

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CIVIL DIVISION)**

Application No. OA 8/2004

**IN THE MATTER** of an Application  
pursuant to Section 235 Crimes Act 1969

**BETWEEN** **The Attorney-General**  
**Applicant**

**AND** **George Oswald Pitt**  
**Of Rarotonga Publisher**  
**First Respondent**

**AND** **Mana Publications Limited**  
**A duly incorporated company**  
**having its head office at**  
**Rarotonga**  
**Second Respondent**

**Mr W Akel and Mr M Mitchell for Applicant**

**Mr T Arnold for Respondents**

Date of hearing: 26 May 2004

Date of decision: 4 June 2004

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**DECISION OF GREIG CJ**

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[1] The Applicant applies for leave to commence a criminal prosecution for criminal libel pursuant to section 235 Crimes Act 1969 ( the Act). The application arises out of an article published in the issue 197 of the Cook Islands Herald Weekly dated 8 May 2004.

[2] The Honourable Dr Robert Woonton is the Prime Minister of the Cook Islands. Between 19 April and 3 May 2004 he made a state visit to the People's Republic of China accompanied by his wife, the Secretary of Foreign Affairs and a Police Officer. Shortly after his return and following some advertising on television of the forthcoming publication there appeared in the issue 197 of the newspaper on page 17 what purported to be a letter written by the Prime Minister to the Premiere of the PRC thanking him for the visit and commenting on various aspects of it.

[3] The First Respondent is the owner and publisher of the Cook Islands Herald weekly newspaper and it is accepted that the article in question appeared in issue 197. The First Respondent is a major shareholder of and director of the Second Respondent. He admits that he authorized the publication of the article.

[4] The article fills most of page 17 apart from two advertisements at the foot of the page. The headline in bold type is, "Secret PM letter revealed". Under that is a sub-heading, "In a proverbial 'fell off the back of a truck' tale, a most unusual letter has come to light and is reproduced here for the entertainment of the Herald's readers". The letter bears the date 4 May 2004, the day after the return of the Prime Minister. It takes the form of what is sometimes called a bread and butter letter following a visit. It begins by thanking the Premiere for an "extra" four million dollars. It includes what are laudatory references to some of the PRC policies and practices which have come under criticism in some parts of the world and contain fulsome observations of the favourable treatment that the Prime Minister was said to have received from the Premiere. Two passages in the letter have been singled out as the gravamen of the matters of complaint beside what is said to be the insulting nature of the article as a whole. These passages are as they are printed:

"So thanks again for that \$4m. My re-election committee is thrilled. No, don't worry, we won't embarrass China by doing something stupid and using the money for campaign ads or flying in voters. \$4m will buy a bloody big pile of tin meat and beer. Your idea of calling it 'aid' to the outer islands was just brilliant"

"(Just a personal note on that regard, could you pass on to little Lay Mee – that nice girl on the kitchen crew who made sure all my needs were met at odd hours – that I meant what I said, I really did)"

[5] It is these two passages for which leave is sought to commence the prosecution for criminal libel. It is submitted by Mr Akel that these two passages are grossly insulting and libellous of the Prime Minister.

(a) The first paragraph alleges political corruption.

(b) The second passage alleges sexual impropriety.

[6] Criminal libel is defined by section 233 of the Act in these terms:

*"A criminal libel is matter published without lawful justification or excuse, either designed to insult any person or likely to injure his reputation by exposing him to hatred, contempt, or ridicule or likely to injure him in his profession, office business, trade, or occupation, whether such matter is expressed by words written or printed, or legibly marked on any substance, or by any object signifying such matter otherwise than by words, and whether expressed directly or by insinuation or irony"*

[7] Section 235 requires the leave of a Judge of the High Court to commence a prosecution. There are no procedural or other requirements or considerations in the relevant sections other than the requirement that the person to be charged is to be given notice and an opportunity to be heard. The Judge therefore has an unfettered discretion which must be exercised judicially. It is important to state that at this preliminary stage the Judge can make no final factual findings. The decision in broad terms is whether in all the circumstances it is appropriate that a prosecution be commenced in respect of the publication.

[8] Although a prosecution for criminal libel is rare and apparently unknown in Cook Islands there is helpful recent authority in England New Zealand Canada and elsewhere on criminal statutes which are similar in scope though not all in wording. Because it is an unfettered discretion the relevant matters for consideration cannot be defined exclusively or exhaustively. Guidelines which were stated by Wien J in *Goldsmith v Pressdram Ltd* [1977] 2 All E R 557, [1977] QB 83 were applied in New Zealand by Fraser J in *Police v Mc Lachlan* [1989] 3 NZLR 689 and by Fisher J in *Police v W* [1989] 3 NZLR 697. They seem to me to be equally apposite to the Cook Islands and are helpful toward the decision to be made in such a case as this. I adopt them. The passage in Wien J's judgment is at p.88 and is as follows"

*'First, before a discretion can be exercised in favour of an applicant who wishes to institute criminal proceedings in respect of a libel, which he contends is criminal, there must be a clear prima facie case. What I mean by that is that there must be a case to go before a criminal court that is so clear at first sight that it is beyond argument that there is a case to answer. Secondly, the libel must be a serious one, so serious that it is proper for the criminal law to be invoked. It may be a relevant factor that it is unusually likely for the libel to provoke a breach of the peace, although that is not a necessary ingredient at all. Thirdly, the question of the public interest must be taken into account, so that the judge has to ask himself the question, 'Does the public interest require the institution of criminal proceedings?'. What is not appropriate, in my judgment, is the question whether damages might or might not afford an adequate remedy to a complainant. I consider that that question is irrelevant. Once one arrives at the conclusion that the criminal law ought to be invoked, then it is not a private case between individuals: the state has an interest and the state has a part in it.'* (Emphasis in the judgment)

[9] There are two other matters which need to be borne in mind. One is the right of freedom of speech which in Cook Islands is an article of the Constitution. That is subject to the provisions of subsection (2) of Article 64 which recognises and declares that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed by any enactment or rule of law for the time being enforced, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands. The place of criminal libel is recognised as being a reasonable limitation on freedom of expression where the protection of reputation is at stake. See *R v Lucas* (1998) 157 DLR (4) 423 at 426, *Gleaves v Deakin* [1980] AC 477, *Worme & Anor v Commissioner of Police* [2004] UKPC 8 Mr Arnold in his submissions made reference to what is called the chilling effect of defamation proceedings which he submitted was relevant in light of the description of newspaper publishing in Cook Islands as described by the 1st Respondent in his affidavit. Reference was made to *Lange v Atkinson and Anor* [2000] NZCA 95, not a criminal libel case, and in particular a passage as follows

*"[24] Before considering the three matters which the Privy Council proposed this Court consider, it is helpful to refer to two important aspects of defamation law which are affected by Reynolds. The first is its chilling effect, which has been carefully researched in the United Kingdom in Libel and the Media (1997) by Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, referred to by Lord Steyn in Reynolds ([1999] 3 WLR 1010, 1032). Their account of social and socio-legal practice was based on responses to questionnaires, repeated interviews, and information about the media libel writs filed, set down and heard. The publishers and others questioned in that research included those involved with periodicals; the monthly publication involved in this case, North & South, being such a periodical. The survey led the authors to the conclusion that "the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear." (191) The authors also stated this general conclusion applicable to all media sectors: "uncertainty in both the principles of defamation law and their practical application induce great caution on the part of the media. Virtually every interviewee, in all branches of the media, emphasised the lottery aspect attached to this area of the law." (186) The blurring, perhaps even the removal, of the line between the occasion and its abuse in Lord Nicholls' non exhaustive list must add significantly to that uncertainty. In the absence of compelling justification that consequence appears undesirable."*

[10] The second further matter is the position of the complainant considered against the background of the community. I note the words of Lord Cooke in giving judgment of the Court of Appeal in Samoa in *Malifa & Tupua v Sapolu & Alesana* [1998] WSCA 5:

*"Numerous cases in the field of criminal libel were cited to us by counsel, but each must turn on its own facts and social setting. Close comparisons are unhelpful. Politicians are expected to have broad shoulders. In the interests of freedom of speech and democracy, they must put up with criticism, even of a strong and unfair kind. But there is a line between: severe criticism on the one hand and vilification or character assassination on the other. The material published by the defendants as specified in the information is reasonably capable of being found to have crossed that line. In some societies it might perhaps be dismissed as obvious nonsense, so absurd as to be incapable of being taken seriously. We do not consider, however, that this is necessarily so in Samoa.*

[11] The Respondents in the affidavit in support and in Counsel's submissions acknowledge that the newspaper has published many articles detailing instances of abuse, mismanagement, and ongoing departures from basic principles of good governance. It is said that it has reported, in the past, alleged sexual impropriety by the Prime Minister. Those allegations have related to actual incidents involving real, as opposed to fictitious persons. As to the first passage it is submitted a reader of the Cook Islands Herald might bear in the mind, in the words of Counsel, "the well-documented and widely reported preoccupation of the Prime Minister and present government in the allocation of disproportionately large sums and resources to small, easily manipulated, outer islands electorates, many of which initiatives are of dubious utility and are properly brought to public attention for closer scrutiny and debate". It is acknowledged, at least in the case of the first passage complained of, that the newspapers, radio and television of the Pitt Media Group, the Respondents, have, over recent months, monitored and reported on a wide range of questionable practices initiated or encouraged by the Prime Minister's government in the outer islands. The affidavit of the First Respondent deals at length with the personal animosity of the Prime Minister towards him. Reference is also made to the civil proceedings issued by the Prime Minister and his close political advisor Norman George against the Respondent and others. Counsel sought to bring to the Court's attention the recent formation of a "Cook Islands Broadcasting Corporation" which - at least from Cabinet Minutes - appears to have as part of its remit to investigate the revocation of television and radio licenses held by the Pitt Media Group or alternatively depriving that group of broadcasting assets.

[12] This bespeaks a continuing and somewhat personal controversy between the Respondents and members of the present government at least as perceived by the Respondents. While this may indicate some motive on the part of the Respondents in publishing an article of ridicule or satire it does not I think assist me one way or the other in making the decision on this application. The absence of previous action in Court about them may indicate only the Prime Minister's shouldering of strong criticism. The question is about the meaning and effect of the particular article read by members of the community. It seems that compared to the earlier articles which have been exhibited this one is apart in its tenor. The earlier ones appear to deal by serious reporting with allegations of facts and events. This article seems to intend to belittle the Prime Minister.

[13] Dealing with the three guiding ideas in turn, I turn to the clear prima facie case. It is clear that the Respondents are responsible for and acknowledge the text of the publication. It is admittedly fictitious so there is no suggestion of justification or truth. There has been no claim of lawful justification or excuse under the Act. It is to be noted that the definition of criminal libel includes, with what are recognized essentials of civil defamation, the design to insult.

[14] Mr Arnold in his submissions dealt at some length and detail with the interpretation of the two passages, analyzing the words and phrases. As I have said I do not decide the meaning of the words in their context and whether in the end there is finally a libelous or designed insult to be drawn from them. It is whether the words are clearly capable of being likely to injure in the ways set out in the section or can clearly be read as designed to insult. Because it is at this preliminary stage it is, I believe, inappropriate to detail in an analytical way the meanings which are capable of being read out of the article. I have carefully considered Mr Arnold's submissions and those of Mr Akel and have read several times the whole article. I conclude that it is capable clearly of a libelous meaning. There is a clear prima facie case

[15] Is the libel serious enough to warrant the intervention of the criminal law? As Fisher J noted in *Police v W* there is a large overlap between the three matters under consideration. A clear prima facie case involves a consideration of the seriousness of the effect. The public interest equally poses the need for a prosecution in the Court. This second question raises the reality of the defamatory meanings. If matter is purely satire or a lampoon it may wound but ought to be borne without recourse to Court process. It is suggested that the words and language used such as "a bloody big pile of tin meat and beer" and the fanciful if double meaning of the name "Lay Mee" destroyed any serious effect. The difficulty with that submission lies with the earlier advertising which did not indicate a joke, nor does the heading in the page 17 nor the real date nor the general tenor of the article which to a hasty or less sophisticated reader might appear as genuine. There is a possible imputation of improper conduct in relation to parliamentary election and adultery. That is serious when made against the principal office holder of the Parliament. It may be all the more so when other earlier allegations of misconduct have been made. My answer to the question is in the affirmative.

[16] The public interest raises similar considerations to the last point. It raises in particular the special social circumstances of the complainant and the publisher in their particular community the Cook Islands. It is the Prime Minister who is being insulted or defamed in conduct or intentions which impugn his integrity in his office. It is suggested that the chilling effect, mentioned above, has particular relevance here. But no person let alone a newspaper is at liberty to defame that is to publish false matter which is likely to injure in the ways set out in the Act. When the matter is fiction there is all the more reason to be cautious. As the Supreme Court of Canada put it "defamatory libel ... merits but scant protection" – *R V Lucas*.

[17] It was further submitted that a prosecution in this case might bring ridicule on the

Cook Islands and its government and Courts. This Court is not to be influenced by possible ridicule from outsiders when and if it thinks that some course of action is legally justified and the proper course in accordance with the authority of precedent. An independent judiciary is not swayed by the threat of scorn by those who are unlikely to be fully informed.

[18] I have given careful consideration to all that has been put before me. I have taken into account the sensitivities of this case and the special circumstances of this community and its setting as I know it. As Lord Cooke put it there is a line between severe criticism, (and I add harsh ridicule) on the one hand and vilification or character assassination on the other. This article crossed the line and can be classified as sufficiently serious to justify the intervention of the criminal law. I grant leave to the Attorney- General to commence a prosecution for criminal libel.

[19] Costs are reserved.

[20] It is now for the Attorney- General, if he so decides, to file an information. Once that is done it may be convenient for the Court to convene a timetable conference to deal with the pre-trial proceedings.

Laurie Greig CJ