

HELD AT APIA

Misc. 20034

BETWEEN: SUKI TUGAGA male of  
Leauva'a

Applicant

A N D: POLICE

Respondent

Counsel: TK Enari for applicant  
G Latu for respondent

Hearing: 22, 29 September 1997

Judgment: 9 October 1997

---

JUDGMENT OF SAPOLU CJ

---

The applicant in these proceedings was charged in the Magistrates Court under section 3(y) of the Police Offences Ordinance 1961 that at Leauva'a on the 10<sup>th</sup> day of September 1996 he permitted cattle to wander on the land of Sega Sang Yun (hereinafter referred to as "the complainant") a male of Leauva'a. He pleaded not guilty to the charge against him and stood trial in the Magistrate's Court. He was then not represented by counsel. He was found guilty and convicted of the charge. From

that conviction, he has applied to this Court under section 107 of the Criminal Procedure Act 1972 for a retrial.

Now section 3(y) of the Police Offences Ordinance 1961, as far as relevant, provides:

“Every person commits an offence and is liable to a fine  
“of up to \$50 who permits any ....cattle to wander or be  
“at large in any public place or to trespass on any land.”

It is clear that section 3(y) provides in the alternative for two acts which may constitute an offence under that provision. The first is the act of permitting cattle to wander or be at large at a public place; the second is the act of permitting cattle to trespass on any land. Either one of those acts if proved would constitute an offence.

In the information with which the applicant was charged, it is alleged that the applicant, the defendant at the trial, permitted cattle to wander on the complainant's land at Leauva'a. I raised with counsel the question whether in terms of section 3(y) of the Police Offences Ordinance 1961 the wording of the information discloses an offence. The reason for this was in order to avoid any possible confusion from arising in these proceedings, given the way in which the argument for the applicant was presented.

If one is to relate the wording of the information to the provisions of section 3(y) it would be clear that the wording of the information does not allege that the applicant permitted cattle to wander at a public place which is the first limb of section 3(y), or that the applicant permitted cattle to trespass on the complainant's land which is the second limb of section 3(y). Obviously the first limb of section 3(y) does not

apply because the complainant's land at Leauva'a is not a public place as the expression "public place" is defined in section 2 of the Police Offences Ordinance 1961. Likewise, the second limb of section 3(y) does not apply as it is not alleged in the information that the applicant permitted cattle "to trespass" on the complainant's land but that the applicant permitted cattle "to wander" on the complainant's land. The word "trespass" has acquired a technical meaning in law which is different from the ordinary meaning of the word "wander".

The result of all this is that the information with which the applicant was charged does not disclose an offence. That is contrary to the requirements of section 15(1) of the Criminal Procedure Act 1972 which, as far as relevant, provides that every information shall contain an offence. Understandably counsel for the applicant submitted that as the applicant was not represented by counsel at his trial he could not have moved to quash the information on the ground that it does not disclose an offence.

Be that as it may, counsel for the applicant directed the main thrust of his argument to what is alleged in the information that the land on which the applicant permitted cattle to wander was the complainant's land. Counsel for the applicant argued that the land in question does not belong to the complainant but to the applicant. He produced documents, some of which were produced by the applicant at his trial, to show that the land belongs to the applicant. Counsel then submitted that the trial Court did not take into consideration the defence of ownership in making its decision to find the applicant guilty of the charge and convict him.

It appears to me that part of the reason why counsel for the applicant has directed the thrust of his argument at the question of ownership of land is because of the wording of the information which says that the land in question is the complainant's land. The other reason is the firm belief of the applicant that the land belongs to him.

Certain points must now be clarified in order to avoid any possible confusion. The first is that it appears clear that the land in question is customary land. It also appears that both the applicant and the complainant are not matais but untitled men. If that is correct then both the applicant and the complainant cannot claim individual ownership of customary land. The second point is that if the land in question is customary land and the complainant is an untitled individual, then the allegation in the information that the land is the complainant's land is inappropriate. It is also embarrassing on the grounds of vagueness, ambiguousness and obscurity. The third point is that as the wording of the information does not fall within the first or the second limb of section 3(y) of the Police Offences Ordinance 1961, the issue of ownership of the land does not arise. The fourth point is that it appears to me that the present application for a retrial proceeded on the assumption that the applicant was charged with having permitted cattle to trespass on land. But that is not so. The word trespass is not to be found anywhere on or in the information.

I cannot help thinking that the appropriate cause of action that should have been taken in this case was to file an appeal against conviction on the ground that the applicant was convicted on an information which does not disclose an offence in

terms of section 3(y) of the Police Offences Ordinance 1961 rather than to apply for a retrial. But the Court cannot deal with something that is not before it.

I would also add that trespass to land is primarily concerned with possessory interest in land. That is to say, trespass to land is concerned primarily with possession and rights of immediate possession to land. Trespass is not primarily concerned with questions of ownership or title to land. Such questions may only be relevant to the issue of trespass to land in certain limited circumstances. For the purpose of these proceedings I need not go into those circumstances or determine whether any of them would have applied to this case if the applicant had been charged with cattle trespass. I would only say that in appropriate circumstances where trespass to land is in issue and there are competing claims to possession of land, the Court may have to determine who has the legal right to possession. In such circumstances ownership of the land may be a relevant factor to a determination by the Court.

Without making any conclusive findings of fact as that is not necessary here, it appears from the documents produced to this Court by counsel for the applicant that the pule or authority over the land in question was vested by the Land and Titles Court in 1963 in the Ali'i and Faipule of Afega. The land committee of the Ali'i and Faipule of Afega then allotted the land to the heirs of Tugaga Isaako which includes the applicant. However, the complainant and his family cultivated the land and have continued to cultivate the land. If these circumstances give the applicant a right to possession of the land as opposed to the complainant, the question then is whether the applicant's act of permitting cattle on the land under cultivation by the complainant amounts to trespass. But because of the present wording of the information the issue

of trespass does not really arise or require a determination by the Court as there is no mention of the word trespass in the information. I have only referred to trespass to land because the main thrust of the argument for the applicant appears to have proceeded on the basis that the applicant was charged with cattle trespass on the complainant's land when in fact he was not.

In all the circumstances, I have decided to grant the application and order a retrial.

*TFM Sapola*  
.....  
**CHIEF JUSTICE**

**Solicitors:**

Kruse, Enari & Barlow for applicant

The Office of the Attorney-General for respondent