PETAIA (UELESE) v SUPREME COURT OF WESTERN SAMOA

Court of Appeal Apia
Dillon, Martin, Latham
5 November 1990: 19 December 1990

PRACTICE AND PROCEDURE - Contempt of Court - definition - jurisdiction on appeal - judicial precedent

CONFLICT OF INTEREST - comment thereon

HELD: Appeal allowed against decision finding the Appellant in contempt of court and the sentence imposed, evoked.

CASES CITED:

- re Tapu Leota [1960 69] WSLR 196
- Young v Bristol Aeroplane Co Ltd [1944] All ER 293
- Registrar, Court of Appeal v Collins [1982] 1 NSWLR 682
- Re Lonrho plc [1989] 2 All E.R. 1100
- R v Commissioner of Police ex parte Blackburn [1968] 2 QB 150, 155
- Bridges v State of California 62 S.C. 190 314 U.S. 252 (1941)
- R v Brett [1950] V.L.R. 226
- Amband v Attorney-General for Trinidat & Tabago [1936] AC 322
- R v Kopyto 47 D.L.R. 213

LEGISLATION:

- Constitution of Western Samoa, Articles 13(2), 79, 80 & 81
- Judicature Ordinance 1961, S 53, 64
- Acts Interpretation Act 1974, S 5(i)

Dr Barton QC & Fepulea'i for Appellant
To'ailoa for Attorney General

This is an appeal against two decisions of Sapolu A.C.J. delivered in January and February 1990 and involving the editor of the Samoa Times Newspaper, a Mr Uelese Petaia, the Appellant in these proceedings.

The first decision found the Appellant in contempt of Court. That decision was made on 30 January 1990 and the reasons delivered on 12 February 1990.

The second decision dated 12 February 1990 sentenced the Appellant to pay a fine of $1,500 in default 10 weeks imprisonment.

The Appellant seeks leave to appeal against both these decisions.

The articles in the Samoa Times Newspaper which gave rise to the proceedings against the editor were published on Friday 26 January 1990, but after a verdict had been delivered earlier on the same day, in a Supreme Court trial presided over by the Acting Chief Justice.

THE TRIAL

At the relevant time Sapolu A.C.J. was Attorney General and therefore responsible for all criminal prosecutions. He was principal of a law firm, Sapolu & Co, not having severed his connections with that firm (as is customary) on appointment as Attorney General; and in December 1989 in the absence of a substantive judge, he was appointed Acting Chief Justice.

On 24 January 1990 the Acting Chief Justice, sitting with five assessors, commenced hearing a charge of murder. The prosecution was brought by the Department which he heads. The defence was conducted by his sister from the law firm which he heads. Before the trial commenced he called Counsel in to ascertain whether either had any objection to his presiding. Not surprisingly, neither objected. On Friday 26 January 1990 the accused was convicted of manslaughter, and remanded in custody for two weeks for reports to be obtained before sentence.

THE ARTICLES

On the same day, 26 January 1990, the Samoa Times published an article questioning the propriety of the Acting Chief Justice presiding in these circumstances. In the same edition a similar query, expressed in much more vigorous terms, appeared in the editorial. The newspaper appeared after the assessors had reached their verdict, but before sentence.

The articles are as follows:

"CJ Presides Over Sister's Case

A murder case being heard at the High Court this week is causing some major concerns amongst members of the public and some of the Western Samoa Law Society, but not about the actual case but about a "blatant case of conflict of interest".

The criticism has arisen out of the fact that Tiavaasue Falefatu Sapolu as the Acting Chief Justice is presiding, and his sister, Katalaina Sapolu from the Acting C.J.'s own private law firm, of which he is still the principal, is acting as the lawyer for the defendant. And to make things even more complicated, the attorney general's office which Tiavaasue runs as Attorney General, is prosecuting.

Some members of the law society, who did not want to be named say that they question the ethics and wonder if "real justice" will ever be seen under a case such as this.

The Samoa Times tried to get a comment from Frank Curtin, the Parliamentary counsel who is now acting attorney general, but he said the case was now in progress and he would not make a statement until the trial was over.

Acting Chief Justice Tiavaasue told the Samoa Times last night that he could not make a statement on the case either as the Chief Justice or as the Attorney General.

The Samoa Times believes that before the case was held both counsel for defence and the prosecution were called into the Chief Justices chambers and were asked if they had any objections to the case being heard by him given the circumstances and apparently both counsels did not object and the case was being heard starting Wednesday morning.

This case is just one of many instances that has caused a strong reaction from members of the Law Society and the general public since government made the appointment of Tiavaasue to the office of the Attorney General.

Apart from the fact that Tiavaasue is a strong supporter of the Human Rights Protection Party, some members of the Society want him to relinquish his ties to his private law firm of Sapolu and Co. of which he is the principal partner.

Members state the case of when Vaovasamanaia Filipo was made the Chief Justice and he was asked, and obliged, to severe his ties with the then law firm of Phillips, Stevenson and Epati, right down to taking his name off the plaque outside the offices.

In the Law Society code of ethics any member with an appointment as the one given Tiavaasue must relinquish all ties with law firms they represent.

Tiavaasue still will not relinquish his ties with his firm and some members have even said that he has been known to conduct the affairs of his law firm from his Attorney General's office.

An official statement from the Western Samoa Law Society could not be gotten because the matter had not yet been discussed at a Society meeting but the Samoa Times believes that an urgent meeting of the Society is being called to "discuss matters".

It is not known if the matter of the Acting Chief Justice's appointment will be discussed at that meeting.

Meanwhile rumour is still rife that the Prime Minister will eventually advise the Head of State, Malietoa Tanumafili II to appoint Tiavaasue as the country's second Samoan Chief Justice.

This is also expected to bring more criticism from the Western Samoa Law Society.

Tiavaasue could not be drawn to comment on that issue last night either, saying only that as far as he knows his appointment finishes Wednesday next week."

"Give the Judiciary Total Independence

Events of this week has highlighted a glaring and it seems a deliberate erosion of the ability of our judiciary system to be independent of political interference. It is heartening to hear that the Western Samoa Law Society or at least some of its members are willing to act to try and preserve the independence of the judiciary, without which none of us can ever be able to look to the courts as our last honest and only avenue for justice.

The recent appointment of the Attorney General as acting Chief Justice was from the beginning bound to come up against unsurmountable hurdles.

We are appalled at the failure of the Acting Chief Justice to disqualify himself from the murder case that has been in progress at the Supreme Court because of his close relationship not only with the counsel for defence but also because as Attorney General he heads the office prosecuting the case. To our eyes, untrained though they may be in legal matters, there is a clear case of conflict of interest and we are surprised that both counsels failed to object to the case being heard by the Acting Chief Justice. The magnitude of the case being heard, one would have thought, should have at least warranted utterances from not only either counsel but from the Justice Department itself. The question we want an answer to is are both parties really being given a fair hearing - close examination of the evidence from both sides and the ultimate verdict handed down by the Acting Chief Justice will no doubt create a long and never ending debate but whatever the outcome, there will always be doubts in people's minds as to the integrity of the country's only avenue of recourse.

This should never have happened but it has, and only through the wrong decisions made by our policy makers. Again we believe that the blame must lie on the shoulders of the Prime Minister and his Cabinet. We cannot accept that you did not know this kind of thing would arise out of your appointment and yet you went ahead and made the decision. We strongly challenge the motives behind such a monumental (or deliberate) blunder. We believe it dangerous to try and manipulate the judiciary system which we sincerely hope was not the real motive behind this appointment.

Just yesterday in Auckland the Canadian Minister for Sports resigned because he had actually tried to tamper with decisions of the courts in his country to suit his purposes. If indeed those were your motives, then we call on you all to resign.

Former Governor General of Australia, Sir Ninian Stephen, could not have put it better when he said during an address once that, "today's world judicial independence ... is more dependent than ever it was upon the judiciary maintaining in difficult times standards both of efficiency and of unquestionable integrity; and distancing themselves from all influences which might be seen as affecting their integrity".

We do not believe we are a big enough country to warrant appointing a local person to the top judiciary post. This should not be misconstrued as a slur on any candidates

ability but only because we believe the nature of our close society does not permit one to "distance themselves from all influences which might be seen as affecting their integrity".

And if the rumours are true that the Acting Chief Justice will eventually become the Chief Justice, then we along with the population of this country will certainly lose confidence in the ability of the judiciary system to be our last recourse, independent of all influences."

THE CONTEMPT PROCEEDINGS

The following Monday, 29 January 1990, the Acting Chief Justice signed motions to commit the editor and the newspaper company for Contempt of Court. The motion relating to the editor read:

"THE SUPREME COURT by its motion MOVES to commit the above named contemnor for contempt of Court for publishing or causing to be published three articles in the issue of the Samoa Times Newspaper of Friday 26 January 1990 which have brought or were calculated to bring the Acting Chief Justice and/or the Supreme Court into contempt,

Dated this 29th day of January 1990.

"Falefatu M. Sapolu"
ACTING CHIEF JUSTICE"

The Company appeared (by a director) and was granted an adjournment to the following day. The editor did not appear - it is not clear from the record whether he had been served - and a warrant was issued for his arrest.

He attended Court voluntarily the next day, and was remanded in custody until 1 February 1990.

On 1 February 1990 counsel for both the company and the editor invited the Acting Chief Justice to disqualify himself from hearing his own motion. He declined to do so, heard the matter, and found both to be in contempt. He remanded the editor in custody pending sentence, but after eight days in custody he was released on bail in view of delays caused by Cyclone Ofa.

On 12 February 1990 the Acting Chief Justice fined the editor $1,500 with 10 weeks imprisonment in default. The editor now appeals against the finding of contempt, and against the penalty imposed.

JURISDICTION

We were required to rule on a preliminary issue - whether this court has jurisdiction to entertain any appeal against a conviction for contempt. There is a previous decision of this Court. In re Tapu Leota WSLR [1960-69] -106 where it was held that while the Supreme Court has jurisdiction to commit for contempt, this Court has no power to consider any appeal from that conviction.

That decision is based on the terms of S53 of the Judicature Ordinance 1961 which states that:

> "A person convicted on a trial (our emphasis) held before the Supreme Court may appeal to the Court of Appeal ..."

It was held that because the committal proceedings were of a summary nature, the conviction could not be regarded as having been "...on a trial ..." and that the Court of Appeal has no jurisdiction to entertain an appeal.

This raises the issue whether this Court is bound by its previous decisions. It is the final Court of Appeal for Western Samoa. It would be disastrous if it could not depart from its previous decisions in necessarily rare, but proper, cases to take account of changing circumstances. Mr To'ailoa for the Attorney General conceded, in our view rightly, that we are not implacably bound by previous decisions. In our view we are free to do so in the exceptional circumstances where too rigid adherence to precedent may lead to injustice or unduly restrict the development of the law. To that we would also add, when a previous decision was reached per incuriam and without consideration of all relevant matters (Young v Bristol Aeroplane Co Ltd [1944] All ER 293).

Leota was decided without consideration of a large number of relevant provisions, for example Articles 79, 80 & 81 of the Constitution (relating to the jurisdiction of this Court); Section 64 of the Judicature Ordinance 1961 (which empowers this Court to grant special leave to appeal); and Section 5(i) of the Acts Interpretation Act 1974 (which requires a statute to be given a "... fair, large and liberal construction and interpretation ..."),

To that extent the decision in Leota may be said to have been per incuriam. But we prefer to found our decision on a more fundamental principle.

Circumstances have changed, whatever the position may have been in the past. Today it is simply not acceptable that a conviction for contempt of Court should not be reviewable in a higher Court.

Accordingly, we held that in re Tapu Leota should no longer be followed insofar as it denies the right to appeal to a person convicted of contempt of Court.

We therefore granted special leave to appeal pursuant to Section 64 of the Judicature Ordinance 1961. In view of that decision, it was not necessary to consider an alternative application by the appellant to enforce his constitutional rights.

THE CONTEMPT

The Supreme Court has power to commit for contempt (Leota and the power expressly saved by art. 13(2) of the Constitution).

We have been referred to a very large number of authorities, but the real issue is a simple one - whether or not the conduct complained of was a contempt of Court. On well established principles, it could only fall into one of two categories - "scandalising the Court" or conduct tending to interfere with the course of justice in a particular case.

The Acting Chief Justice treated the publication of the articles as falling into a third category - "contempt in the face of the Court". It was nothing of the sort. We adopt the reasoning in Registrar, Court of Appeal v Collins [1982] 1 NSWLR 682 that "contempt in the face of the Court" can extend to conduct outside the courtroom, but it must be so close in time and place as to present an immediate threat to a fair trial and must therefore be dealt with immediately. Our own researches and those of counsel have failed to trace any case in which publication of a newspaper article has been held to be contempt in the face of the Court.

The Acting Chief Justice justified his immediate action by reference to the likelihood of a further critical article in the next edition of the newspaper. He was not entitled to speculate. In our view the articles were quite obviously not "contempt in the face of the Court".

In his judgment the Acting Chief Justice stated:

> "... the special kind of contempt we are dealing with in this case is the publication of materials that is likely or tends to prejudice a fair trial ...
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> ... the Court in this kind of contempt is not concerned with the truth or falsity of the publication or its validity or invalidity, or actual prejudice to a fair trial, or the intent of the contemnor, in determining whether a contempt has been committed. Although such matters may be relevant to the question of penalty. What the Court is really concerned about is whether the publication is likely to or tends to prejudice a fair trial. Actual prejudice is not

necessary. It is ... the protection of the integrity of the institution of fair trial and the confidence of the public in that institution which are of real concern to the Court in this case."

He could not have stated the test better. Having stated the test to be adopted, the Acting Chief Justice applied it to the facts and concluded:

"... the publications in the Samoa Times blatantly and grossly interfere with the trial Judge whilst the trial has not been completed, as sentencing is still pending and ny subsequent motion for possible appeal is likely to be heard and determined by the same judge ... the independence and impartiality of the Judge have been scathingly and scurrilously attacked. Aspersions have been cast on his integrity. The manner in which he conducted the trial has been severely questioned and even abused with inflammatory statements."

He referred to the "... high handed arrogance ..." of the editor and stated that he saw no difference between interfering with a witness, assessor or counsel, or interfering with a Judge.

That is where we differed from the Acting Chief Justice. There is all the difference in the world between making comments which might influence a witness or a party to an action, and making comments about a judge who may be presumed to be immune to such influence. See the comments of Lord Bridge in Re Lonrho plc [1989] 2 All E.R. 1100 (at pages 1116-7).

"Discussion and criticism of decisions of first instance or of the Court of Appeal which are subject to pending appeals are commonplace in legal journals, but on matters of more general public interest examples also readily spring to mind of criticism in the general press directed against, for example, criminal convictions, sentences imposed, damages awarded in libel actions and other court decisions which arouse public controversy. No case was drawn to our attention in which public discussion of the issues arising in, or criticism of the parties to, litigation already decided at first instance has been held to be a contempt on the ground that it was likely to impede or prejudice the course of justice in proceedings on appeal from that decision."

The Acting Chief Justice referred to cases on contempt heard in 1903 and 1945. The world has moved on since then and so has the law of contempt. Today judges are (and should be) no more immune from criticism than any other person.

Salmon L.J. commented in R v Commissioner of Police ex parte Blackburn [1968] 2 QB 150, 155:

> "It is the inalienable right of everyone to comment fairly upon any matter of public importance."

In the same case Lord Denning M.R., referring to the power to punish for contempt, spoke for all judges when he said:

> "... we will never use this jurisdiction as a means to uphold our own dignity ... Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself."

We adopt the general definition of contempt given in Halsbury 4th edition Vol 7 paragraph 7:

> "... words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of court."

A verdict had been reached before the publication complained of had reached the streets. The Acting Chief Justice expressed concern at the possible effect of the articles on the mind of the accused or the victim's family. We think he gave undue weight to these considerations. The tone of the judgment indicates that the Acting Chief Justice was at least as concerned with the criticism of himself as with any possible interference with the course of justice but it must be noted that there was no criticism of the manner in which the Acting Chief Justice conducted the trial nor any suggestion that the Acting Chief Justice showed any partiality to one side or the other.

His concern that sentencing was still pending was also over emphasised. As a professional judge he would address the question of an appropriate sentence on the facts presented to him at that time. This factor was also referred to in re Lonrho at page 1116.

> "The possibility that a professional judge will be influenced by anything he has read about the issues in a case which he has to try is very much more remote. He will not consciously allow himself to take account of anything other than the evidence and argument presented to him in Court."

Mr Justice Frankfurter of the United States Supreme Court, in the case of Bridges v State of California 62 S.C. 190 314 U.S. 252 (1941) considered that "... criticism of the Courts, however unrestrained, made after a decision has been rendered, to be an exercise of the right of free discussion and free speech".

CONDUCT SCANDALISING THE COURT

While the Judgment of Sapolu A.C.J. inferred that the conduct of the editor could be characterised as scandalising either the Court or himself, we reject such inference. The situation where the Acting Chief Justice simultaneously held Judicial Office; the appointment as Attorney-General; and as well retained his position as principal of his private legal firm of Sapolu & Co; cried out for public comment.

The only basis on which either article could be held to be contempt is that they may tend to interfere with the administration of justice by diminishing public confidence in the courts.

The articles must be read as a whole. They support the independence of the judiciary; they point to matters of concern; they draw attention to the situation in which the Acting Chief Justice found himself; and they point out by reference to the particular case that the obvious has occurred. The concluding remarks do no more than demand a judiciary free from any political interference.

The Australian case of R v Brett [1950] V.L.R. 226 deals directly with the matters about which we are concerned with in this appeal. In that case the following article appeared in the Melbourne Guardian of 27 January 1950 headed up as follows:

> "Mr Justice Sholl: Die-Hard Tory
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> The appointment of Mr R.R. Sholl, K.C., to the Supreme Court Bench directs pointed attention to the character of this bench. Mr Sholl was counsel for the Government in the abortive Essential Service Act prosecutions; he was counsel for the extreme Right Wing in the Trade Union movement (Messrs J.V. Stout and Co.); above all, he was counsel for the Government before the Royal Commission on Communism (as many people thought he was a prosecutor). There is no doubt that he is a die-hard tory, who has earned the gratitude of the notorious Hollway Government. His legal practice was confined to litigation over huge estates; disputes between great commercial concerns, and the like. His whole life has been a sheltered one: his main mission has been defending the positions of power and privilege of the wealthy - he, himself, was chairman of directors of a wealthy company. His daily associates have been men of the same kind - one of

> his chief backers in securing promotion to the bench was Chief Justice Sir E. Herring, whose reactionary utterances are well-known. Mr Sholl's knowledge of real life is nil - he knows nothing of the lives of the people. He will be called upon to adjudicate in the Criminal Court (the only court where even a semblance of the problems of the lives of the people arise). Yet Mr Sholl, like all except one of his new colleagues, has very rarely been in the Criminal Court - not only is it beyond his capacity, but it is beneath his dignity. What can such a man know of the real problems that arise there? Such an appointment throws a clear light upon the nature of the judiciary - namely, an institution forming an integral part of the repressive machinery of the State."

In the course of a detailed analysis of the law relating to contempt the following passage from Lord Atkins judgment in the case of Amband v Attorney-General for Trinidad and Tobago [1936] AC 322 was referred to:

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

It was contended for the respondent in that case that the article was not an attack upon the Court but was rather adverse criticism of the Executive in the exercise of its functions of appointing Judges. The Court accepted that the article did not qualify as a proper case for punishment as a contempt of Court.

In the course of the editorial article we are reviewing the appellant stated as follows:

> "This should never have happened but it has, and only through the wrong decisions made by our policy makers. Again we believe that the blame must lie on the shoulders of the Prime Minister and his Cabinet. We cannot accept that you did not know this kind of thing would arise out of your appointment and yet you went ahead and made the decision."

There is no doubt that Sapolu A.C.J. in contemporaneously exercising his Judicial office; retaining his appointment as Attorney-General; and continuing with his private law practice; allowed himself to be placed in an impossible situation. That the Executive should be criticised for creating this situation was inevitable; that the Acting Chief Justice should be questioned about the obvious conflicts was a natural consequence. While this aspect of the appeal has caused us no difficulty - we have however been concerned as to whether the article complained of may have brought the Court or the Judicial process into disrepute. This principle was considered in relation to the Canadian Charter of Rights and Freedoms in the case of R v Kopyto 47 D.L.R. 213, a 1987 decision of the Ontario Court of Appeal. At page 214 it is stated -

> "... if the Crown were to prove that an act was done or words were spoken with the intent to cause disrepute to the administration of justice or with reckless disregard as to whether disrepute would follow in spite of the reasonable foreseeability that such a result would follow from the act done or words used; that the evil consequences flowing from the act or words were extremely serious; and as well demonstrate the extreme imminence of those evil consequences so that the apprehended danger to the administration of justice was shown to be real, substantial and immediate, then the act or words could be punishable as a criminal offence in order to ensure the functioning of the judicial process."

Whether the Judicial process is brought into disrepute must of necessity be considered in relation to the rights of free speech as contained in the Constitution of Western Samoa. In this case, the Executive having created the office of Acting Chief Justice; and Sapolu A.C.J. having accepted the position while still retaining the position of Attorney-General and as well his private practise; the resulting situation, not unnaturally, attracted lively debate; reasoned criticism; and constructive recommendations. We consider the articles are in these categories and as such do not bring the Judicial process or the court into disrepute. We do not find the articles likely to diminish public confidence in the Judicial system.

The conviction for contempt cannot be sustained. The appeal is allowed. The fine of $1,500 is to be refunded to the appellant.

Costs in the sum of $2,000 in favour of the Appellant.