote for the respondent. The first of the two remaining allegations in the election petition has therefore been proved insofar as it relates to Tanuvasa Lefafao.

Before going on to deal with the second remaining allegation in the petition, I should mention briefly here that I am unable to accept the evidence which was adduced in respect of the allegation which was dismissed on the submission of no prima facie case as admissible here. The reason is that there is no sufficiently striking similarity between the evidence adduced in respect of that allegation and the remaining allegation of bribery which has been proved.

I come now to the second remaining allegation which alleges that :

"On election day 26 April 1996 the respondent and his family gave out "plates of food to those who voted starting from 10.00am in the morning".

To prove this allegation, counsel for the petitioner called three witnesses, namely, Fololiga Pologa, Lata Tuisauta and Falaniko Ama.

According to Fololiga Pologa who on her evidence is an elector for the Aana Alofi No.2 territorial constituency, Peato Atonio, a committee member for the respondent, came to her and her husband at about 7.00am in the morning of election day and told them to get ready as the vehicle had arrived to take them to



Leulumoega to vote. The vehicle was a pick up truck driven by Afa Leiatua a brother of the respondent. Fololiga also said they were driven to the respondent's house where many people were having breakfast. And Fololiga and her husband were also served with breakfast consisting of buttered bread, biscuits and tea. Later in the morning, the respondent told all the people gathered in his house that cars will be ready to take them to vote at the Leulumoega polling booth. After the electors had been taken to the polling booth and cast their votes, they were transported back to the respondent's house where they were served with lunch consisting of chop suey, sausages, chicken drumsticks, taamu and drinks.

According to the witness Lata Tuisautu, he was standing at the polling booth at Leulumoega with one Falaniko Ama and Iopu Amosa at about 10.00am on election day when the driver of a pick up vehicle parked by the main road asked them to jump onto the vehicle. They were then driven to the respondent's house. The driver of the pick up vehicle was Merota a relative of the respondent. At the respondent's house they were served with plates of food while fifty or so other people were also having their meals there. Lata also said that after their meals they were driven back to Nofaalii and he went and cast his vote at the Nofaalii polling booth.

The evidence of the witness Falaniko Ama was that at about 10.00am on polling day after he had cast his vote a number of people including himself were invited to get on to a pick up vehicle which took them to the respondent's house. When they arrived there they were given plates of food and then driven back to their homes at Nofaalii. Counsel for the respondent questioned Falaniko whether

he had remained in the Courtroom on the first day of hearing after the Court at the commencement of proceedings had ordered that all witnesses to be called to testify in this case were to remain outside until a witness is called to testify. Falaniko's reply was that he left the Courtroom when the order was made for all witnesses to remain outside and he only returned into the Courtroom when he was called to give evidence.

Now the respondent in his evidence denied having given food to electors on election day to induce them to vote for him. He said that prior to the general election his village of Leulumoega had met and resolved that the respondent and his family should not be preparing any food on election day and if they do prepare any food then that food must only be for the respondent's relatives and members of his own family. So according to the respondent he gave clear instructions to his wife and family not to give or serve food to electors on polling day except for members of their own family. The only other people to whom food was given were people from other territorial constituencies who came in a van and were met by the respondent.

The respondent also denied the evidence of the witness Fololiga that breakfast and lunch were served to her and her husband at the times she stated. According to the respondent he was present at his house at the times Fololiga stated she and her husband were served with food but he did not see Fololiga or her husband at his house.

The respondent also denied the evidence of the witnesses Lata and Falaniko saying that he did not see those witnesses at his home on polling day. However

the respondent also stated that during the hours of polling he spent about the same time away from his house as he spent at his house. And if Lata and Falaniko had been given any food by members of his family it was without his knowledge or authority.

Foumalo Tolofua, the wife of the respondent gave evidence confirming the instructions given by the respondent to her and their family not to give food to any electors except for members of their own family. According to Foumalo they had in their home numerous relatives from various villages including Falefa, Aleipata, Siumu and Fasitoo which are villages outside the Aana Alofi No.2 territorial constituency. There were about 400 such relatives so about 400 meals consisting of chicken drumsticks, curry and chop suey were prepared. There was no evidence before the Court to contradict that evidence by Foumalo.

The witness Tiata Vailiga was also called for the respondent and he testified that during the hearing of this petition he was assigned by the respondent to keep an eye out for witnesses for the petitioner who remained inside this Courtroom before they were called to give evidence. Tiata gave evidence that he knows the petitioner's witness Falaniko Ama and that witness remained in Court until 12.00 noon on the first day of hearing after the Court had given its order at the commencement of the hearing that all witnesses were to remain outside until they were called to give evidence. Tiata also described the clothes Falaniko was wearing at the relevant time on the first day of hearing.

I turn now to consider whether on the evidence the allegation of treating

under section 97 of the Act has been established. Taking the evidence of Fololiga first, it is clear that this witness on her own account must be regarded as an accomplice for having received an alleged treat. In the circumstances her evidence requires corroboration. But I find there is no acceptable corroboration of her evidence. Her evidence was also denied by the respondent. There is also a discrepancy between her evidence as to the ingredients of the meal she said she was given at the respondent's house and the evidence of Fomalof. Fololiga in her evidence included sausages in the meal whereas Fomalof in her evidence did not. Fololiga in her sworn affidavit also said that the driver of the pick up vehicle that took her and her husband to the respondent's house was Afa Leiatua, a brother of the respondent. However in cross-examination by counsel for the respondent she repeatedly admitted that she did not know the name of the person who came in the pick up vehicle and up to now she still does not know the name of that person. Given these circumstances I find it unsafe to accept Fololiga's uncorroborated testimony.

I turn now to the evidence of Lata who on his own account must also be regarded as an accomplice for having received an alleged treat. Corroboration is also required for this witness's evidence. Even though Falaniko's evidence has been to some extent discredited by the evidence of the witness Tiata, I find that to some extent the evidence of Falaniko does provide some corroboration for Lata's evidence. However, neither Lata nor Falaniko testified that the respondent was present or had any knowledge of the food which were given to them. The respondent's evidence was that he had given instructions to members of his family against the giving of food to electors except members of their own family and if food had been given to Lata and Falaniko then that was given without his

knowledge or authority. If food was also given to Lata and Falaniko, I am in doubt whether it was accompanied by any corrupt intent as it appears from the evidence for the respondent that the respondent had numerous relatives from various villages at his house on polling day and it could have been difficult to remember all such many faces at the time food was given out.

In all I am not satisfied that the allegation of treating has been proved beyond reasonable doubt and it is therefore dismissed.

Likewise it is not clear from the evidence how many of the respondent's relatives or non-relatives who were given food were in fact electors of the Aana Alofi No.2 territorial constituency. I accept that giving food or money to an elector on polling day before the close of the poll is an illegal practice under section 99A of the Act. However before illegal practices can avoid an election, they must have so extensively prevailed that they may be reasonably supposed to have affected the result of the election in terms of section 113 of the Act. On the evidence to which I have referred, it is not clear how many of the people to whom food was given were in fact electors of the Aana Alofi No.2 territorial constituency so that one cannot reasonably suppose that the result of the election has been affected.

The allegation of illegal practice under sections 99A and 113 is therefore also dismissed.

That brings me to the two counter-allegations of bribery made by the respondent against the petitioner. Here the burden of proving the counter-

allegations against the petitioner rests on the respondent who has brought those counter-allegations. The required standard of proof is again the criminal standard of proof which is proof beyond reasonable doubt.

I will deal first with the counter-allegation of bribery which alleges that :

"On Friday morning 26 April 1996 the petitioner gave \$50 to one Agaseata Foliga for the purpose of inducing the said elector and his family to "vote for the petitioner".

To prove that counter-allegation, counsel for the respondent called as witnesses Agaseata Foliga and his wife Siupolu Agaseata.

In his evidence, Agaseata testified that he is an elector of the Aana Alofi No.2 territorial constituency and on the morning of polling day, 26 April 1996, while he was getting ready to go to the polling booth to cast his vote, the petitioner came to his house. The petitioner gave him a \$50 note in the presence of his wife Siupolu Agaseata and other members of his family and said it was to buy some sugar and cigarettes. Agaseata then handed the money to his wife Siupolu. Agaseata also testified that the petitioner had not previously given them any money prior to the election.

Siupolu in her evidence stated that she is an elector of Aana Alofi No.2 territorial constituency and that the petitioner came to her home on the morning of polling day and gave her husband Agaseata \$50 in the presence of herself and other members of her family. Siupolu also testified that she is related to the

petitioner but that was the first time the petitioner had given her and her husband a monetary gift. The petitioner had not previously given them any money for sugar or cigarettes.

Obviously both Agaseata and Siupolu must, on their own evidence, be regarded as accomplices for having received an alleged bribe. However there is no law which prevents the corroboration of the evidence of one accomplice by the evidence of another accomplice. In this case I find that the evidence of Agaseata and Siupolu corroborate one another in material particulars. Given that this was the first time the petitioner had given any monetary gift to Agaseata and Siupolu and in view of the fact that the money was given on the morning of polling day, I conclude that the money was given by the petitioner for no other purpose but to induce those electors to vote for him at the election. I am unable to accept the denial given by the petitioner that he had no intention of inducing those electors to vote for him at the election.

I am therefore satisfied that this particular counter-allegation under section 96 of the Act has been proved beyond reasonable doubt.

I come now to the second of the counter-allegations made by the respondent against the petitioner which is as follows :

"On Thursday, 25 April 1996 at a meeting attended by the petitioner at Leulumoeaga, the petitioner gave \$100 to the electors Muliaumalu Sapepe, Amiatu Feata, Vaitogi Sio, Tamatimu Ale, Tualetonu Fale, Soloi Noa, Vaitogi Apelu, Togitele Taumei and Tutusa Tutusa Tamatimu Ale for the purpose of inducing those electors to vote for him".

To prove that counter-allegation counsel for the respondent called as witnesses Vaitogi Apelu, Amiatu Feata and Togitele Taumei.

All those three witnesses testified they are electors of the Aana Alofi No.2 territorial constituency and that on 25 April 1996 a meeting was held at the house of Soloi Goa a matai of Leulumoega. Attending that meeting were all the persons named in the counter-allegation as well as the petitioner. As the meeting was about to conclude, the petitioner gave \$100 to be distributed amongst those persons attending the meeting.

The witness Vaitogi Apelu also stated that when he arrived at the meeting the petitioner was nearing the end of his speech and was explaining to the matais present how to cast one's vote. At the end of his speech the petitioner reached inside his pocket pulled out some money and said that even though bribery was prohibited that was \$100 for your cigarettes as their good relationship was difficult (e faigata le va fealoai).

The petitioner gave evidence saying that when the trip of his village Nofaalii returned from American Samoa, the matais of the village Leulumoega came and greeted them back by performing the customary "usu" or "inu". That was on Monday of election week. Then on the very next day, Togitele Taumei contacted the petitioner and told him that the "small village" of Leulumoega wanted to meet with the petitioner for him to explain election matters. Apparently Leulumoega at that time was divided into two parts, the large village and the small village. Togitele Taumei was the leader of the small village. The petitioner said he then attended the meeting at Leulumoega as organised by Togitele Taumei and he spoke



about the scrutineers for the polling booths on election day and how one was to make his vote.

During the meeting one of the orators who was present spoke saying that Nofaalii's trip had arrived back and Leulumoega has been wishing the trip by Nofaalii the best and a safe return (sa nofo tapuai Leulumoega). The petitioner also stated that of the orators of Leulumoega who were present at the meeting, only Togitele attended the "usu" or "inu" performed by Leulumoega early in the week for the return of Nofaalii's trip from American Samoa.

So as an orator himself, the petitioner said that he felt obliged by custom to present a lafo to the orators of Leulumoega who were present at the meeting. The reason was that he the petitioner was a member of his village's trip to American Samoa. Furthermore those attending the meeting had indicated their support for his candidacy and all of them, except for Togitele, did not take part in the "usu" that had been performed earlier in the week by Leulumoega.

I have given careful consideration to the evidence given by the petitioner and it has left me in doubt whether his real intention in giving the lafo be presented to the matais attending the meeting held on 25 April was to induce those electors to vote for the petitioner or whether his real intention was to comply with normal Samoan courtesy as expected of a resident returning from a trip overseas. In the first place the petitioner did not call or organise the meeting at Leulumoega. That was done by Togitele. The petitioner also did not appear at the meeting on his own freewill; he was invited to the meeting by Togitele. Secondly the petitioner had travelled overseas and had just returned.

It is normal courtesy for a returning resident to give a lafo to those remaining behind in a village. The speech by one of the orators present at the meeting that Leulunoega had been wishing the trip by Nofaalii well is a customary way of saying greetings and welcome back which carries with it the expectation of a lafo from the person returning from overseas.

So notwithstanding the closeness of the election, I am in doubt as to the true intention of the petitioner when he gave \$100 as lafo to the electors present at the meeting on 25 April given the circumstances in which he found himself. The second counter-allegation of bribery is therefore dismissed.

In all then the election of the respondent against whom one allegation of bribery has been proved is declared void. I will report my findings to the Honourable Speaker of the Legislative Assembly.

As both the petition and the counter-allegations have succeeded, there will be no order as to costs.

*TFM Sapele*  
.....  
CHIEF JUSTICE