

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

MISC. 22229

BETWEEN: **SAVEA SANO MALIFA** of
Vaitele and **FUIMAONO**
FERETI TUPUA of Alafua

Applicants

A N D: **KATALAINA MAKA**
SAPOLU of Afiamalu

First Respondent

A N D: **TOFILAU ETI ALESANA** of
Leufisa, Prime Minister

Second Respondent

Counsel: L L Stevens QC (of the New Zealand Bar) & T Malifa for applicants
K M Sapolu for first and second respondents

Decision: 17 November 1997

Reasons: 24 February 1998

REASONS FOR DECISION

These proceedings originated from the Magistrates Court where the first respondent, who is presently counsel for both respondents, brought a charge of criminal libel against the applicants. After adjournments before the Magistrates Court, various motions were then filed by the applicants in this Court. Two of these

motions were for an order by this Court to stay proceedings in the Magistrates Court until further order of this Court and for an order to remove proceedings in this Court to the Court of Appeal for determination. The motion for an order to stay proceedings in the Magistrates Court until further order of this Court was granted, but the motion for removal of proceedings in this Court to the Court of Appeal was denied.

I indicated to counsel at the time of my decision that I will give my reasons in writing in due course. Because of the Court's workload of hearings before Christmas, the intervention of the Christmas and New Year's holiday, and other unforeseen circumstances that had arisen, it has not been possible to prepare those reasons and make them available to counsel earlier.

As this case does touch upon the provisions of the Constitution, it would be helpful to refer to the relevant constitutional and statutory provisions now. Article 79 of the Constitution which provides for the general jurisdiction of the Court of Appeal states :

“Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine such appeals (including proceedings removed by order of the Supreme Court to the Court of Appeal) as may be provided by Act”.

It is therefore clear from Article 79 that the jurisdiction of the Court of Appeal to hear and determine proceedings removed from the Supreme Court to the Court of Appeal, as provided by Act, is to be subject to the provisions of the Constitution. This must mean that in the event of a conflict or an inconsistency between a statutory jurisdiction

of the Court of Appeal to hear and determine proceedings removed from the Supreme Court and any provision of the Constitution, the latter must prevail. This point was, however, not argued. But see also Article 2 of the Constitution and the definition of "law" in Article 111(1).

Now section 55 of the Judicature Ordinance 1961 which deals with the question of removal of proceedings from the Supreme Court to the Court of Appeal provides :

"(1) The Supreme Court may order the removal into the Court of Appeal of
"any of the following proceedings :

"(a) any notice of motion;

"(b) any petition presented;

"(c) any special case stated;

"(d) any question of law ordered to be argued.

"(2) On removal the Court of Appeal shall have the same power to adjudicate
"on the proceedings as the Supreme Court had".

A number of the issues raised in these proceedings relate to the enforcement of some of the fundamental rights provisions of the Constitution. These are the right to a fair trial as provided in Article 9, the right to freedom of speech and expression as provided in Article 13, and freedom from discriminatory legislation as provided in Article 15. Article 4 of the Constitution which deals with the enforcement of fundamental rights provides :

“(1) Any person may apply to the Supreme Court by appropriate proceedings
“to enforce the rights conferred under the provisions of this Part.

“(2) The Supreme Court shall have power to make all such orders as may be
“necessary and appropriate to serve to the applicant the enjoyment of any of
“the rights conferred under the provisions of this Part”.

The particular “Part” of the Constitution referred to here is Part II which contains the
fundamental rights provisions. One thing is clear from Article 4. It is that the
Constitution is not silent or ambiguous as to which Court is to deal with the
enforcement of its fundamental rights provisions. It is the Supreme Court. Article 81
then provides :

“An appeal shall lie to the Court of Appeal from any decision of the Supreme
“Court in any proceedings under the provisions of Article 4”.

Perhaps I should also refer to two other provisions of the Constitution which
touch on the question of jurisdiction. Article 73 provides :

“(1) The Supreme Court shall have such original, appellate and revisional
“jurisdiction as may be provided by Act.

“(2) Without prejudice to any appellate or revisional jurisdiction of the
“Supreme Court, where in any proceedings before another Court (except the
“Court of Appeal) a question arises as to the interpretation or effect of any
“provision of this Constitution, the Supreme Court may, on the application of
“any party to the proceedings, determine that question and either dispose of the
“case or remit it to that other Court to be disposed of in accordance with the
“determination.

“(3) The Head of State, acting on the advice of the Prime Minister, may refer
“to the Supreme Court for its opinion any question as to the interpretation or
“effect of any provision of this Constitution which has arisen or appears likely
“to arise, and the Court shall pronounce its opinion on any question so referred
“to it”.

Article 80, as far as relevant, then provides :

“(1) An appeal shall lie to the Court of Appeal from any decision of the Supreme Court in any proceeding, if the Supreme Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution.

“(2) Where the Supreme Court has refused to give such a certificate, the Court of Appeal may, if it is satisfied that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution, grant special leave to appeal from that decision”.

I have cited in detail these constitutional provisions to show that the Constitution does expressly give to the Supreme Court jurisdiction to enforce the fundamental rights provisions of the Constitution or to deal with any question which arises as to the interpretation or effect of any provision of the Constitution. Obviously weight and respect must given to the expressed words of the Constitution.

Now in its unreported judgment in *Su'a Rimoni Ah Chong v Attorney-General* (C.P. 210/96; delivered on 24 March 1997) this Court dealt for the first time with a motion for removal of proceedings from this Court to the Court of Appeal. In that case, this Court followed the approach as to the exercise of discretion in a motion for removal of proceedings to the Court of Appeal which was stated by Cooke P in the New Zealand Court of Appeal in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon [1981] 1 NZLR 614*. It is there stated at p.616 :

“Section 64(b) of the Judicature Act enables any notice of motion in the High Court to be removed into this Court, but in this and the other categories of case covered by the section the jurisdiction is in practice exercised sparingly. Parties are prima facie entitled to the benefits of both a determination at first

“instance and a review on appeal. The appellate Court then has the advantage “of the opinions and findings of the trial Court; we value and respect them as “to both fact and law. The two tier pattern (three in the event of an appeal to “the Privy Council) is departed from only exceptionally and for clear reason “applicable to the particular case. We agree with Speight J that the need for a “prolonged inquiry into the facts tells against removal, but the jurisdiction “does extend to the removal of questions of fact”.

The factors stated in this approach as relevant to a consideration of a motion for removal of proceedings from the Supreme Court to the Court of Appeal were discussed in detail in the *Ah Chong* case (supra) in relation to the circumstances of that case and those of Samoa. I need not reiterate all that I said in the *Ah Chong* case. But a reading of the judgment in that case will show that some of the things I said there about the benefits of both a determination at first instance and a review on appeal, the value of the opinions and findings of the lower Court, the sparing nature of the jurisdiction, and the special circumstances of Samoa and its Court of Appeal, are also relevant to these proceedings. I will, therefore, pass on to the other issues raised in these proceedings.

One of the grounds raised in the motion for removal is the novelty of the issues raised in these proceedings. In general terms these issues include the lawfulness and constitutionality of section 84 of the Crimes Ordinance 1961 which provides for the offence of criminal libel, the requirements and content of the right to a fair trial under Article 9 of the Constitution as they relate to a criminal libel prosecution, and whether the information charging criminal libel is an abuse of the Court's process. It must be pointed out that the social, economic and political development of Samoa, particularly in the recent past and up to now, has been accompanied by some novel legal and constitutional developments of major

importance. This Court has played a major role in these legal and constitutional developments. Some of the issues, principally of a constitutional nature, were novel at the time they were raised before this Court.

Whilst the constitutional issues raised in this case are novel in the sense that this is the first time they have been specifically raised before this Court, I am of the view that the same will be true of many more issues to be raised within the foreseeable future regarding the Constitution and its interpretation, because it is only since the recent past that the Constitution has become an increasingly litigious document. If every constitutional question is, therefore, to be removed to the Court of Appeal on the ground of novelty, then the Supreme Court will virtually cease to play any real role in the interpretation of the Constitution. But that does not appear to be the intention of the Constitution itself. And as I have said, the Supreme Court has dealt with novel questions regarding the interpretation of the Constitution in the past.

As to the public importance of this case, I do not find the circumstances of this case as giving it more public importance compared to other constitutional cases of major importance which have been heard before this Court. This case has received much publicity in the appellants newspaper. But the publicity a case receives is not always conterminous with its actual importance to the public.

One final matter. If those proceedings are to be heard in the Supreme Court, they will have to be heard before another Judge as one of the parties is my sister.

For all those reasons, the motion to remove proceedings to the Court of Appeal
is denied.

TFM Saph
.....
CHIEF JUSTICE