

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20457

IN THE MATTER of the Electoral Act 1963 and
its Amendments

A N D

IN THE MATTER of an Election Petition by
AUFAI UPUESE against the
election of FAASOOTAULOA PATI
to represent the Territorial
Constituency of GAGAITAUGA NO.2

BETWEEN: AUFAI UPUESE of Salamumu, a
candidate for election

Petitioner

A N D: FAASOOTAULOA PATI of Vaitele, a
candidate for election

First Respondent

A N D: THE REGISTRAR OF ELECTORS AND
VOTERS of Nulinuu

Second Respondent

A N D: THE CHIEF ELECTORAL OFFICER

Third Respondent

Counsel: T K Enari for petitioner
R Drake for respondent
P Tanielu for second and third respondents

Hearing: 10 & 11 June 1996

Judgment: 17 June 1996

JUDGMENT OF SAPOLU, CJ

A General Election for Members of Parliament was held on 26 April 1996 and the results were publicly notified by the Chief Electoral Officer on 14 May 1996. The results of the poll for the territorial constituency of Gagaemauga No.2 were declared as follows :

<u>Candidates</u>	<u>Votes Received</u>
Aufai Upuese	288
Faasootauloa Pati	402
Total number of valid votes	690
Number of votes rejected as informal	7

Faasootauloa Pati was accordingly declared to be elected.

By an election petition dated 21 May 1996 the petitioner Aufai Upuese seeks declarations that the election of the first respondent Faasootauloa Pati is void, or alternatively that the petitioner be declared to be duly elected. The petitioner's allegations against the first respondent are essentially that :

- (a) on polling day the first respondent did interfere with electors at the front of the booth at Salamumu with the intention of influencing them as to their votes;
- (b) on polling day the first respondent made a speech at the front of the booth at Salamumu which had a direct or indirect influence on the election; and
- (c) on polling day the first respondent by his agents committed the corrupt practice of treating by providing at the polling booth for special votes at Malifa food and drink to electors en route to vote and/or on return from voting for the purpose of corruptly

influencing those electors as to their votes.

The Court has already dismissed both allegations (a) and (b) as the evidence called to establish those allegations do not establish any prima facie case. Furthermore the acts alleged in (a) and (b) are not corrupt or illegal practices in terms of the Electoral Act 1963 so as to void the result of an election.

Turning now to allegation (c) which is that of treating against the agents of the first respondent, it is clear from the evidence of the first respondent and members of his campaign committee who were at the booth at Malifa for special votes on polling day that prior to polling day the first respondent did issue instructions to all members of his campaign committee not to provide food or drink to electors on polling day. Then at about 7.00am on polling day the first respondent left his home at Siusega with some of his scrutineers for the polling booth at Salamumu. His wife had already left the previous day for the polling booth at Saleaula in Savaii. The first respondent's campaign committee members who were assigned to organise the electors who were to cast their votes at the Malifa special booth were Lofipo Utu, Faasootauloa Segifili, Vaa Lua and Leaula Lopea. The other committee member Aufai Uisele was assigned as the first respondent's scrutineer at the Malifa booth.

Starting from about 6.00am on polling day, the members of the first respondent's campaign committee for the Malifa booth together with the assistance of the first respondent's daughters Betty Taulapapa and Jacinta Taulapapa were transporting electors for the Gagaemauga No.2 territorial constituency to the Malifa booth. Some of these electors were elderly people, nursing mothers and children. As it was a hot morning and the polling booths were not to be opened

until 9.00am for voting, witnesses for the first respondent say the first respondent's campaign committee members became concerned about the condition of the elderly electors and nursing mothers as they had not had any breakfast when they were picked up and taken to the Malifa booth in the early morning.

It was then, according to the evidence of Aufai Uisele the scrutineer for the first respondent at Malifa, that he instructed the other members of the first respondent's committee to request the children of the first respondent for some drink and sandwiches for the elderly electors and nursing mothers. It appears that a bucket of home made cordial, a bucket of iced water and a container of fifty to sixty half-sandwiches were prepared and taken to Malifa. Aufai Uisele further testifies that his instruction for the provision of food and drink to the electors in question was contrary to the instruction which had already been given by the first respondent to his campaign committee not to give out food or drink to electors on polling day.

What happened at Malifa is that the van which carried the sandwiches made of eggs and herring and the two buckets of home made cordial and iced water was parked not far from the entrance to the special booth used for both the Gagaemauga No.2 and Alataua-i-Sisifo territorial constituencies. The van was also parked directly facing the entrance to the booth. According to the evidence of Betty Taulapapa, Jacinta Taulapapa and Afaese Nataafa the sandwiches and drinks were given out from the van to anyone who came to the van for a sandwich and drink. The sandwiches and drink ran out at between 10.30am and 11.30am.

The evidence given by the witnesses Roina Faatauva, Liliu Nailo, Simanu

Maatia, Ua Ufi, Tamalega Polesi, Matua Malo and Levaopalo Maanaima for the petitioner are all to the effect that sandwiches and drinks were given out from the van to electors by members of the first respondent's committee from 9.00am when the booths were opened on polling day until 3.00pm when the booths were closed. The sandwiches and drinks were given out to electors on their way to the booth and/or on their return from the booth after casting their votes. However some of the witnesses for the petitioner like Roina Faatauva'a and Liliu Mailo were not at the Malifa booth all of the time as they were going out to collect electors and transport them to Malifa. The evidence of the witness Matua Malosi is that he himself also went to the van at about 10.30am for some food and was given a drink and sandwiches by members of the first respondent's committee with some reluctance. The witness Levaopalo Maanaima testifies that he and Matua Malosi went together to the van for some food and only he and Matua Malosi were eating at the van at that time. No witness who was asked as to whether the supplies on the van were replenished was able to say that they were replenished. In fact the evidence clearly suggests that no replenishments of the sandwiches and drink were seen after they ran out.

After giving careful consideration to the evidence I find that the giving of sandwiches and drinks by members of the first respondent's committee to electors of Gagaemauga No.2 territorial constituency while they were on their way to vote in the polling booth for special votes at Malifa was more than were concern for the elderly electors, nursing mothers and other electors who were given sandwiches and drinks as they were on their way to vote. I am of the view that what was done was also done for the purpose of corruptly influencing the votes of those electors or for corruptly procuring the election of the first

respondent. Accordingly I find that the actions of the first respondent's committee members in giving sandwiches and drinks to electors as they were on their way to the polling booth to cast their votes amount to treating of those electors. I express no view whether in the circumstances of this case the giving of sandwiches and drinks to electors after they had cast their votes would also amount to treating of those electors. I find the evidence to suggest any corrupt intent at that stage somewhat weak and vague.

I also find from the evidence put before the Court that the first respondent did not know or authorise the members of his campaign committee who were at the Malifa polling booth to give out any food or drinks to electors. If anything, it is clear from the evidence that the first respondent issued clear instructions to members of his committee not to give out any food or drinks to electors on polling day. The question then is whether in the circumstances of this case the election of the first respondent ought to be declared void.

I pointed out to counsel that the two provisions of the Electoral Act 1963 which deal with the avoidance of an election are sections 112 and 113. Section 112 provides :

"Where a candidate who has been elected at any election is proved at the trial of an election petition to have been guilty of any corrupt practice at the election, his election shall be void".

In my view that provision does not apply here because the giving out of sandwiches and drinks to electors at the Malifa booth was not done personally by the first respondent but was done without the knowledge, authority or consent of

the first respondent who was at the booth at Salamumu on polling day. The first respondent had also issued instructions to members of his campaign committee not to give out any food or drinks to electors on polling day. Section 113 then provides :

"(1) Where it is reported by the Supreme Court on the trial of an election petition that corrupt or illegal practices committee in relation to the election for the purpose of promoting or procuring the election of any candidate thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, his election, if he has been elected, shall be void.

"(2) Except under this section, an election shall not be liable to be avoided by reason of the general prevalence of corrupt or illegal practice".

As I pointed out to counsel, this seems to be the relevant provision for the purpose of the petitioner's case.

Some support for the view I have taken of sections 112 and 113 of the Act may be found in the judgment of Ryan CJ in the case of *Faasaleleaga No.4 Territorial Constituency : re Vui Viliamu [1990-1993] WSLR 433* where His Honour says at pp 433-434 :

"The evidence does not suggest that the first respondent himself has been personally guilty of any corrupt practice but rather that his supporters and/or campaign committee members actually committed the offences... Accordingly s.112 of the Act which makes it mandatory for the Court to avoid an election if the successful candidate himself has been guilty of corrupt practices, has no application.

"The section applicable therefore is s.113 where the Court can only make an order declaring an election void where it is reported to the Court that the corrupt practices have so extensively prevailed that they may be reasonably supposed to have affected the result".

The difficulty with the remaining allegation in the petition is that as it stands, it is not supported by the evidence and the provisions of sections 112 and 113. The allegation is that the first respondent by his agents committed the corrupt practice of treating at the Malifa booth on polling day. If the evidence was such that the first respondent with his knowledge, authority or consent did permit or instruct members of his campaign committee to give out sandwiches and drinks to electors on their way to the booth to vote, the allegation would undoubtedly have been established and the applicable provision would be section 112. However, without objection from counsel for the first respondent, counsel for the petitioner at the conclusion of the evidence submitted that the evidence established extensive prevalence of corrupt practices in relation to the poll at the Malifa booth that they may be reasonably supposed to have affected the result of the poll for the Gagaemauga No.2 territorial constituency.

Turning to the relevant evidence, the result of the poll for all booths for the Gagaemauga No.2 territorial constituency shows the petitioner having polled a total number of 288 votes and the first respondent having polled a total number of 402 votes. The evidence also shows that 218 special votes were cast for the Gagaemauga No.2 constituency at the Malifa booth and of those special votes the first respondent polled a total of 155 votes; so the inference is that the petitioner must have polled a total of 63 votes at the same booth. It is not clear whether there were any informal votes for the Malifa booth. Given the quantity of sandwiches which was fifty to sixty half sandwiches and one bucket of home made cordial and one bucket of iced water which were given out at Malifa to electors including some of the members of the petitioner's own committee, it would appear that about fifty or so electors not including the members of the

petitioner's committee, were being treated to drinks and sandwiches at the Malifa booth. That is assuming every elector who was treated was given one half sandwich each and one drink. An assumption which I must say I am not at all too confident in making as it appears from the evidence of the witness Matua Malosi that he himself had more than one half sandwich when he went to the van to get some food and drink. I also accept the evidence that the sandwiches and drink ran out well before the closure of the poll at 3.00pm.

The onus of proof in election petition proceedings is on the petitioner to prove his petition. The required standard of proof is the criminal standard of proof which is proof beyond reasonable doubt. I am not satisfied beyond reasonable doubt that the petitioner has established that the sandwiches and drinks given out to electors at Malifa had so extensively prevailed that it may be reasonably supposed to have affected the result of the election. The remaining allegation in the petition is therefore dismissed. This, however, does not mean that the members of the first respondent's campaign committee who gave out sandwiches and drinks to electors who were on their way to the Malifa booth to cast their votes are exonerated. They are still liable to prosecution under the provisions of the Electoral Act 1963.

Turning now to the evidence called by the first respondent against the petitioner, it is first alleged that on 23 April 1996 at the house of Fepuleai Samuelu at Vaigaga the petitioner and his agents treated electors of the Gagaemauga No.2 territorial constituency to breakfast and lunch for the purpose of corruptly influencing those electors to vote for the petitioner at the general election. It is further alleged that the petitioner in the course of the

gathering at the house of Fepuleai Samuelu made a campaign speech to the electors who present. I must say I was not at all impressed with the evidence of the witnesses called for the first respondent to support those allegations. I found their evidence very unsatisfactory. I am not therefore satisfied that those allegations have been proved beyond reasonable doubt. Accordingly they are dismissed.

I turn to the next allegation which is that on the evening of 23 April 1996 at Lotopa the petitioner gave the elector Faauma Lofipo \$50 for the purpose of bribing that elector to vote for the petitioner at the general election. I accept the evidence of Faauma Lofipo that on Tuesday evening during the week of the general election the petitioner in the company of Lofipo Molesi came to her house at Lotopa and gave her her ID and \$50 for the purpose of inducing her and her children to vote for the petitioner. While Faauma Lofipo is an accomplice for accepting the money that the petitioner gave her, I am satisfied of her evidence bearing in mind that it may be dangerous to act solely on the uncorroborated testimony of an accomplice. Her evidence however is corroborated in material respects by that of her son Asaua Lofipo. The petitioner also admits in his evidence that he gave \$50 to Faauma Lofipo on 23 April 1996 although he denies it was with a corrupt intent. The evidence of Faauma Lofipo is that this was the first time that the petitioner had acknowledged personally to her that they are related and had given her money. She also says the petitioner wanted her and her children to vote for him. Given that evidence and the imminence of the general election, I am satisfied beyond reasonable doubt that the \$50 given by the petitioner to this elector was bribery within the meaning of section 96 of the Electoral Act 1963. I find accordingly. I do not accept the petitioner's

evidence in this respect.

- There is no evidence against the second and third respondents who is the same person and who did not take active part in these proceedings.

In all the petition is dismissed and the election of the first respondent is confirmed. I will report my findings to the Honourable Speaker of the Legislative Assembly.

Costs of \$500 are awarded to the first respondent against the petitioner.

TFM Sapaku
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CHIEF JUSTICE