IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

CR.1178/99

BETWEEN : *ATTORNEY GENERAL* - *Prosecution;*

AND : *1. VIOLA ULAKAI* - *Defendants*
2. LAUMANU PETELO
3. NANISE FIFITA
4. NALESONI TUPOU
5. TAVAKE FUSIMALOHI
6. TONGA BROADCASTING COMMISSION

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : Mr Kefu for the Prosecution
All Defendants in person

Date of hearing : 1 December 1999 and 6 December 1999.
Date of judgment : 15 December 1999.

JUDGMENT

On 1 October 1999 Radio Tonga broadcast a news item about two civil actions which had just been filed in the Supreme Court. The item was broadcast four times; twice in Tongan when it was presented by the first defendant, Viola 'Ulakai, and twice in English when the presenters were the second and third defendants, Laumanu Petelo and Nanise Fifita. All are employees of the sixth defendant, the Tonga Broadcasting Commission of which the fifth defendant is the General Manager.

The plaintiff in the two cases referred to is a New Zealand barrister, Barry Wilson, and his claim was against a Tongan law practitioner and the Attorney General for the payment of costs awarded in favour of his clients in a case he had conducted here in the Supreme Court in 1996. The defendant law practitioner had apparently represented Wilson's clients in the costs hearing and it was stated that, despite written and oral demands, she had refused to pay. The allegation against the Attorney General was that the costs had been improperly set off against other awards of costs made against the law practitioner's clients. Those writs had been filed in the court that same day and the copies had been placed in the rack in the registry for collection by the lawyers [illegible] defendant and a complaint was made to the Registrar by the law practitioner because the broadcast was the first she had heard of the action against her.

The news item started with a statement that the actions had been filed and named the law practitioner and, later, the Attorney General as defendants. However, it then went on to detail a number of alleged facts from the claim. These so closely followed the wording of the statement of claim that it was clear the writer of the news item had used a copy of that document. Those claimed facts alleged impropriety by the lawyer and the Attorney General and the news item concluded with the statement that the plaintiff had also lodged a formal complaint to the Tonga Law Society.

The information for the broadcast was supplied by the fourth defendant, Nalesoni Tupou, the lawyer representing the plaintiff who had just filed the papers.

The defendants have been summoned, on the motion of the Attorney General, to show cause why they should not be committed or found liable for contempt.

The fifth defendant has written a letter to the court on behalf of the Broadcasting Commission and its employees. He points out that the procedure used in this report was in accordance with a long established and hitherto unchallenged practice of Radio Tonga News. The item contained no editorial comment or expression of opinion and it was broadcast in good faith and without any malice. He apologised for any possible contempt. He repeated those comments in court and I accept them all.

For reasons I shall set out later in this judgment, I find this broadcast constituted a contempt but I shall take no further action against the first, second, third and fifth defendants and shall pass a relatively nominal fine against the sixth defendant.

The ~~fifth~~ 4th defendant was unable to attend on the return date and filed an affidavit disputing the suggestion he had been guilty of a contempt. He appeared on his own behalf as soon as he was able to come to Tonga.

He is a barrister and solicitor of the High Court of New Zealand and is enrolled as a law practitioner of this court. In the light of the latter, it was startling to find that he sought to pass the blame for some of the events on the registry staff who had attempted to assist him in filing the writ. The assistance he admits he sought from them showed that he was ignorant both of the normal rules of civil procedure in this court and of day to day registry practice. Although it is an unfortunate basis for such a decision in relation to the professional conduct of a practitioner, I accept he did believe, albeit incorrectly, that he had arranged service of the writs when he left the registry that afternoon. However, it is also clear that he must have known that those documents could not have been seen by the defendants involved before the broadcast.

In his affidavit he explained how he went to Radio Tonga and, whilst talking of other things with the fifth defendant, was asked if the writs had been filed. He then went to his car and handed over two copies of the writ and statement of claim. When he appeared before the court, it was clear that was not an accidental event as the affidavit might have been taken as suggesting. He told the court that he went to the radio office specifically to deliver the documents and had prepared a number of extra copies for that reason. Indeed he went from there to the offices of the Tonga Chronicle and also of one of the other defendants in the case in which Wilson had appeared. In each case he similarly gave copies to them. He also told the fifth defendant of the complaint filed with the Tonga Law Society.

His affidavit states that he told the fifth defendant to contact the court registry to check when it would be proper to broadcast such an item. In his written submissions he suggests:

> "This is a situation where reasonable steps were taken by the solicitor and the defendants from the radio. The solicitor actually delivered a copy of the statement of claim to Radio Tonga at their request. It is submitted that the solicitor informed the Radio to make contact with the Registrar before making any broadcast. The solicitor had no further control from that point as to when the broadcast would be broadcast but was satisfied on advising the radio that they must first seek the permission of the registrar before broadcasting."

I cannot avoid the comment that he, as a qualified lawyer conducting the case, was in a better position to advise on such matters than the court staff. He agreed he would never have expected the equivalent court officials in New Zealand to give such advice. I cannot accept it is proper conduct by a lawyer to give such a warning and then consider he is relieved of any further responsibility as appears to be his reasoning. I certainly do not accept that the steps he admits taking could be considered reasonable.

When asked in court whether he had his lay client's permission to release these documents, he stated that released the papers on the express instructions of his client and suggested that shifted in some way the responsibility from him for any possible contempt. I appreciate his client is a senior barrister of some eminence in New Zealand and it may be difficult to question his instructions in such a case but the seniority or importance of the client does not absolve a lawyer from his responsibility to advise about the propriety or otherwise of anything his client asks him to do.

He stated in his affidavit that, "at no time, I had any intentions whatsoever of causing any embarrassment, inconvenient or any motive of similar nature against any persons or organisations or the institution of the law Courts in Tonga during the events of Friday 24th of September 1999 and thereafter. At no time that I encouraged promoted or represented any mannerism that may seem to be in contempt of Court."

I suggested to the law practitioner who appeared for the fourth defendant at the first hearing of this motion that she should advise him I would be particularly interested to hear just what was his intention when he released these documents to the media. He did not explain further in his affidavit and, when asked in court, gave no explanation apart from the fact that they had all been interested in the earlier case.

However, the main thrust of the fourth defendant's submissions was that his admitted conduct did not amount to contempt and I now pass to that aspect of the case.

His submission is that this publication did not create a real risk that the course of justice would be impeded or prejudiced. He relies principally on the English cases of Attorney General v MGM Ltd (1997) 1 All ER 456, Re Lonrho plc (1989) 2 All ER 1100 and Attorney General v News Group Newspapers Ltd (1987) 1 QB 1. Whilst I accept the principles enunciated in those case as to the general risk of influencing potential jurors or the trial judge, the judgments are tailored to the English Contempt of Court Act 1981 and, in particular the extent and meaning of section 2 in relation to the strict liability rule. That Act does not apply in Tonga.

The power of this court to punish for contempt is derived from the inherent power of the court as developed through the common law. The 1981 Act in England was an attempt to modify that position especially in relation to publications in the media. In the News Group Newspapers case, Lloyd LJ pointed out;

> "...the statutory purpose behind the 1981 act was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech."

The balance between the need to protect fair trial and the equally important right of freedom of discussion, of which freedom of the press is a part, has been the subject of a long series of cases through which the common law has been developed. The result of the attempt to preserve both these rights has, to some extent, inevitably resulted in a compromise but the courts have repeatedly regarded the proper administration of justice as the over-riding interest. Therefore, whenever the circumstances are such that one must prevail, it one will be the protection of the due administration of justice. Whatever the recent developments in England, that is still the law in many common law jurisdictions including Tonga

The result has been often severe restrictions on what may be published about legal proceedings until they are complete. The justification for this was seen not just in the need to ensure a fair trial but in the fact that the restrictions imposed simply postponed the publication and were not a continuing ban. Thus, once the legal proceedings are completed, the restrictions on publication imposed by the law of contempt are in general terms lifted.

It is perhaps worthy of mention that the position in the United States of America is that, as a result of the First Amendment to the Constitution, the balance is firmly tipped the other way. The difference and its effect was seen very vividly recently in the trial of O J Simpson. The elaborate steps necessary to select a jury unaffected by the free publication of matters that would be regarded here as sub judice are a direct consequence.

Most other common law jurisdictions, including Tonga, have chosen not to follow that path and have preserved the court's right to restrict, at least to some extent, by the law of contempt, the publication of matters that are sub judice.

The purpose of the law of contempt of court is to safeguard the effective administration of justice. It is a phrase that has been criticised frequently in England, Australia and New Zealand as suggesting that it is to protect the dignity of the court or its judicial officers. That is not the case and the term is unfortunate in that respect. In Attorney General v Leveller Magazine Ltd (1979) 1 All ER 745, Lord Diplock pointed out that contempt takes many forms and continued:

> "...they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

In Attorney General v Times Newspapers Ltd (1974) AC 273 (the Sunday Times case), Lord Simon pointed out that the rules that are embodied in the law of contempt are the means by which the law vindicates the public interest in the due administration of justice.

Freedom of the press in Tonga is preserved in article 7 of the Constitution along with and, I would suggest, as part of freedom of speech. The media has the right to publish issues of public importance and also to publish them in such a way as to stimulate discussion. It is important, therefore, that the media is not unduly restricted in what it reports and, when it is, the courts must always be careful to see that the rules of contempt are not used to gag the reporting and discussion of matters of public interest or concern for the wrong reasons. Equally it must be vigilant to ensure the right of the public to expect a fair and effective trial process is not compromised by careless or irresponsible publication.

However, it should be remembered that the media are part of the public and have no more rights than does a member of the public. I do not consider that the separate references to freedom of the press and of speech in article 7 give any special right to the press over the rest of the general public. In a frequently quoted passage, Donaldson MR stated;

> "I yield to no-one in my belief that the existence of a free press, in which term I include other media of mass communication, is an essential element in maintaining parliamentary democracy...But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. Their right to know and their right to publish is neither more nor less that that of the general public. Indeed it is that of the general public for whom they are trustees." (Attorney General v Guardian Newspapers Ltd (No 2) (1990) 1 AC 109)

In the present case, the radio published this as a matter of general interest arising from the original application for habeus corpus in which the plaintiff first appeared here. I accept the defendants from Radio Tonga quoted the contents of the statement of claim accurately. The third defendant in her memorandum to the general manager, suggested that there was no added commentary or expression of opinion. The test she applied was one that would hold in many of our neighbouring common law jurisdictions. However the test must be based on the conditions here in Tonga. In this country comment and discussion is widespread. So also is gossip and the allegations in this claim could soon be circulating as if they were statements of proven fact.

The sources of information through the media here are not comprehensive. It is also common that, once an item has been published, later developments may be disregarded. In the case of reporting of court cases it is not uncommon for the result of a case that has been the subject of an earlier media report to go unreported. Thus discussion of any news item may be based entirely on that single source of information and single view of the facts alleged.

These were, of course, civil cases. Had this report been confined to the general facts of the case, such as the names of the parties and the general nature of the claim, it would have been unobjectionable. What gives rise to the risk of prejudging the trial is the fact that it cites a number of allegations of fact that have yet to be proved. Many listeners to that broadcast will have only that upon which to base any comment or discussion. The final comment that a complaint had been lodged with the Law Society did not come from the claim in the court cases. It adds to the unproved suggestions of impropriety and I feel, despite the third defendant's assertion, falls within the description of comment.

The risk is that the report will be taken as the end of the matter and it will be decided on those facts alone. Anyone later involved in the trial will have been subject to a one sided version of the facts that could well influence the way he ultimately assesses the evidence.

As I have stated the purpose of the law of contempt is to prevent publication of material that will give rise to a real risk of prejudicing the fair trial of the action and thus the due administration of justice. In the Sunday Times case, Lord Diplock set out the requirements of the due administration of justice as;

> "First that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes and to their legal rights and liabilities, secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

In the third edition of Borrie's and Lowe's "Law of Contempt", the present authors suggest:

> "The immediate object of limiting what can be said during the currency of legal proceedings is, in broad terms, to protect the fairness of that trial. The underlying fear is that without such protection there would be 'trial' by the media and participants in the proceedings, such as witnesses and jurors, could be influenced. As Lord Reid said in Attorney General v Times Newspapers Ltd:
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> 'There has long been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.'
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> The objection to such 'trials' is that they usurp the power of the court without any of the safeguards that are to be found in legal proceedings such as those provided by rules of procedure and evidence. As Wills J put it in R v Parke (1903) 2 KB 432 at 437, they:
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> '....deprive the court of the power of doing that which is the end for which it exists – namely, to administer justice duly, impartially and with reference only to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.'
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> In short, the objection to 'media' trials is that they put at risk the due administration of justice in the particular case. The long term fear, however, is that such trials could undermine confidence in the judicial system generally. Lord Reid said in the Sunday times case that trial by newspaper is intrinsically objectionable:

'not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible 'mass media' will do their best to be fair but.... if people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow and, if mass media was allowed to judge, unpopular people and unpopular causes will fare very badly.' "

That is the problem in this case. I do not suggest that the report that is the subject of these proceedings could ever be described as trial by the media in the sense in which that is used in the Sunday Times case. The danger is that, in this society, even that one-sided report of unproved facts carries a substantial risk that the public will decide these issues before trial. Witnesses and jurors may be included in those who have considered them. By the time the matter is concluded in the courts, that conclusion may not be reported and the public view will remain based solely on the original report.

The courts have been asked to give some guidance to the media as to what is and what is not permissible but have consistently declined to set out any hard and fast rule. It will always depend on the facts of the case as a whole and the local circumstances. The news presenters on Radio Tonga are well placed to make an assessment based on such considerations.

One case in which it was attempted was in the High Court of Australia in Packer v Peacock (1912) 13 CLR 577. This concerned publication of the facts of a criminal trial but the principles apply in all cases.

"One question is common to all these appeals, namely, "to what extent is a public journal warranted by law in publishing matter relating to a criminal charge?" We were invited to formulate limits within which such publication is lawful. But this, we think is neither desirable nor practicable. In this as in many other cases, it may be difficult to lay down a precise line of demarcation, but not difficult to say on which side of the line a particular case falls. One rule, however may be stated with confidence. A publication which tends to prejudice the public mind, either on one side or the other, and so to endanger a fair trial, is unlawful and a contempt of Court. The whole matter published must be considered, and its tendency must be regarded as a whole."

Later in the same judgment, Griffith CJ attempted to take it a little further. He stated the courts opinion that the public is entitled to entertain a legitimate curiosity in some things and it would be lawful for any person to publish information as to the bare facts relating to such matters.

"By "bare facts" we mean (but not as an exclusive definition) extrinsic ascertained facts to which any eye witness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person accused, and so on. But as to alleged facts depending upon the testimony of some particular person which may or may not be true and may or may not be admissible in a court of justice, other considerations arise."

As I have stated this was a criminal case and, in as small a community as Tonga, even some of the matters he considered acceptable as bare facts may not be acceptable but that is more a question of sense and taste than of contempt and will always depend on the good sense of the publisher.

It should also be borne in mind that, although the courts are always sensitive to the interest of the public in many matters, there is no "public interest defence" in contempt despite the attempts of some judges to introduce it.

Mr Tupou has pointed out that the English authorities have tended to play down the risk of influencing the judge and I accept that is the case. No judge, as Salmon J stated in Attorney General v BBC (1981) AC 303, would be influenced in his judgment by what may be said by the media. If he were he would not be fit to be a judge. However, that comment arose from the earlier statement that, in England, jury trials in civil actions have almost ceased to exist. Far stricter rules apply to criminal cases where jury trial is common.

In Tonga, trial by jury in civil matters is less common that in criminal but Mr Tupou's assumption that there will not be one in this case is misplaced. Our law gives the right of jury trial to both parties and for Mr Tupou to make an assumption before the papers had even reached the defendants that it will not be exercised by them in this case was as bold as it was wrong.

The position at common law is that it is not necessary to prove actual prejudice to a case. It is sufficient if the conduct is shown to have a tendency to prejudice the case. Its nature must be such that prejudice might result. Mr Tupou points out, correctly, that the court must not lose sight of the fact that the risk must be a real one. The courts should not invoke such mandatory power lightly. The New South Wales Court of Appeal has stated:

> "Without purporting to state the test exhaustively, it can be said that contempt will be established if a publication has a tendency to interfere with the due administration in a particular proceedings. This tendency is to be determined objectively, by reference to the nature of the publication; and it is not relevant for this purpose to determine what the actual effect upon the proceedings has been, or what it probably will be. If the publication is of a character which might have an effect on the proceedings, it will have the necessary tendency, unless the possibility of interference is so remote or theoretical that the de minimis principle should be applied." (Attorney General for NSW v John Fairfax and Sons Ltd (1980) NSWLR 362 at 368.)
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> Earlier in the judgment the Court had adopted the remarks of Lord Reid in the Sunday Times case:
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> "Lord Reid stated the test as being that "there must be a 'real risk as opposed to a remote possibility' " of influence and that there is no contempt if the possibility of influence is remote. The qualification, he said, was an application of the de minimis rule. Lord Diplock adopted the same test. The 'risk' to which Lord Reid referred is the possibility that the publication might cause prejudice. If it might cause prejudice, it is a real possibility, unless the possibility is a remote one."

As I have stated, I do not consider the actions of the Tonga Broadcasting Commission and its employees was a very serious contempt. The attitude expressed on their behalf by the fifth defendant is responsible and I have no doubt they were misled by the fact this information was given to them by a lawyer. They are however guilty of contempt. It has long been the position at common law that if there is real risk of prejudice, once it is shown that there was an intention to publish, there will be a contempt even if there was no intention to prejudice the trial.

However, their intention is relevant to the proper penalty and I impose no penalty on the first, second, third and fifth defendants and I order the sixth defendant to pay a fine of $1.000.00.

The position of the fourth defendant is different. He was an experienced lawyer. He took the decision to pass these papers to the media. He has given no adequate reason for so doing.

Far from having no intention to prejudice the proceedings, his own statement quoted above shows a reckless disregard for any use to which the documents might be put by Radio Tonga. However, I go further. I am satisfied beyond reasonable doubt that he gave those documents to the fifth defendant and added the information that a complaint had been made to the Law Society with the deliberate intention of influencing the trial of this action by putting pressure on the defendants to deter them from defending the action or to settle rather than have the court decide issues that had already been made public through the media. That is a serious contempt and all the more so for being committed by an officer of the court.

I find him guilty of contempt. He confined his submissions to disputing the allegation of contempt and has not, therefore, had an opportunity to address me on the appropriate penalty. I shall adjourn that question to a date to be fixed to give him that opportunity.

SUPREME COURT TONGA

DATED: 15 December 1999.

CHIEF JUSTICE