



**BACKGROUND**

- [1] On Sunday 29 June 2008 at about 5pm, the defendants were part of a group of people gathered at Aitutaki Airport to protest against Sunday flights to Aitutaki. Mr Okotai serves as a Pastor within the Cook Islands Christian Church, Aitutaki. Mr Ngatipa is one of his congregation.
- [2] The Crown alleged that, during the protest, both defendants were heard making certain statements to the crowd assembled at the airport, and that those statements sought to encourage the crowd to go onto the airport runway in protest of Sunday flights. No one gained access to the airport that night and the flight landed as scheduled.

**CHARGES**

- [3] Originally, both defendants were individually charged under section 334(2) of the Crimes Act 1969 (Cook Islands), that:

"On 29 June 2008, did incite counsel or procure any person to commit the offence of wilful trespass, wilful damage or unlawfully found when that offence is not in fact committed."

- [4] At the end of the Crown case defence counsel challenged the validity of the informations on grounds of duplicity pursuant to section 15 of the Criminal Procedure Act 1980-81 (Cook Islands). Submissions were presented by both counsel.
- [5] The Court noted in passing that, whenever a case is received from the Police for prosecution by the Crown, it is the responsibility of the Crown to check that the information is not bad for duplicity or any other ground. It should be checked against the requirements of sections 15 and 16 of the Criminal Procedure Act. If imperfections are noted, immediate steps should be taken to apply for leave to amend the information. It is not correct practice to do nothing and then, if there is a problem either before or after Judgment, seek to invoke section 137 of the Criminal Procedure Act.
- [6] After considering the matter overnight, the informations were amended with leave from the Court on the basis that there could be no prejudice to the accused by the amendment and because the Court had a duty to ensure that

the informations complied with section 15 of the Criminal Procedure Act. The amended informations read as follows: “[o]n 29 June 2008, did incite or counsel any person to commit the offence of wilful trespass when that offence is not in fact committed”.

#### **ELEMENTS OF THE CHARGES**

- [7] For the Crown to succeed, it had to prove beyond reasonable doubt that the defendants did “incite or counsel any person to commit the offence of wilful trespass.”
- [8] In discussing the meaning of “incite” in the comparable New Zealand provision contained in section 311 of the Crimes Act 1961 (NZ), *Adams on Criminal Law (Student Edition 2009)* states at paragraph CA 311.04 that “to incite” means to induce, persuade, threaten, or pressure another person to commit an offence. “To counsel” has been interpreted as deliberate encouragement or active inducement or recommending: *Adams supra* at CA311.04. The act of inciting or counselling may be directed at a particular person, a group of persons or the world at large: *Adams supra* at CA311.04.
- [9] The offence under section 334(2) of the Crimes Act 1969 (Cook Islands) is “complete once the inciting or counseling is communicated to the other person [...]. Any subsequent countermand or renunciation of advice or persuasion by the inciter will therefore not cancel the liability that he or she had already incurred”: *Adams supra* at CA311.04.
- [10] The *mens rea* requirements of an offence under section 334(2) are:
- (i) Knowledge of the circumstances which would make the act of the person incited [or counselled] an offence
  - (ii) An intention that the person incited will act with the *mens rea* required for the offence incited, though the inciter need not have that *mens rea*: *Adams supra* at CA311.05.

#### **THE CROWN EVIDENCE**

- [11] The Crown called nine witnesses at the defended hearing. By consent, the evidence of four of those witnesses was received through the presentation and reading out of their signed statements. The first of these was Mr Tu

Bishop, a security officer at the airport. Mr Bishop stated that he saw the defendant Okotai in the crowd of protesters at the airport and heard him say, "when we come back blood will be spilled and this house (terminal) will be on fire." Mr Bishop also deposed that the defendant Okotai told people to drive a truck into the airport and that the defendant Okotai was the "mastermind" of the protest.

[12] The next witness whose evidence was read was Mr Davy Roa, also a security officer at the airport. He heard the defendant Okotai say in Cook Islands Maori, "this terminal will be burnt by fire", "we will crash the fence" and "blood will flow today". The last statement was "made in a loud voice, more like yelling".

[13] The written statement of Mr Rupe Nelio also referred to various threatening statements made by the defendant Okotai and testified that he overheard the defendant Okotai say "you the landowners go on the airport".

[14] The first of the witnesses who gave oral evidence was Mr Joe Raki, a security officer working at the airport. Mr Raki's written statement, which was confirmed at the hearing, gave the following account of events:

"I saw and heard the defendant Pastor Charlie Okotai telling the people to drive the motor vehicles and they will go onto the airport. Do not be afraid come we will go onto the airport, you people are lucky I have changed my coat (referring to him having changed his way to becoming a pastor). At one point he came to the boundary and I told him that this is a restricted area. He replied no this is not a restricted area and then went back. He was walking to one side and to the other. It was obvious that he was the one encouraging and inciting the people to go onto the airport. He (Okotai) makes a move the people move too."

Mr Raki believed that the defendant Okotai was encouraging and inciting the crowd: "when someone calls out to somebody to drive the vehicle onto the airport, he is encouraging that person or those people to do so."

[15] Mr Ngatokorua Rota heard the defendant Okotai say, "come let's go on the airport don't be scared", "come we go to the other side" and, "come on let's go on the airport." He also deposed that he saw the defendant Okotai call out and wave his hand to the people to follow him to the seaward side of the airport and that the crowd followed the defendant Okotai wherever he went.

- [16] Sergeant Avele Naku testified that he heard the defendant Okotai say, "come let's go onto the airport, come this is our land, we have a right to go onto the airport."
- [17] The statement of Mr Jessie Toa was read. Mr Toa said in it that he overheard the defendant Okotai say, "everybody let's go on the airport, do not be afraid".
- [18] Inspector Arama Tera gave evidence that he heard the defendant Okotai encouraging people to go onto the airport. He stated that the crowd would do anything their leaders said. However, Inspector Tera said under cross-examination the mood of the crowd was quite friendly. He heard the defendant Okotai say in Cook Islands Maori "akaruke kotou ia matou kia aere ki runga i te airport" – meaning "you leave us to go on the airport".
- [19] Police Sergeant Tukua Putu testified that he heard the defendant Okotai say "come, let's go inside the airport and don't be afraid".
- [20] As to the evidence against the defendant Ngatipa, Sergeant Putu testified that he was heard calling out "who are you to tell us to stop". These words were directed at Inspector Tera.
- [21] Sergeant Putu testified that the defendant Ngatipa was heard to say "you are like Pharaoh and you are the Egyptians". Mr Putu saw both defendants leading people to the seaward side of the of the airport. The Court notes later that this was because the defendants thought they could lead the crowd onto the airport that way and that this is indeed what the Defendant Ngatipa said in his evidence: see paragraph [23] below.

#### **DEFENCE EVIDENCE**

- [22] The defence called both defendants. Mr Okotai admitted when giving evidence that he told a group of protesters to "[g]o onto the airport because that is your airport." He also admitted that, "we had only one objective and that's to go on to the runway and stay there till the plane lands and then the plane won't land and goes back then we would have on [sic] home".
- [23] Defendant Ngatipa admitted telling the group of protesters to "go forward the children of Israel, you are facing Pharaoh and his soldiers." Under cross-examination Mr Ngatipa stated that:

"the reason why we went to the seaside [of the airport] is because I know there were no security and police officers on the seaside that is why I went to the seaside and we were being chased away from where we were."

### **The Tarotaro Defence**

[24] A number of Crown witnesses were asked by the defence counsel, Mr George, about their understanding of the Maori custom "tarotaro". Mr George submitted that the custom involved making (harmless) threats to show anger or unhappiness with the recipient of the threats but with no intention of carrying them out.

[25] Mr Raki stated: "[t]arotaro is when I say to you I will punch you in the mouth and I will punch you in the mouth".

[26] Inspector Tera, on the other hand, considered that tarotaro just means "complaining, moaning, whining".

[27] The defendant Okotai stated his understanding of the custom as follows:

"Tarotaro is when you complain about something you don't like. It's a way [of saying] you are not going to do anything or something. If my friend hurts me I will complain about my friend, I will say nasty things to show my anger but it's not because I am going to do it, or do what I said."

### **SUBMISSIONS OF THE CROWN**

[28] The Crown submitted that the words used by the defendants amounted to inciting and counselling the group to commit the offence of wilful trespass and that the words used by the defendants went beyond the Maori custom of "tarotaro".

[29] The Crown further contended that both defendants knew that it was an offence for any person to enter the restricted areas of the airport, including the runway. This was made clear to the defendants by signs on display and also by the police and airport security officers who advised them and the protesters to stay out of the restricted areas of the airport.

[30] It was alleged that both defendants intended the protesters to commit the offence of wilful trespass. The main objective of the group of protesters, including the defendants, was to get onto the runway in order to stop the plane.

- [31] Crown counsel said that the defendants, in leading the group of protesters away from the front of the terminal and towards the seaward side, clearly showed that their aim and intent was that the crowd should move onto the airport runway.
- [32] It was also submitted that the statements attributed to both defendants, which were not denied, coupled with their conduct in leading the group of protesters to the seaward side of the airport was intended to incite or counsel any person or the group of protesters to commit the offence of wilful trespass by going through the restricted area and onto the airport runway.
- [33] The Crown submitted that it had proved its case to the requisite standard of proof and that a guilty verdict should be entered against both defendants.

#### **SUBMISSIONS OF THE DEFENCE**

- [34] Defence counsel submitted that the protests were protected by Article 64(1) of the Cook Islands Constitution.
- [35] It was also submitted that the Crown had failed to prove the necessary elements of the *actus reus* of inciting, persuading, threatening or pressuring another person or group of persons to commit an offence, and the Crown had similarly failed to prove the *mens rea* of the offence.
- [36] The defence also submitted that, while the making of statements to the crowd as alleged by the Crown was not disputed, the necessary element of criminal intent was absent because the statements were made pursuant to the custom of "tarotaro"; the statements made by the defendants were not intended to incite or counsel any person to commit the offence of wilful trespass but were made as part of the Maori custom of "tarotaro".
- [37] It was submitted that "tarotaro" equates to the rantings and ravings of either a vanquished or defeated foe or of someone who accepts futility of attempting to do anything physical against the intended target and is reduced to using words instead of actions.
- [38] Defence counsel further argued that there was no evidence of any protester listening to, hearing or acknowledging anything said by the defendants and that there was no planned group action.

[39] In any event, defence counsel submitted that the involvement of the defendant Ngatipa was less than that of defendant Okotai.

[40] In summary, defence counsel submitted that the Crown had failed to prove its case beyond reasonable doubt and that the charges should be dismissed.

#### **FREEDOM OF SPEECH AND ASSEMBLY**

[41] The Court is deeply conscious that the Cook Islands Constitution recognises the existence of the right to freedom of speech and expression (Article 64(1)(e)) and the right to freedom of peaceful assembly (Article 64(1)(f)). However, it is to be remembered that Article 64(2) provides that:

“every person has duties to others, and accordingly is subject in exercise of his rights and freedoms to such limitations as are imposed by any enactment or rule of law for the time being in force, for protecting the rights and freedom of others or in the interests of public safety [...]”

[42] Thus while the Court has an obligation to uphold the right of freedom of speech and expression and of peaceful assembly, in this particular case there were strong countervailing interests: namely, the interests of public safety and the safe conduct of Air Rarotonga flying into the Aitutaki Airport that day. The opponents of the Sunday flights, including the two defendants, had every right to assemble at the airport and to make a peaceful protest against the Sunday flights. However, those rights did not extend to going onto the airport and endangering the plane and its passengers by endeavouring to block the flight from landing.

[43] In this area the US Supreme Court has often drawn a distinction between advocating unlawful action, on the one hand, and advocating political or religious ideas on the other: see e.g. *Yates v United States* (1957) 354 U.S. 298. That distinction is relevant to the present case. If the defendants had confined their activities to giving a vigorous speech to the assembled crowd opposing the introduction of commercial flights, that would have been a perfectly acceptable exercise of their rights to freedom of assembly and freedom of speech and expression. But it is quite clear on the evidence that the defendants, and particularly the defendant Okotai, strayed well beyond that to the point where words were used which were intended to encourage the crowd to go onto the airport itself and obstruct the landing of the flight. It matters not that the attempt to incite the crowd to unlawfulness failed since



s 334(2) of the Crimes Act specifically provides that the offence of inciting or procuring is committed irrespective of whether the recipient of the incitement actually carries out the proposed unlawful activity.

## DECISION

[44] From the evidence presented, the Court finds that both defendants were actively involved in the protest and did incite, counsel, and encourage protesters to go onto the restricted area of the airport.

[45] Initially the defendants may have been under the impression that they had a right to go there as they considered the protesters to be the "landowners", as testified by Mr Nelio. It is, however, clear from the statements of the other witnesses, and in particular the testimony of Inspector Tera, that the defendants were warned not to enter the restricted area and that doing so would amount to trespass.

[46] The Court therefore finds that the first element of the charge is established: the defendants knew that if their incitement succeeded a trespass would be committed.

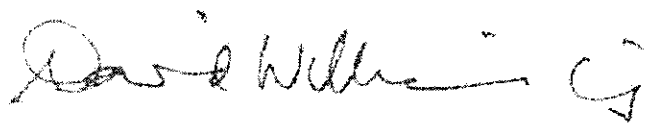
[47] The Court now turns to the question of whether the defendants also had the required intention that the incited person(s) should commit the act which would have amounted to an offence. It is here that the defence claims the defendants only wanted to exercise "tarotaro".

[48] In the testimony of the defendant Okotai he said that, according to his understanding of "tarotaro", it only involves the saying of things to vent one's anger and that the person would not intend to follow through with those threats. Inspector Tera's understanding of tarotaro is similar; he described it as "complaining, moaning or whining." Mr Raki, however, had a different understanding of the custom. In his view, one would follow through with the actions threatened in tarotaro.

[49] The defendant Okotai did, however, admit in his evidence that his intention was to get the crowd to go onto the airport and to stop the aircraft from landing. If that had occurred, the protesters would have committed the offence of wilful trespass. The defendant Okotai admitted in cross-examination that he was aware that the protesters were following his

instructions and he acknowledged that he wanted them to go onto the runway. He also admitted that the only reason they did not go was because of the tight security and the police officers present. The Court finds that he had the required intention to incite the protesters to commit the offence of wilful trespass.

- [50] The defendant Ngatipa admitted that he told the protesters "go forward the children of Israel, you are facing Pharaoh and his soldiers", but denied that he encouraged the protesters to enter the airport. He did, however, lead protesters to the seaward side of the airport and admitted that he did this to avoid the tight security that was stopping the protesters on the other side of the airport. The Court finds that his aim was to try to lead the crowd onto the airport – both defendants admitted that this was their intention. He knew that they could enter the airport from that side and would probably do so after he told them to "go forward and not be scared".
- [51] The Court finds that the defence of "tarotaro" fails in this case. The Crown has proved beyond reasonable doubt that various words of incitement were conveyed to the crowd with the intention of leading the assembled crowd to trespass on the airport.
- [52] The provocative nature of the words used in the tense circumstances which existed at the airport unmistakably conveyed that the crowd was being incited and encouraged to trespass on the airport. Neither of the defendants was just "blowing off steam".
- [53] Both defendants are found guilty as charged in the amended informations.
- [54] I direct that a probation report be prepared and supplied to the Court and counsel.
- [55] The parties are to lodge written submissions as to penalty no later than 21 days after receipt of the probation report.

A handwritten signature in black ink, appearing to read "David Williams CJ". The signature is fluid and cursive, with a large initial "D" and a distinct "CJ" at the end.

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**David Williams CJ**

**Date: 29 September 2009**