

Hopoi & Fusimalohi v Police

Supreme Court, Nuku'alofa

Hampton CJ

10 Cr App 1372/96

11 & 18 July 1997

Dances Act - obstruction of police - rank

Appeal - obstruction - lawful execution of duty

Police - obstruction - lawful duty - Dances Act - rank

Criminal offence - proof - obstruction of police - rank

20 The appellants had been convicted of abusing and obstructing police officers in the execution of their duty when the police endeavoured to close a licensed dance being held in a private club, the dance having continued past the permitted hours.

Held, on appeal:

1. The private club, whilst holding such a dance, was a public place.
2. Only police officers of the rank of first class constable or above could take steps to stop a dance under the Dances Act.
3. The officers here were constables only and not of the necessary rank.
- 30 4. They were not therefore acting in execution of their lawful duty so the offences charged could not be committed.
5. The Minister of Police could not delegate power to such officers who were not of the necessary rank; the Minister could not order officers to do things beyond their own powers and in any event, the Minister was not a police officer.
6. (Obiter) S.57 Criminal Offences Act was being incorrectly used in the sort of circumstances involved here.

Cases considered : *Tauvaka v Police* [1997] Tonga L.R. 164

40 Statutes considered : Dances Act
Criminal Offences Act s.57, s.113

Counsel for appellant : Mrs Taufateau

Mr 'Etika

Counsel for respondent : Ms Tapueluelu

Judgment

The appellants appeal against convictions and sentences imposed on 17 September 1996 by a Senior Magistrate:-

Hopoi against convictions for

- (a) abusive language to a government servant namely a police officer (s.57 Criminal Offences Act) on which he was sentenced to 4 months imprisonment, suspended for 9 months;
- (b) obstruction of police officers in the lawful execution of their duty (s.113 b Criminal Offences Act) on which he was fined \$200 to be paid within 14 days and in default 4 months imprisonment;

Fusimalohi against conviction for

- (c) obstruction of police officers in the lawful execution of their duty (s.113 b Criminal Offences Act) on which he was fined \$200 to be paid within 14 days and in default 4 months imprisonment.

The facts are simple. On Wednesday 7 August 1996 the Tonga Club, a private club, applied pursuant to the Dances Act (cap 166) for a license to hold a public dance that evening, at the Club, between 8 pm and midnight. (Both appellants were involved with the Committee which organised dances, which were held regularly).

The applied - for licence was granted on conditions inter alia, that the dance should cease at midnight, and that thereupon all persons not being bona fide residents upon the premises should leave and disperse.

At 12.30 am on 8 August police officers (including officers Mahe and Sakopo the 2 officers named in the charges) went to the Tonga Club, the dance and the music still then continuing and a nearby resident, the Hon. Minister of Police, having been disturbed and having dispatched Police Officers. (I will come back to the Hon. Minister's role, and the police attitude to his instructions).

There was a considerable measure of agreement between the accounts of the 3 police officers, who attended the Club, and the accounts of the appellants, both in their interviews with the police and in their evidence given before the Magistrate.

The police arrived. The volume of the music was asked to be turned down. The police there then learnt from the appellant Hopoi that the dance was supposed to have stopped at midnight. Officer Mahe then directed the appellant Hopoi (a member of the organising dance committee) to stop the dance. The response from Hopoi, on all accounts (including his), was the use of the obscenely abusive language complained of.

These exchanges, it seems, took place at the door of, or just outside, the Club. The appellant Hopoi retreated in. Officers Mahe and Sakopo tried to enter as well to stop the dance (it being long after midnight by now) and Hopoi admits trying, physically and verbally, to stop and prevent them from entering. He claimed in relation to this conduct of his (the swearing, the attempted stopping) that it was as a result to a misunderstanding by him viz. that his view was that this was a private club and the police could not enter and the police could not stop the dance.

Hopoi retreated; Officers Mahe and Sakopo followed. In the barroom the appellant Fusimalohi was seated. He, on his own account, knew the position. He knew the Police were intent on arresting Hopoi and he tried to stop (and did interfere with) them by holding out his hands in front of them and telling them to wait and went on to claim that this was a private club and only members could enter.

On those facts the Magistrate found all 3 charges proved. He had been referred, in defence submissions, to sections 2 (2) and 3 of the Dances Act (cap 166) under which Act this licence had been issued and which sections provide, in their effect, that it is only a "police officer of or above the rank of first class constable" who can enter any place in respect of which a licence has been granted or any place where he has reason to believe dancing is going on contrary to the provisions of the Act to either enforce the conditions of the licence or to warn persons there to leave and disperse.

100 The Act is very specific. It is only a police officer of or over a specified rank who can enter. Here the 3 witnesses (Mahe, Sakopo, Tongia) who gave evidence for the prosecution about attending this dance described themselves as being police constables only. Nothing was said to indicate that any of them were of higher rank.

Questions of different ranks are provided for in the Police Act (cap 35) eg. in s 5 and some definitions in s 3 although there is no specific mention of, and definition of, a "first class constable".

110 However, in further argument, all counsel agreed that a first class constable is an accepted and approved rank in the police and such a constable wears one stripe, is the equivalent of a lance-corporal and is often described as a lance-corporal. The Civil Service List, to which counsel referred me, describes the following ranks : Police Commander, Deputy Police Commander, Chief Superintendent, Detective Superintendent, Assistant Superintendent, Chief Inspector, Assistant Chief Inspector, Inspector, Cadet Officer, Sergeant, Corporal, Constable First Class, Police Constable, Special Constable, and Probation Constable. Those ranks fit within the scheme for ranks contained in the Act as can be seen, for example, from these definitions taken from s 3:

- 120 "Superintendent of Police" means the police officer appointed to that rank or any other police officer appointed or deputed to act in such office;
- "inspectorate officer" means and includes any police officer below the rank of Superintendent of Police and appointed to inspectorate rank;
- "senior police officer" means any police officer appointed to the rank of inspectorate or above;
- "subordinate police officer" means and includes any police officer below the rank of an inspectorate officer and appointed to rank above that of police constable;
- "police constable" means any police officer appointed to that rank and includes a recruit.

130 It is clear, therefore, that a first class constable (or lance-corporal as sometimes described, presumably from the one stripe) is a "subordinate police officer" as defined (and as set out above) and is a "rank above that of police constable".

Proof of the necessary rank was lacking in these prosecutions. Only officers of the ranks specified in the Dances Act could lawfully carry out the duties these officers (particularly Mahe and Sakopo) were attempting to perform namely to enforce the conditions of the licence, close down the dance and disperse those persons there.

140 If neither Mahe nor Sakopo were of the required rank (and/or that was not proved in evidence - and it was not) they were not acting in execution of their lawful duty first when they encountered Hopoi, directed him to shut down the dance, and provoked his

swearing at Mahe; and secondly when they tried to enter to shut down the dance. Those unlawful actions by the 2 officers conditioned everything that then followed. Hopoi, though it may have been stupid and the height of folly, was entitled to resist the entry verbally (and physically) as he did. Is he then guilty of a serious crime (and I emphasize crime - not some petty misdemeanour or petty offence) under the Criminal Offences Act and, as was alleged here, against s.57 of using abusive language towards an officer in the service of the Government?

As I expressed during the course of argument I am concerned about the use of s.57 in these sort of circumstances.

First this is not the type of situation and behaviour that s.57 is directed towards, particularly when one looks at it in the context of the surrounding sections e.g. ss.55, 56 and 58. All of those clearly deal with various interferences with the performance of expected and lawful duties of various government (and police - see specifically mentioned in s.58) officers. I underline lawful. So also should - and does - s.57. To be an offence under s.57 against an officer that officer must be acting as an officer in the service of the Government at the time - and he/she must be performing lawful duties. Here Constable Mahe was not - and it was he who was abused, sworn at, by Hopoi.

Secondly, is a police officer a "Government servant" within the meaning of those words in s.57? Government servant does not seem to be defined anywhere (c.f. "civil servant" and "civil service" in s.2(1) Interpretation Act (cap.1)). The terms and conditions of engagement of police officers are specifically spelt out in the Police Act (cap.35). Police officers are engaged for specific periods of time (5 years) (s.12); the police force (s.4) is a disciplined body (see Part V) formed to fulfil specific functions (s.6) (generally of upholding the law - therefore in doing that they must themselves act lawfully, I add); all officers are sworn (s.13 - their attestation) inter alia, to perform those functions. Police officers are treated differently to, and are different to, other persons in the service of the government - they may be civil servants (and I stress "may" because I have not heard argument at all on these aspects) but they are more akin to naval and military personnel who are specifically exempted from the definition of "civil servants". (Whereas a constable is an officer of the Crown the English view, I note, is that a constable's relationship with the Crown is not that of master and servant or principal and agent). I have doubts therefore whether they are Government servants in the ordinary recognised sense of those words, and the Criminal Offences Act would indicate recognition of the differences between police officers on the one hand and other Government servants on the other. As examples of that differentiation in the Act, one looks at e.g. s.55 which creates offences of assaulting, obstructing and resisting Government servants in the lawful execution of their duty and s.113(b) which creates the self same 3 offences for police officers acting in the execution of their duties; and s.58 which creates offences of refusing to assist "any public officer, police officer or other person" when lawfully required so to do.

Thirdly, such behavioural - type offences surely are more appropriately dealt with under the Order in Public Places Act (cap.37) e.g. ss.3 (h) or 3 (i) which not only carry a more appropriate maximum penalty but are still offences for which alleged offenders are arrestable without warrant (see s.5). There is a gross over-charging taking place from time to time in the use of s.57, in my view and as I have commented on before (see Cr App 746/95 and 218/97, Tauvaka v Police, Neiafu, Vava'u, 2 May 1997) - [1997] Tonga LR 164.

And it is no answer to say, as was put to and accepted by the Magistrate, that the problems for the prosecution here caused by s.2(2) Dances Act (first class constable or greater) were overcome by general provisions in the Police Act (cap 35) such as s.24 (duty of every police officer to prevent offences) or s.20 (duty to obey lawful directions). The claim was that the Minister of Police had given an order and the officers were executing that order.

200 That cannot be the position. The Minister cannot order and direct officers to do something which, as a matter of law, is beyond their power (or his, as I will come to) - as here. They were not of sufficient rank to do these duties, as specified in the Dances Act so that the Hon. Minister was no more than a complainant to the Police in the ordinary way, and if steps were to be taken by the Police then they (the Police officers concerned) had the duty to ensure that those steps were taken properly and lawfully. Here, on the evidence, they did not so ensure.

In any event - and I stress this - the Hon. Minister of Police is not a police officer, is not a member of the police force and is certainly not a "police officer of or above the rank of first class constable" - so he could not, himself, take steps and e.g. enter under s 2(2) Dances Act. He did not have the power, so he certainly could not delegate it to others, and order or direct others to enter and stop the dance on his say so. Those others could only enter and stop the dance if they were proved to be of the necessary rank themselves i.e. a first class constable or above. That was not proved.

210 It mattered not that the Tonga Club was a public place as surely it was when conducting a dance of such a nature where members and non-members could attend on payment of an entrance fee - look at the definitions of public place in both the Criminal Offences Act - s 2 - and the Order in Public Places Act - s 2. The Magistrate was quite right to conclude it was a public place - it had lost its status as a private club, so the appellants were wrong in holding and maintaining the view it was still a private place, at the relevant time, particularly Hopoi. However that mattered not, as I have said - only the requisite (proved) rank could enter such a place.

220 Given the matters I have outlined both the charges against Hopoi had to fail. Charge 554 charged him with obstruction (under s 113 b Criminal Offences Act) by stopping Mahe and Sakopo from entering to stop the dance. They were not of a (proved) rank able to do that. They were not in execution of their lawful duty. Earlier Hopoi had sworn at Mahe as part of his resistance to the direction to stop the dance (the charge, no.555, under s 57 Criminal Offences Act). Mahe was not acting lawfully at the time and I have already set out my other reservations about s.57 and its use.

230 As to Fusimalohi the obstruction charge (no 556) (s 113 B) against him must fail as well. What the 2 officers (Mak, Sakopo) were then attempting to do with Hopoi was not lawful - they were not executing their lawful duty.

In all these circumstances I allow both these appeals against conviction.

The convictions (and the sentences imposed thereon) are quashed, and set aside absolutely. In lieu thereof, on all 3 charges, verdicts of not guilty are entered and the Appellants are acquitted on each charge that relates to him.