

PERIYIAH DHAYANANADAN

-v-

POLICE

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mrs P Taufaeau for appellant
Mr S Mangisi for respondent

Dates of Hearing: 19th March, 1999

Dates of Judgment: 19th March 1999 (written reasons 21st April 1999)

J U D G M E N T

On 8 September, 1998, the appellant was convicted in the Magistrates' Court of defamation, contrary to section 5 of the Defamation Act, Cap 33. He was placed on probation for three months. He appealed and, on 19 March, 1999, I allowed the appeal and quashed the conviction and sentence. I said I would give my reasons later and I now do so.

The charge stated that the appellant "defamed a man, namely Lilo Finau, when you told 'Emosi Fanagatua and some others that the cut of your dog was because Lilo Finau hit the dog with a bush knife and also other defamation"

It is well established that a charge of defamation must specify the defamatory words. It is usual to quote them in direct speech but in this case the magistrate was right, if he considered the point, to accept the principal defamatory words were set out clearly enough to allow the defendant to know the case alleged against him. However, the last words were totally defective and should have been struck out. It is important that magistrates see that charges brought before them are properly drawn up and, if they are not, should have no hesitation in amending them or striking them out.

The appellant pleaded not guilty and the prosecution called two witnesses, the complainant, Lilo Finau, and 'Emosi Fangatua. The first part of Finau's evidence, given without any intervention by the magistrate, consists of a totally inadmissible conversation he had with another man. The evidence in chief continues, "after one week I met the accused again and he told me that I had injured his dog. 'Emosi told me that the accused and his dog went to the vet. His dog was injured and he is presuming that it was me. I am hurt by this untrue story."

In cross-examination he added:

"I heard rumours that it was I who injured the dog....'Emosi told me that the accused told him that I injured the dog....I have been branded the man who hits dogs. I have not hit a dog."

The second witness 'Emosi told the court he worked at the Ministry veterinary department. He told the court he had been asked by the complainant's wife whether the accused had told him her husband injured the dog but he did not tell the court his answer, if any. He said the accused asked him to look at his dog and it had clearly been injured by a knife or spade or some other sharp object. He then said; "I asked the accused who injured his dog and he told me it was Lilo."

That was the prosecution case and, not surprisingly, there was a submission by the defence. I do not repeat it now but, besides pointing to the almost total lack of admissible evidence of defamation, counsel for the defence suggested that the comments to 'Emosi were covered by section 10 of the Act. That was rejected by the magistrate with the words; "section 10 is far from the point."

The appellant was then called. He told how he found his dog injured and took it to the vet. At that time he did not speak to the complainant. He said he told 'Emosi some days later but what he told him was never ascertained.

He said that he did not tell 'Emosi it was Lilo who hit his dog. He said that when he saw the dog injured, Lilo was carrying a bush knife. He explained that he had been told to complain and he did so to a police officer.

That officer, Siieli Latu, gave evidence and said he went to see the complainant who told the officer that the dog ran towards him and he hit it with the knife.

The judgment of the magistrate was short and I set it out in full:

"The accused has defamed the complainant. A dog was injured. That is the case. Injury was caused and rumours were made. The accused told 'Emosi that Lilo injured the dog. The accused was doubtful in cross-examination. Siieli said that Lilo told him that he injured the dog. The complainant said that his co-workers have branded him as a dog hitter. The defence counsel submitted section 10. This section is for privileged people.

Section 2(1). Is the reputation of the complainant affected. The policeman, Sioeli Latu 's evidence is not true. I have no doubt he is guilty."

This judgment is so deficient that I am surprised the prosecution tried to support the conviction. The magistrate refers to rumours yet, as there was no evidence of who had started them, it was not a relevant matter in determining the guilt of the accused. On the other hand, the charge referred to the accused telling 'Emosi "and some others". The only evidence was that the accused told 'Emosi and the magistrate should specifically have dismissed the part of the allegation relating to others. He states the accused was doubtful in cross examination. By that, I assume the magistrate was stating that he did not believe the accused's evidence. If that is the position he must state it clearly and give the reasons for taking that view. Similarly, he finds the evidence of the police officer is untrue but gives no reason for that conclusion.

There is no mention of the burden that is on the prosecution to prove the case and, indeed, he does not mention the view he takes of the prosecution evidence although his final decision suggests he accepted it. Where, as here, so much of what he has heard from the witnesses was hearsay, he should state which parts they are and that he does not rely on them. The final sentence does suggest he has applied the correct standard of proof.

Defamation is a highly technical offence. The magistrate must be satisfied to the criminal standard of proof beyond reasonable doubt and yet he makes no attempt to identify the ingredients of the offence or to identify the evidence that satisfies him it has been proved. The nearest he approaches to this is when he poses the question; "Is the reputation of the complainant affected" but then never provides the answer.

I also fail to understand the reason for his statement that section 10 is for privileged people. The prosecution case, at its highest, was that the accused had told one of the staff at the veterinary department that the complainant had injured his dog but did so in answer to his enquiry. That allegation was later repeated by 'Emosi to the complainant. The accused later reported it to the police.

Section 10 provides:

"10. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making the communication was actuated by anger, ill-will or other improper motive."

Section 11 provides that the judge shall decide if it was made in any of the circumstances mentioned in section 10 and section 11(3) then provides;

"(3) If it is ruled by the judge that the communication was made under any of the circumstances mentioned in section 10 hereof then if there is no evidence that the defendant was actuated by anger, ill-will or other improper motive the judge shall direct a verdict for the defendant."

I fail to understand what the magistrate meant by his assertion that section 10 is only for privileged people. This was clearly the type of case envisaged by the terms of section 10. The original complaint that the dog was injured by the complainant was made to the witness 'Emosi who worked at the veterinary section of the Ministry of Agriculture and was in reply to his query as to how the dog was injured. This was a classic case of the communication being made in discharge of a moral and, possibly, legal duty to a person who had an interest in hearing it and there is nothing on the evidence before the magistrate from which he could possibly impute anger, ill will or other improper motive.

Whenever such a defence is advanced, the magistrate must first decide whether the communication was made in the circumstances mentioned in section 10. If he so decides, he must state it and then move on to consider whether the prosecution has established that the accused was actuated by anger, ill will or other improper motive. Again he must state that he has done so.

If the magistrate had found that the communication to 'Emosi and the officer was covered by section 10, the only other publication of the alleged libel was by 'Emosi to the complainant which, because of 'Emosi's work, could also have been covered by the same section had he been charged.

Finally, having convicted the appellant, the magistrate passed sentence of a probation order for three months. The reasons given were: "He is a foreigner. Not a serious offence."

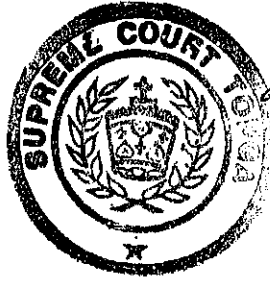
I fail to see what sentencing significance for a case of this nature the magistrate saw in the fact that the appellant is a foreigner. Counsel for the defence had raised the far more important and relevant considerations that the accused worked here as a farm manager, was 51 years old, married with four children and had no previous convictions. I fail to see any reason for making a probation order in such a case. Even if it was a sensible order, to make such an order for only three months is worthless except in very rare and unusual cases.

It has been stated many times that probation is not a soft option and neither is it a penalty for the court to make when it can think of no other. It is certainly not the penalty to pass just because the offence is not serious. If that was the magistrate's view, he should have ordered a small fine or discharged the accused.

As I have already stated this judgment was totally defective and the sentence totally inappropriate. The appeal is allowed and the conviction and sentence quashed.

This was a police prosecution. The time of the courts would be better occupied if the prosecuting authorities took a little more care when deciding which cases to bring to court. I appreciate that frequently witnesses do not come up to proof in court but, in this type and scale of case, the police might have considered it a better course to try and settle the matter by a sensible intervention at an early stage possibly followed by a caution. Instead it was brought to court and a minor irritation was made into a major drama. As a

result, what should have been transient may have been aggravated into a lasting source of conflict.



W. W. W. W.

NUKU'ALOFA, 19th April, 1999.

CHIEF JUSTICE