Case Note: Police v Sikuea and Others

Magistrates Court, Tonga
22nd April 1996

This was a prosecution of three persons for alleged breaches of section 57 of the Criminal Offences Act Cap. 18 of Tonga. That section reads as follows:

Every person who uses threatening, abusive or insulting language or behaviour towards any officer in the Service of the Government shall be liable on conviction to imprisonment for any period not exceeding 2 years or to a fine not exceeding $500 or to both such a fine and imprisonment.

Two of the defendants were the authors of letters published in the newspaper the Taimi 'o Tonga on 21st February 1996. The third defendant 'Akau'ola was the editor of the newspaper and was charged as an accessory under section 8 of the Act. The published letters, according to the evidence of the first and second defendants, were written in order to correct certain statements by the complainant in the proceedings, the Minister for Police, which had earlier been made in an article in the Chronicles newspaper on 8th February 1996. Clearly there were issues of a political nature as an undercurrent to the current proceedings.

The defence contended, firstly, that section 57 was ultra vires as against clauses 4 and 7 of the Tongan constitution. Next, it was claimed that section 57 of the Act applied only with respect to abusive material by spoken words and not to material which was published. Thirdly it was claimed on behalf of the third defendant, the editor of the newspaper, that the owner of the paper, a corporation, was the proper defendant in the proceedings. Finally, it was contended by the prosecution that section 57 imposed a strict liability offence negating the need to prove intention or *mens rea*. There were a range of other issues raised in the proceedings, but this note concentrates on these only.

On the constitutional issue, it was held that the Tongan constitution did embody the principle of the supreme law; a matter set at rest by clause 82 of the Constitution Amendment Act 1990. The first eighteen clauses of the constitution functioned effectively as a Bill of Rights. It was held that section 57 did not infringe clause Clause 4 of the Constitution. That clause which provides that there will be one law for Chiefs and Commoners in Tonga. The Court applied the narrow, and seemingly non-literal interpretation, of that section by the Supreme Court of Tonga in Sunia Mafile'o Tu'itavake v Porter and Ors. 24/1989 SC Tonga as imposing a requirement that like be treated alike and that a legally justifiable and non-arbitrary differentiation between different groups in society is permissible. The defendants appeared to contend that the infringement by section 57 lay in so far as it purported to provide special privileges to servants of the government, whilst denying those privileges to others. Here it was held that the differentiation was not arbitrary and provided justifiable protection to servants of the government as a class within society. The section provided no arbitrary differentiation by the law within that class of persons.

Clause 7 of the constitution purports to guarantee freedom of speech and of the press. Again it was held that section 57 was not inconsistent with that clause. Clause 7 was taken to prohibit any law which will censure freedom of expression and publishing in the sense that it would impose, in advance, "legal limits which prohibits or otherwise effectively restrain (sic) speaking or publishing (Censorship Law)". The publication of threatening, abusive or insulting language is not something which Clause 7 itself would permit under the guise of freedom of speech or freedom of the press. See also Francis v Chief of Police [1970] 15 WIR 1 and Collymore and Another v Attorney-General of Trinidad and Tobago [1967] 12 WIR 9.

In relation to the second matter it was held that section 57 did apply with respect to published material. The section used the word 'language', unlike provisions such as section 47(1) which refers specifically to speech. There was therefore no need to limit the section to spoken words only. In this regard the Court applied the decisions in Attorney-General v Prince Ernest Augustus of Hanover [1957] 1 All ER 49 and Director of Public Prosecutions v Schildkamp [1969] 3 All ER 164 A sub-issue concerned what was alleged to be an inconsistency between the Tongan version of the section and the English version. The defendants contended that the summons was bad because it alleged only that the letters were *'Fakatut'ita'i'* rather than *Leakov'i Fakatut'ita'i*. Hence it was alleged that the summons was bad for duplicity.

The wording of the Tongan version of the section, so far as relevant runs as follows "57... nguae'aki-pa lea FAKAMANA LEAKOVI'I FAKATUPU'ITA'I pe FAKAMATALILI .." The English section as stated above refers to ".. uses threatening, abusive, insulting language or behaviour...". Section 21 of the Interpretation Act 1988 of Tonga provides as follows:

"If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the Section which the accused person is charged with violating differ in meaning, then, in deciding the question of the accused person's guilt or innocence the Court shall be guided by what appears to be the true meaning and intent of the Tongan version."

However, the Court held that this section did not apply to the case in hand because there was no material difference between the Tongan and the English rendering of the section. The Magistrate said in the course of the judgement:

"I am sure that the legislature when enacting Section 57 did not intend to use LEAKOVI'I and FAKATUPU'ITA'I together. Those two words are both verbs. It is grammatically incorrect both in writing and in speaking. I think that the true construction of the intention of the law makers is to separate them with a comma in between." (p. 17)

It was held that the Court was entitled either to ignore or to imply punctuation when interpreting the words of a section. Hence it was held that the summons was not bad for duplicity by merely referring to FAKATUPU'ITA'I.

On the question of the liability of the third defendant, the editor of the Taimi, the defence claimed that the company owing the newspaper rather than the third defendant should have been the defendant in the case. The Interpretation Act Cap 1 includes a corporate body within the definition of the definition of a 'person' for the purposes, *inter alia,* of criminal prosecution. The Court proceed on the basis that had the proceedings been brought against the company, the prosecution would have had to show that the third defendant was not merely a servant or agent of the company but that he was "the embodiment of the company ... and that .. his act and his mind are the act and mind of the company." (p. 21) The Court here relied on the principles of corporate criminal liability set out in Tesco Supermarkets Ltd. v Nattras [1972] AC 153 This decision of the House of Lords imposes a control test. It requires in effect a differentiation between those senior officers who carry out the functions of the Company and speak and act for the company, on the one hand, and those lesser officers who, although they exercise some managerial functions, do so under the supervision of others; that is, between those who direct and those who are directed.

On the evidence in this case it was decided that there was no basis for holding that the company was the proper defendant. The third defendant was not the editor and was not directly responsible for the management of the company. Thus he and not the company was a proper defendant in the proceedings.

Finally the Court considered whether, according to the prosecution's submission, section 57 imposed strict liability on persons alleged to have breached it. The Court discussed the various rationalia for strict liability offences set out in authorities such as Sherras v De Rutzen [1985] 1 QB 918, Cundy v Cocq [1884] 13 QBD 207 Harding v Price [1948] 1 KB 695 and Lin Chin Aik v R [1963] AC. Some reliance was placed on the judgement of Devlin J in Reynolds v Austin and Sons Ltd. [1951] R KB 135 at 148 which suggested that the term 'uses' as it appears in section 57 in some circumstances impose a requirement of proof of *mens rea.* The Court was of the view that section 57 did not create a strict liability offence and that the prosecution did need to prove criminal intention. However, on the facts such intention was found.

In the end result the charges against the second defendant were dismissed as the material published was not found to be abusive in nature. So also the charges against the third defendant of abetting the second defendant. The other charges against the first and the third defendants were found proved.

PROFESSOR R. HUGHES
Head, School of Law
University of the South Pacific

Port Vila, 4th October 1997