

Tonga

R. v. 'Akilisi Pohiva (Kolomotu'a)

Supreme Court
Martin A.C.J.
15 January 1988

Criminal law—criminal libel—burden of proof of defences on accused—defences of justification and fair comment—whether statements are statements of fact, to be proven true, or comment, to be proven honest and relevant—Constitution, clause 7—Defamation Act, cap. 140, sections 4, 7, 9, 10, and 12.

10 *Defamation—criminal libel—elements of prosecution's case proven—defences of justification and fair comment—burden of proof on accused, as in civil defamation—whether statements are comment or statements of fact.*

Parliamentary privilege—documents as proceedings—waiver of privilege—whether court would be considering a proceeding in Parliament by looking at evidence of the facts of parliamentary allowances, where such evidence is necessary for case of defendant in criminal case.

20 Defendant caused to be published a letter, in the monthly newspaper *Kelea*. The complainant was identified by name, third persons read the letter, and the material therein was clearly defamatory. Defendant stated that the complainant, the Minister of Police, had dishonestly claimed parliamentary allowances to which he was not entitled and had failed to do his duty as Minister of Police with respect to payments made fraudulently to other parliamentarians. The letter also claimed that the Minister had failed to carry out his duty, in right of the police, to cause a particular suspect to be brought to court.

Defendant raised the defences of justification and fair comment. No privilege was available.

HELD:

The defendant is guilty.

- 30 (1) The defence of fair comment was not available in respect of a purportedly factual statement.
- (2) The defence of justification fails because defendant could not prove the truth of the factual statements.

Cases referred to in judgment:

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 2 W.L.R. 805; [1988] 3 All E.R. 545, (*sub nom Attorney-General v. The Observer Ltd. and Others (The Times*, 22 December 1987)), Scott, J.

Fotofili v. Siale [1987] S.P.L.R. 339; [1988] L.R.C. (Const.) 102, P.C.C.A.

Legislation referred to in judgment:

Constitution of Tonga, cap. 2 of 1967, clause 7

40 Defamation Act, cap. 140 of 1967, sections 4,7,9,10, and 12

Other source referred to in judgment:

Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 41st. ed. (1982), paragraph 25-67, at p. 1919.

MARTIN A.C.J.**Judgment:**

This case concerns the limits within which a newspaper may print criticism of persons in high office. Clause 7 of the Constitution states:

It shall be lawful for all people to speak write and print their opinions. . . . There shall be freedom of speech and of the press for ever.

50 As Scott J. pointed out in the recent English case of *Attorney-General v. The Observer Ltd. and Others* (*The Times*, 22 December 1987): "the press has a legitimate role in disclosing scandals in Government. An open democratic society required that that be so". (See now *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805 at p. 858; [1988] 3 All E.R. 545 at p. 588.) If a newspaper believes that wrong has been done it is right that it should report it. But it must first take careful steps to ensure that what it alleges is true. That does not give the right to print anything. That freedom must be balanced against a number of other interests, including the right of any person who deserves it to retain his good name and reputation.

60 'Akilisi Pohiva is charged with criminal libel of a Cabinet Minister, contrary to section 4 of the Defamation Act. It is not disputed that he caused to be published in the *Kele'a*, a monthly newspaper, a letter to the Hon. 'Akau'ola, Minister of Police. That letter made various allegations which are set out in full in the indictment. The first two allegations must be read together. They allege that the Minister received parliamentary travelling allowance to which he was not entitled. Quite clearly, that is defamatory. It implies that he was dishonest. The third allegation is that he failed to investigate the possibility of fraudulent conversion of government funds in relation to payments of travelling allowances paid to other members of the Legislative Assembly. That too is defamatory. It implies that he neglected his duty to investigate

70 crime, and exercised favour towards his parliamentary colleagues. The fourth allegation is that he ignored a government directive to trace and prosecute his brother, Sione 'Akau'ola (a.k.a. Sione Faletau), in respect of some unspecified offence. Again, that is defamatory. It implies neglect of duty and favouritism. The defence does not dispute that the statements bear the meanings alleged in the indictment.

Before I deal with the allegations in detail I must refer to certain matters of law. The offence of criminal libel is unusual in criminal law in that there is a burden of proof on the defence. Once the prosecution has proved publication of a defamatory statement, the accused must prove on a balance of probabilities that he was entitled

80 to do so.

The defence is put under two grounds. First, justification under section 7 of the

Defamation Act. To succeed in this they must show that the facts alleged are substantially true—every material fact must be shown to be true—and that it is for public interest to publish those facts. If the facts alleged are true, it was undoubtedly in the public interest to publish and the only issue under this limb of the defence is whether the facts were true. The second ground is fair comment under section 12 of the Act. This defence is available where something was published in a monthly periodical (as this was) which consisted of: (1) fair comment; (2) based on facts truly stated; (3) on a matter of public interest.

90 The defence only applies where comment is made. It does not apply to a statement of fact, and it must be based on facts which are substantially true. The allegations clearly relate to matters of public interest. The issues under this limb of the defence are: Was it comment? If so, was it fair? And, was it based on facts truly stated?

Mr. Niu argued that this defence is really one of qualified privilege, so that Mr. Pohiva could claim that protection unless the prosecution could prove that he was acting with malice—in the sense of personal spite, or not believing the facts stated to be true. I disagree. Section 9 of the Defamation Act specifies what is subject to absolute privilege. Section 10 specifies what is subject to qualified privilege. If the 100 defence of fair comment were intended to have qualified privilege it would be included in section 10. It is irrelevant that some of the matters referred to in section 12 give rise to qualified privilege under English law. In any case Mr. Niu stated at the beginning of the trial that he intended to rely on two defences only, which do not raise the question of malice. So the prosecution did not address that issue. In a trial of this nature, a new ground for defence cannot be introduced in a closing speech.

The charge refers to three separate allegations (the first two being read together). Mr. Niu argued that if Mr. Pohiva could show that he is not guilty in respect of any of the statements complained of, he is entitled to be acquitted on the entire charge. I do not agree. *Archbold* 41st ed. (1982), at paragraph 25–67 states:

110 Where the libel contains several charges, and the defendant fails in proof of the truth of any one of the matters alleged in it, the jury must of necessity find a verdict for the Crown.

So much for the law. I find these facts: the allegations first appeared in a letter dated 16 November 1986 from Mr. Pohiva to the Hon. 'Akau'ola. On receipt of that letter 'Akau'ola invited Mr. Pohiva to meet him to discuss the matter. They met on 19 November 1986 and 'Akau'ola gave his explanations in respect of each allegation. These were the same as he has given in this trial. There is a slight disagreement over some of the things that were said or not said, but nothing turns on that save in one 120 minor matter which I shall refer to later. Mr. Pohiva did not believe the explanations. He appears to have made no further inquiries to see if they were true. He published his letter in the November issue of the *Kele'a*, which appeared during December. On 12 December 'Akau'ola wrote in reply, asking that his letter be published. Mr. Pohiva wrote to 'Akau'ola on 26 December making various points but 'Akau'ola declined to reply. His letter of 12 December was published in the January issue of the *Kele'a*.

Turning now to the individual allegations, the first two are:

1. you accepted payment for the Legislative Assembly Fonos despite not having attended;

2. you have no legal right to the money you accepted.
130 During 1986 the Legislative Assembly resolved that certain members should visit different areas in the Kingdom. 'Akau'ola was chosen to visit Vava'u. This visit was to be from 21 July to 1 August.

Members were entitled to be paid a parliamentary travelling allowance for that period at the rate of \$103.20 per day. In anticipation of that, their respective allowances were authorized by the Speaker and paid in advance—on 16 or 17 July. 'Akau'ola received $12 \times \$103.20 = \1238.40 . So did all the other members designated to go to Vava'u. Some time after this, Cabinet decided that 'Akau'ola should accompany the police band to the Commonwealth Games in Edinburgh. He left on 22 July and was away until 19 August, so he did not go to Vava'u as originally
140 planned.

The Minister was entitled to a parliamentary travelling allowance of \$103.20 per day for any days spent outside Tongatapu. The daily rate was the same whether he travelled inside or outside the Kingdom. Having already been paid up to 1 August, he claimed travelling allowance at the same rate from 2 August until 9 August. This was authorized by the Speaker of the House, and was duly paid. In fact he was away longer than expected, until 19 August, and on his return he claimed and was paid travelling allowance from 10 to 19 August. So in fact he was paid travelling allowance for one day when he was not entitled to it—on 21 July 1986. He says that he did not realize this until this action was prepared. He accepts that repayment is due but he
150 did not make this repayment lest it should appear that he was trying to cover it up. I accept that explanation.

'Akau'ola was not paid twice for the period from 22 July to 1 August. He did not go to Vava'u, but he was entitled to all but one day's allowance of the sum he was paid on 17 July, because he was travelling elsewhere on business approved by the Speaker.

Accordingly, I find that the first and second allegations are not substantially true. It follows that the defences of justification and fair comment fail in respect of these two allegations.

The third allegation is that "you have not investigated the possibility of fraudulent conversion of Government funds in relation to salaries paid to members of the Legislative Assembly with respect to the Fonos". Mr. Pohiva believes that certain members of the Legislative Assembly took more than they were entitled to in parliamentary allowances. This raises matters which have already been aired in *Siale v. Kalaniuvalu and Others* (see *Fotofili v. Siale* [1987] S.P.L.R. 339). The Privy Council decided in that case that the court has no power to inquire into the amount of allowances paid to see whether they were proper. Accordingly, I disallowed defence questions which sought to challenge the members' right to the payments made.

Mr. Tupou raised the issue of parliamentary privilege in respect of certain evidence. Parliamentary documents were produced by the prosecution—no doubt
170 having obtained a waiver of parliamentary privilege in respect of them. These were the documents required to support the prosecution case. They were: the vouchers signed by 'Akau'ola and others; documents relating to the rates of daily allowance authorized; minutes of Parliament when the proposed rates were discussed; a list of members allocated to visit each district; and the minutes of proceedings on 16 July 1986 when these visits were discussed. Further evidence was given under cross-examination by the Clerk of the House in 1986, Mafua Kisina, as to resolutions passed concerning the payment of allowances. I am invited to disregard this

evidence. Mr. Tupou suggests in effect that if I take it into account I would be embarking on just such inquiry as the Privy Council has ruled that I cannot do. He
180 acknowledges the apparent injustice to the defendant, and obviously makes the point because he feels obliged to do so, and probably on instructions.

I must protest that I am expected to decide an issue which involves criminal sanctions, and possibly the liberty of the subject, without consideration of all the evidence available. However, I must apply the law. In my view I am entitled to take this evidence into account to the extent that it proves what was decided in the House. I am not inquiring into the decision-making process. I am not inquiring whether the decision was right or wrong. I simply inquire: what did the House decide in relation to travelling and other allowances? I do not read the Privy Council decision to say that I cannot do that. It is information which the public has a right to know, and in
190 fact the information has been well publicized. I accept that I cannot go into the merits of the decision, but it cannot be right for a court to ignore what is already widely known.

I find these facts: Parliament has authorized the payment of certain allowances to members. In July 1986 they were entitled to the following allowances:

1. a daily payment of \$44.40 (slightly more for chairmen and Speaker);
2. a rent allowance of \$68.75 per week (\$9.82 per day);
3. a transport allowance of \$14.40 per day (unless transport was provided, e.g., for Ministers);
4. while travelling on parliamentary business so certified by the Speaker,
200 \$103.20 per day.

It is the Speaker who decides what is parliamentary business and I would not seek to interfere with his discretion. Further, for each hour worked after a certain time each member is entitled to be paid an allowance for one extra day. So that if he worked three extra hours he would be paid three times:

1. his daily allowance;
2. his rent allowance, even if he has not incurred any extra expense for accommodation;
3. his transport allowance (if entitled), even if he has not incurred any extra expense for transport.

It is not clear from the evidence whether members are entitled to an extra day's
210 travelling allowance (\$103.20) for each hour's "overtime". Even more surprising, I am told that by long practice, and presumably by a resolution of the House, members are entitled to be paid travelling allowance (\$103.20 per day) whether they travel or not, provided that they are designated to travel.

Mr. Pohiva knew the approximate totals paid out in allowances for the parliamentary visits. They bore no apparent relationship to the number of days actually spent by the members. We now know that these totals reflect the extra full day's allowances paid for each single hour of overtime. Mr. Pohiva was entitled to express his dismay. But he went further than that. He alleged that it was possibly
220 fraudulent conversion of government funds; and, in effect, that it was 'Akau'ola's duty as Minister of Police to investigate this possibility.

This allegation displays a misunderstanding of the situation. First of all I must make it clear that it is not and cannot possibly be fraudulent conversion for a member to claim a properly authorized allowance. As the Privy Council stated:

It was for the Assembly to determine its allowances, and only self-restraint

influenced by fairmindedness and expediency, are available to prevent abuse of its privilege not to have its decision investigated. (*Fotofili v. Siale* [1987] S.P.L.R. 339)

230 If a member dishonestly claims money to which he is not entitled he commits a criminal offence and I doubt whether parliamentary privilege would protect him. But I do not need to decide that. I accept that after the matter was raised 'Akau'ola made inquiries as to whether the payments had been authorized by the Speaker, and ascertained that they had. He could make no other inquiry in his capacity as Minister of Police.

Before parting with this allegation I must express disquiet that the law throws the burden of proof on the defendant, but he is unable to adduce evidence which might—and I only say might—tend to prove what he alleges. It gives the appearance of injustice. But I must apply the law as it is, only observing that at the time when Mr. Pohiva made this allegation *Siale's* case had not been heard, so that he did not have the benefit of the guidance there provided.

240 In respect of the third allegation the defence has not proved that it is substantially true, and the defence of justification fails. It is not comment, merely a statement of fact, and the defence of fair comment is not available. If it were, it would fail because it has not been proved that the alleged facts are "truly stated".

The fourth allegation is entirely different. It states:

The Government directed you and your Department to find Sione 'Akau'ola for prosecution in respect of an offence he committed. Since the date of that direction, Sione 'Akau'ola has returned to Tonga several times and yet you have not carried out your duty as directed by Government.

250 The defence concedes that there is no evidence to show that the allegation is true. It was suggested that 'Akau'ola indirectly admitted it during his conversation with Mr. Pohiva on 19 November 1986. Even accepting Mr. Pohiva's recollection of that conversation—that he was asked if he had seen Sione 'Akau'ola in Tonga—I cannot accept that conclusion. This allegation is based on little more than gossip. Accordingly, I find that this statement is not substantially true and the defence of justification fails. It is not comment—only a statement of fact—and the defence of fair comment would not be available even if the statement were true.

260 I must make one thing clear. Whatever the merits of the payment of parliamentary allowances, the actions of the Minister of Police in relation to all these matters have been correct. He emerges from this action with his reputation unharmed. I accept that the allegations were made by Mr. Pohiva in the belief that they were true and justified. I can only regret that he did not see fit to investigate them further after his meeting with the Minister of Police on 19 November 1986. I find the accused guilty as charged.