IN THE SUPREME COURT OF TONGA **Cr.App.No.593/99**
CRIMINAL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY

SG
AR

BETWEEN : POLICE : ***Appellant;***

AND : SAMIUELA 'AKILISI POHIVA : ***Respondent***:

BEFORE HON JUSTICE FINNIGAN

Counsel: *Mr Malolo for Appellant, Mrs Taufaeteau for Respondent.*

Date of Hearing : *29 July 1999*
Date of Judgment: *11 August 1999*

JUDGMENT OF FINNIGAN, J

This is an appeal against a decision of a Magistrate that the amendment of Ss5 and 8 of the Defamation Act, cap 33, by Act No 15 of 1993, had deprived the court of jurisdiction to hear any charge of criminal defamation under s5. The basis for the ruling was that the amendment to s8 removed the constitutional right of the defendant to trial by jury on that charge.

After hearing the arguments of counsel I upheld the appeal and remitted the matter to the Magistrates' court for hearing. I now set out my reasons. These are based on the submissions that were made to me.

There can be no doubt about the constitutional right to trial by jury in criminal cases, which is enshrined in Ss11 and 99 of The Constitution. The s11 provision is that, with some exceptions, every person accused before any court is entitled to a written indictment of the offence alleged against him, and the grounds for that charge; and that anybody indicted for any offence has the right to elect to be tried by a jury. The provision in s 99 (in respect of criminal charges) is more precise. Any person committed for trial before

the Supreme Court on a charge of having committed any criminal offence punishable by imprisonment for more than two years and/or a fine of five hundred pa'anga has the right to elect to be tried by a jury.

It needs to be emphasised at this early stage that whether the constitutional right of trial by jury exists in any particular criminal case is dictated not by The Constitution but by the maximum penalty for the offence charged.

Neither can there be any doubt about s 34 of The Interpretation Act, cap 1, which makes the legislative power of the Kingdom subject to The Constitution.

Nor can there be any doubt about the jurisdiction of the Magistrates' Courts in criminal matters. The Magistrates' Courts Act, cap 11, provides at s11 for summary jurisdiction to hear criminal cases where the punishment does not exceed $1000 ($1,500 for the Chief Police Magistrate) or three years' imprisonment, and that power is extended in certain cases by s35. Part III of the Act, (Ss32 to 50) provides jurisdiction to conduct preliminary inquiries of indictable offences. If after hearing the evidence at a preliminary inquiry a magistrate thinks a sufficient case has been made out to put the accused on his trial, then s/he must commit the accused for trial. It is s12 that provides for the election, which is normally exercised at this point. In all indictable cases the magistrates must, before committing for trial offer the accused the election of trial by jury, and then must commit for trial accordingly.

Now – the jurisdiction for indictable offences and the jurisdiction for jury trials, i.e. the jurisdiction of the Supreme Court in criminal matters, is provided in s4 of the Supreme Court Act, cap 10. Indictable offences are offences where the maximum penalty exceeds $500 or 2 years' imprisonment. These words, with a minor difference that is generally overlooked, match the words of s99 of the Constitution.

I turn now to The Defamation Act, cap 33. Before it was amended in 1993, it provided, at s8, a procedure for all criminal proceedings for any offence charged under that Act, i.e. for violations of Ss3, 4, 5 or 6. That procedure still remains, but now only for offences under s3. Under that procedure, the prosecution must proceed by way of preliminary inquiry before a magistrate, at the instance of the Attorney-General. Thereafter, if the accused person is committed for trial to the Supreme Court, the prosecution in the Supreme Court must be by the Attorney-General.

Before the 1993 amendment, the penalty under s3 was a fine not exceeding $400 and, (in default of payment), imprisonment for up to 2 years. Under s4 the penalty was a fine up to $200 and, (in default of payment), imprisonment for up to 1 year. Under s5 the penalty was a fine up to $100 and, (in default of payment), imprisonment up to 6 months. Under s6 the penalty was a fine up to $50 and, (in default of payment), imprisonment up to 6 months. It can immediately be seen that the offences formerly created in The Defamation Act, even before the amendment of that Act in 1993, were not indictable offences. It was a function of that Act, not only to create the offences, but also to provide a special method of trial for them.

When the legislature amended that Act in 1993, it repealed the offence formerly created by s4. The penalty for offences under Ss3 and 5 was increased and they became indictable offences under the definition in s11 of cap 10. The penalty under s6 however, continued to keep s6 offences outside the definition of indictable. The legislature then amended s8, and cut out from s8 all references to Ss4, 5 and 6. Clearly, what the legislature did was repeal s4 and remove offences under Ss 5 and 6 from the special s8 procedure for prosecution of defamation offences. While s3 offences are still to be dealt with by the special procedure under the control of the Attorney-General, the other offences are not. Thereafter those other offences are to be dealt with in the same way as most other criminal offences. One is a summary offence and one is indictable by reference to their maximum penalties.

It is not part of The Constitution that defamation charges must carry the right to be tried by jury. Neither was it part of the Defamation Act to provide that right. All that is provided by s8 is a special preliminary inquiry procedure followed, if a case is made out, by trial in the Supreme Court. Until the penalties for all offences under the Defamation Act were increased in 1993, none of them were indictable offences. The magistrate was obliged to commit for trial if a case was established at a preliminary inquiry, but not obliged by s11 of cap 11 to offer the election. The only possible source of the right was s 99 of The Constitution, and that gave the right only for charges where the maximum penalty exceeded two years' imprisonment and/or a fine of $500. So, there was no right of jury trial even for charges of defaming His Majesty The King under s3. Now that right has been provided, not by The Constitution, but by amendment of the penalty.

Likewise, the offence under s5 is now an indictable offence under the definition in s4 of cap 10. Its penalty has been increased from a maximum fine of $100 to a maximum fine of $1,000. It now carries the right of trial by jury if the case is committed for trial. Formerly it did not.

These are the reasons why I held that the learned Magistrate was wrong to decline jurisdiction to conduct a hearing of a charge under s5.

COSTS

Mr Malolo sought costs if successful. This was discussed at the hearing with counsel and I have considered the question since. There was a question of principle involved, and complex arguments were advanced on behalf of the respondent, which required careful consideration in the court below. I direct that costs lie where they fall and make no order.

SUPREME COURT TONGA

NUKU'ALOFA 11th **August 1999**

JUDGE