

CRIMINAL JURISDICTION

, NUKU'ALOFA

BETWEEN : ATTORNEY GENERAL - *Plaintiff;*

AND : 1. 'ULU'ALO PO'UHILA - *Defendants.*
2. KALAFI MOALA
3. FILOKALAFI 'AKAU'OLA
4. SEMISI FAKA'OSIKIMULI

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mrs Taumoepeau for Plaintiff
Mrs Taufaeau for Defendants

Date of hearing: 7 June, 1999

Date of judgment: 8 June, 1999

J U D G M E N T

On 14 April, I found the deputy editor of the Taimi 'o Tonga, Filokalafi 'Akau'ola, guilty of contempt and fined him \$5,000.00. The case arose from the publication of an article commenting on the credibility of witnesses during the trial in which they were testifying. The editor of the paper, Kalafi Moala, and the reporter who wrote the articles, 'Ulu'alo Po'uhila, were in New Zealand and I ordered service upon them of the summons and other documents in the case.

They have now filed a joint affidavit with the Court and appear today by lawyer. I do not need to repeat the details of the case; they are set out sufficiently in my earlier judgment.

In their affidavit, they admit the contempt and point out that the fine I ordered against the deputy editor has been paid by the newspaper already. They have also published, both in Tongan and English, a report of the finding of contempt against him together with an

expression of their regret and apologies for the contempt. They suggest they had not realised that such a publication would amount to contempt of court.

They also exhibit to the affidavit the documents that gave rise to the article. The publication was the result, they say, of their anxiety to bring to the attention of the public important issues as to the accuracy and truthfulness of some of the witnesses in the court proceedings. As those witnesses included a Cabinet Minister and a high ranking public officer, it was a matter of public interest if they were not speaking the truth.

Freedom of the press to publish matters of public interest and to reveal information that they feel causes concern especially in public affairs is an important and valuable liberty protected by the Constitution. However, that is not what this case is about. I do not need to determine the accuracy of the documents or the newspaper article they spawned. Neither do I need to consider whether or not they revealed a matter of public concern. This contempt arose from the timing of the publication and its seriousness was the risk that it could prejudice the fair trial of a matter before the court.

I find it hard to accept that any newspaper editor with the experience of Moala was so ignorant of the laws of contempt that he did not appreciate it is wrong to publish comments on the credibility of witnesses during the trial. On the other hand, I accept that these two have made apology for the contempt and taken steps to acknowledge it in their newspaper. That inevitably allows the court to exercise a degree of leniency that would not have been available in the face of continued defiance.

Both respondents seek leniency. They point out that the paper is already paying a considerable sum in damages from a civil claim for defamation. The financial position of the paper is extremely poor and it is already in the position of having to pay those damages by installments. It is, they claim, the only independent weekly newspaper reporting on Tongan affairs published in Tonga.

They admit that they are, jointly with the deputy editor, 'Akau'ola, responsible for the publication and ask that, in those circumstances, the Court may feel able to consider that the fine already ordered against him effectively covers the contempt as a whole.

The defence put forward by the deputy editor previously did not accord with the admission made by these two respondents. He denied any part in the publication of these articles. I found he was involved knowingly and the penalty imposed took into account his continuing evasion of the truth.

I must decide the appropriate penalty for each of these respondents bearing in mind the nature of the contempt, their part in it and their expressions of regret. I accept that the parlous state of the newspaper's finances means this penalty will inevitably increase the burden it already bears. Independent newspapers play an important role in a free society but press freedom carries with it responsibility and, when the paper fails to pay proper regard to that to the detriment of justice, the court must mark it by an appropriate penalty. The editor inevitably takes the primary responsibility for any decision to publish.

Bearing in mind the factors already mentioned and the fine already imposed, I order that the editor, Kalafi Moala, must pay a fine of \$5,000.00 or 5 months imprisonment in default of payment.

Although the reporter was the author of the articles, this case relates to the timing of publication rather more than to the actual content and I accept he may have had little part in that decision. I order 'Ulu'alo Po'uhila must pay a fine of \$1,000.00 or one month imprisonment in default.

Both to be paid within 2 months. Respondents to pay plaintiffs costs.

NUKU'ALOFA, 8 June, 1999.

