

## Fusitu'a v Ta'ofi & 'Aho

Supreme Court, Hihifo, Māuatoputapu

Hampton CJ

C 174/96

16, 17, 18, 19, 22 April 1996

*Election petition - proof - bribery and corruption*

*Evidence - proof - onus and standard*

The plaintiff brought an election petition against the successful candidate in a general election and against the Supervisor of Elections to have the result of the election declared void on the basis of 6 specific charges of bribery (against the first respondent) and 2 charges of general corruption (against the second respondent, the Supervisor).

Held:

1. S.33 of the Electoral Act 1989 under which the general corruption charges were brought, relates to widespread and general malpractice.
2. S.35 provides that the Court shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities, a wise and sensible provision and very necessary in such an area as an election petition where the smallest of actions can tend to be put under the most powerful magnification.
3. Although hearsay evidence might be received (under s.35(b)) it should be scrutinized with some caution and care.
4. The burden of proof was on the petitioner but given the gravity of the allegations and the very significant consequences which could flow the standard of proof, although on the balance of probabilities, is to a higher level than in an ordinary civil case.
5. There is however a reverse onus relating to the giving of a gift, within 3 months of an election, by or on behalf of a candidate. It is important to ascertain the intent of the donor at the time of the gift.
6. A gift by another person would only be sufficient under the Act if that other was an authorised canvasser and therefore an agent of the candidate.
7. To be an offence it must be proved that the gift was given to an elector.
8. All the allegations of offences of bribery were dismissed.
9. The claims of general corruption against the government representative were grave allegations for which no evidence was forthcoming. The claims were not just of dereliction of duty but claims of deliberate dishonesty - an attempt to distort improperly, a people's election.
10. There was a lack of voting cubicles, but voting did not take place in full view

of others as alleged, although the perception of even a possibility of a lack of secrecy was a concern which must be addressed for the future. Secrecy is rightly regarded as sacrosanct.

11. The allegations of general corruption were dismissed.
12. Recommendations were made for the conduct of future elections in Niuatoputapu.

Case considered : Fasi v Pohiva [1990] Tonga LR 79 and at 156

<sup>60</sup> Statutes considered : Electoral Act 1989

Counsel for petitioner : Mr Niu  
Counsel for first respondent : Mr Tu'utafaiva  
Counsel for second respondent : Ms Weigall

### Judgment

This judgment relates to an election petition brought, under S.25 of the Electoral Act 1989, by an unsuccessful candidate (the second placegetter, the Petitioner) against the successful candidate (the First Respondent) and the Supervisor of Elections (the Second Respondent). The petition seeks to have declared void the result of the 25th January 1996 election of a peoples representative for the district of Niuatoputapu and Niuafo'ou, to the Legislative Assembly.

The bases for the petition, as pleaded and argued are three - fold:-

- i. 6 specific charges of allegations of bribery (referring to S.21(1)(a) of the Act) any one of which, if proven, would result in automatic avoidance of the election under S.32(1) "where a candidate ..... is proved to the satisfaction of the Court to have been guilty of an offence against sections 21, 22, or 24 at the election," and I pause there, and wonder about the narrowness of those words "at the election" given the scope of sections 21, 22 and 24; but the point is irrelevant to any judgment here today - and continue with s.32(1) "the Court shall declare the election of that candidate to be void ..... " with certain consequential ramifications - see e.g. the rest of s.32(1) itself, and S.40 (as inserted by the 1992 amendment).
- ii. a general corruption charge levelled, under S.33 against the Second Respondent, (through his returning officers) alleging in effect the wrongful or unlawful use of motor vehicles on election day.
- iii. a further general corruption charge levelled, again under S.33, against the Second Respondent, alleging breach of claimed duties under the Act in:-
  - (a) not providing voting cubicles; and
  - (b) not replacing a named assistant returning officer; and/or
  - (c) not removing the same officer from the voting area (this very courtroom) during the actual voting.

As to those 2 general corruption charges I read the following relevant provisions of S.33:-

- 33 (1) "where ..... corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidate ..... have so extensively prevailed that they may be reasonably supposed to have affected the result, his election shall be void ....."
- (2) "Except under this section, an election shall not be liable to be avoided by reason of the general prevalence of corrupt or illegal practices"

I agree with the remarks of Martin C.J. in *Fasi v Pohiva* [1990] Tonga L.R. 79 at 88 that s.33 deals with "widespread and general malpractice". (and I note that S.33 was not dealt with, or apparently argued, in the Court of Appeal in that case - see [1990] Tonga L.R. 156, which dealt only with bribery under s.21).

I have had in mind at all times, as I do now, the provisions of s.35. S.35(a) provides that I "shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities". I comment: a wise and sensible provision and very

necessary in such an area as an election petition where the smallest of actions tend to be, or can tend to be, put under the most powerful magnification.

S.35(b) provides that the Court "may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible...." Here I have heard and received certain hearsay evidence, not otherwise admissible under any exception known to me. I take that evidence into account, as with all other evidence received but, because of its nature and its exceptional receipt, scrutinise it with some caution and care.

120 In deciding this matter I approach it on the basis (as accepted by all parties in argument) that the petitioner must prove what she alleges and given the gravity of the allegations (i.e. of offences of bribery and general corruption) and of the very significant consequences which may flow from such a finding or findings the proof required, although on the balance of probabilities, is to a higher level than in an ordinary civil case - see Martin C.J. in Fasi (supra, 81): "strict proof ..... before an allegation can be found proved the Court must be sure, or almost sure, that it is true" - a statement not resiled from or indeed commented on in the Court of Appeal.

130 There is one exception to that general burden of proof. It is in S.21(3): "any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person (except a person named in S.24(3)) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved", I have set this out in full because this subsection may have some affect here, as is argued by Mr Niu. Again I agree with Martin C.J. in Fasi (supra, 81) that "It is for the Respondent" (the First Respondent here) "to prove", on the balance of probabilities, "that a gift made within 3 months of the election was innocent; any other gift is presumed innocent until the petitioner proves otherwise". Again no apparent argument against that, or any contrariwise comment, in the Court of Appeal. I have added the words "on the balance of probabilities" and that is using those words as meaning, and applying when necessary, 140 the ordinary civil standard; and no more.

#### Venue of Trial - Witnesses

I decided that this petition should be heard in Hihifo, Niuatoputapu. Not only is it desirable that the parties have their case heard on their "home turf" in front of friends, family and interested voters from the electorate itself (local issues should be heard, wherever possible, in a local Court); but it was desirable, from the Court's point of view, given the nature of (at least some of) the allegations that the hearing take place in Niuatoputapu. That has turned out to be invaluable. Not only are the physical layout and 150 arrangements for the election itself now very transparent to the Court but also the remoteness and isolation of this district; the lack of money, vehicles and other resources and commodities on Niuatoputapu; the closeness of the communities and the inter-relationship of the peoples; have become very clear and, far more readily, may be seen in their proper perspective.

Indeed the inter-relationship of persons on Niuatoputapu itself is such that it is most unlikely - and extremely rare given the experience of the Court - that a witness born and resident here would not be related by blood or marriage (or both) to one or other (or again both, as did emerge here with at least 1 witness) of the Petitioner or the First Respondent. 160 Even if not related, anyone resident here is virtually bound to know and be acquainted with

everyone else. After all on election day some 504 voters only (and thus including not only Niuaotupatapu but also Tafahi; the near by island) voted. That smallness of the electorate, of course enhances, as Mr Niu rightly said in his thoughtful submissions, the possibility of even small transgressions: upsetting the fairness and balance of the voting. I bear that important feature in mind at all times.

I have heard some 21 witnesses, over 4 days, and submissions on the 5th day. It is important in my view, that a Judgment should be given, if at all possible, before the Court leaves Hinifo. In general terms, with the exception of Government officials, all witnesses are either related to and/or well acquainted with each other, and the Petitioner and the First Respondent in the ways I have mentioned.

### The Bribery Allegations

I first turn to the relevant portions of S.21 which read:

- (i) Every person commits the offence of bribery who, directly or indirectly, by himself or by any other person on his behalf (a) gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting"

- (2) In this section, a reference to giving money or valuable gift includes a reference to giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift".

S.21(3), I have already set out above. There are other preliminary matters as well. First I refer to and adopt what Martin C.J. said in Fasi (supra, 88) as to the importance of ascertaining the intent of the donor at the time the gift was made. Secondly as to the affect of a finding of a bribery offence I have set out S.32 (1) above.

I now deal with the 6 allegations in turn each of them alleging the First Respondent to have been guilty under S.21 (1) (a) in that he committed or was a party to the alleged acts (referring to them by their paragraph numbers in the Petition).

Para.4a: this alleges that the First Respondent in December 1995 and in January 1996, on several occasions promised or offered to voters that if elected he would share his parliamentary salary and allowances with them, "for the purpose of influencing the voters ..... to vote for him". Specific words, or "words to that effect", were pleaded. The allegation was denied (both in the Statement of Defence and in evidence by the First Respondent).

"Several occasions" were alleged. In evidence one person spoke of only one occasion. That witness claimed that, on an occasion towards the end of December 1995, outside the telephone office the First Respondent, in answer to remarks addressed to him, said that after election "I'll sit in the chair and people will withdraw money from the pocket of my shirt". Those words differ markedly from those pleaded. The witness I find unsatisfactory and unreliable; not just because of the closeness of her blood relationship to the petitioner, but because of such as her inability to give any detail of any of the surrounding circumstances and persons (some 17- 18 there she claimed yet she could not name one, even those others who spoke), her failure to record the remark in any way, her telling only the Petitioner, the failure to produce any evidence confirming even eg. her making a telephone call on that particular day although Mr. Niu, in questions of the witness, had elicited details enabling that to be done.

I do not find those words, or words to that effect, or to the effect as used in para 4(a)

have been proved to have been used. Even on the lesser ordinary civil standard of proof I would not find such proved. Therefore I dismiss that allegation.

Para.4b: this is a claim that on or about 19th January 1996 the First Respondent gave to one 'Isitolo Kivalu some 200 concrete blocks "as a gift for the purpose of influencing him to vote for him .....". In general terms the gift is admitted but the intent is denied and the First Respondent's version of the transaction, which admittedly did take place over the concrete blocks between the 2 men, is set out in paras. 4b, 15, 16 and 17 of the First Respondent's statement of defence.

220 To be an offence (under S.21 (1) (a)) there would have to be proof that 'Isitolo Kivalu was an elector. No such evidence was offered by the Petitioner. Indeed the only evidence offered by the Petitioner on this issue was some vague hearsay accounts of conversations out of the presence of the First Respondent but involving 'Isitolo Kivalu. I had some reservations as to the weight of that evidence.

However any defects in proof (over and above the admission of a gift in the pleadings) were remedied by the First Respondent giving evidence himself and calling Mr Kivalu (e.g. Mr Kivalu, in cross examination said he voted in the election and from that I am prepared to infer and find proved that he was an elector, although that is the only proof - the Roll is a public document and available to be searched (refer S.4(10)).

230 In general terms it is clear that on or about the date alleged (so within 3 months of the election) the First Respondent did give to Mr Kivalu some 200 or so blocks so that Mr Kivalu could start the foundations for a house. They were leftover blocks but blocks, up here, are a valuable commodity indeed (and a source of protection, when used in construction, from cyclones and the like). Much time was spent, in evidence, on this issue. I find that this arrangement of giving the blocks had been the subject of discussion only between the 2 men from time to time over a number of years, but that no agreement as to the details or the terms or even the carrying into effect of such proposed arrangement had been reached. Coincidental with the run-up to the election Mr Kivalu and his wife (she  
240 down in, and/or on the way back from, Tongatapu with building materials) moved to start their house building.

Whether the blocks were a simple gift (and I think they were) or to be replaced subsequently (and I have real doubts about that) is I find irrelevant to this judgment, and the First Respondent and Mr Kivalu in trying to dress the matter up as something more than a gift - i.e. as an exchange or for some good consideration were not helpful to themselves or to this Court. Notwithstanding that I find that the blocks were given as part of a family transaction. In para.17 of the Statement of Defence the First Respondent said that he "and Mr Kivalu are related and which relationship is strong, active and they are  
250 helping each other and their families".

On the evidence I have heard, accepting as applicable the reverse onus provision in S.21(3), I find that on the balance of probabilities it has been established that the purpose of the giving of the blocks, whatever the terms of the arrangement, was not to influence Mr Kivalu's vote (to induce him to vote) but to further the family relationship and in pursuance of family interdependence in such a small and isolated community. I refer back to the passage at p.88 of Fasi in the judgment of Martin CJ (para 13 above) - the question is the purpose or intent at the time and proof of that.

260 Given my findings of fact on the basis of the reverse onus this allegation is dismissed.

Para.4c: This is a claimed promise, in January 1996, to give pandanus leaves to 2 named persons. It is denied in the First Respondent's Statement of Defence. No evidence was led as to it, at all. The allegation is dismissed (Mr Niu having indicated during closing arguments that he abandoned this allegation).

Para.4d: This is a claim that on or about 24th January 1996 "one Papihone Huhane who was well known by the ..... voters ..... to be a strong supporter of and campaigner for the First Respondent gave a sum of \$100.00 as a gift at a kava club gathering ..... which was made indirectly on behalf of the First Respondent for the purposes of influencing the voters thereat to vote for the First Respondent ....."

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On the evidence undoubtedly on or about the date alleged \$100 was given by Mr Huhane at a Kava club gathering at Hihifo which was organised, and held, to raise funds to send a successful 5th Form High School student to Tongatapu for her 6th Form year.

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On the evidence it is and was no more than that i.e. a gift by Mr Huhane in furtherance of sending this girl to Tongatapu. I find that there was and is no satisfactory evidence, for reasons I will come to, of any real connection, as claimed, between the First Respondent and Mr Huhane, let alone of the significant claim of Mr Huhane being a campaigner for the First Respondent. One witness for the Petitioner who claimed Mr Huhane was a campaigner only knew of that by hearsay - from what the Petitioner herself had told her. The Petitioner herself did not give evidence as to this allegation; her husband did, indirectly, and I will come to that evidence shortly.

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The Petitioner's other witness as to this \$100 gift knew of no connection at all between the First Respondent and Mr Huhane. Those witnesses for the Petitioner accepted the return of Mr Huhane, recently, from the U.S.A.; his relationship to the family of the student concerned; and the bona fides of Mr Huhane's gift in those circumstances. The First Respondent denied any connection in any way with this gift. The organiser of this Kava gathering (Kalapu), the mother of the student, gave evidence which confirmed the relationship to Mr Huhane, her invitation for him to attend the Kalapu, his gift, and the lack of knowledge in her of any connection, Mr Huhane to the First Respondent. With the exception of the Petitioner's husband's evidence, there is no evidence before me indicating that Mr Huhane was a campaigner for the First Respondent. The Petitioner's husband, on the same day as the Kalapu, said, that at a faikava at Falehau, Mr Huhane in the company of the First Respondent asked those present to remember the First Respondent on election day. This is the only evidence; and I would not, in the circumstances use it to found a finding of guilt of bribery. Even if it is accepted in it's entirety I do not find that that event proves or has, any connection at all with the \$100 gift at Hihifo. Nothing was said at that Kalapu, apparently, about any tie to the First Respondent in any way or to his election campaign. Those there who were called to give evidence did not see it in that way. So there is no evidence that a gift was made by Mr Huhane "indirectly on behalf of the First Respondent" Applying the authorities referred to in Parker's Conduct of Parliamentary Elections at para 19.11 (p.383) I hold that that evidence (even if accepted) of that one occasion at the Falehau faikava was not sufficient to enable a finding to be made that Mr Huhane was an authorised canvasser and therefore an agent for the First Respondent. Much more evidence of e.g. general canvassing, at least would be required. Even if (and it does not because of the facts I have found) but even if S.21(3) were to apply on the evidence I have heard, and on the balance of probabilities, it has been established that such a gift was not for the purpose of influencing the votes of electors.

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Para.4e: is a claim that during \*1995 and at least for 3 months prior to ..... election, the First Respondent gave the use of his motor vehicle to the office of the Government Representative of Niuaotupapu and which was so used ....., at a charge or for free or on credit, and which was used freely by one Taufu 'Otuhouma, clerk to the Government Representative, for official ..... and personal purposes in order to influence..... Taufu 'Otuhouma to vote for him and for him to campaign and he did campaign for him to be elected ..... \*. It is now common ground that this particular claim must fail but I will deal with it, as it sets the scene for the other allegations about vehicles and my findings as to those matters.

320 Much evidence has been given before me about use of vehicles. On the evidence there are only between 10 and 18 vehicles (the lower figure may be more correct, given the Police sergeant's evidence, of actually mobile and lawful vehicles) on Niuaotupapu. Transport of the motorised variety is, and was at the time of the election, at a premium. I find that the Government Representative (both personally and through his clerk) acted with bona fides in endeavouring to arrange transport (in the absence of public transport) on election day for the elderly and infirm, and for voters from Vaipōa and Falehau.

330 He, and his clerk, used vehicles which they thought were best in the circumstances and the truck, L3920, which is the vehicle referred to in this (and other) allegations, was a vehicle which had been hired before for Government work and was hired again on election day. The Government Representative himself had no vehicle.

The truck, L3920, although registered in the name of the First Respondent and a motor dealer in Tongatapu, is known as Faenga Iloa's truck (that person being the First Respondent's brother in law). The Petitioner herself acknowledged that, as I understood her evidence in chief. Undoubtedly the First Respondent drove it from time to time. So did others, (and number of others, I add) including Faenga Iloa and Taufu 'Otuhouma.

340 When hired by the Government that truck was paid for; and I find that it was on a paying basis that its use was obtained for election day and the day following. There is nothing wrong in any of that I find (e.g. A clerical mistake in writing down a figure for a month, does not a conspiracy make).

I will return later (on the other charges) to use of vehicles; but will concentrate now on the claim in para.4(e) and will make some general findings which also do affect those subsequent charges. I find for a start that the vehicle mentioned was not the First Respondent's alone as such although, importantly, it was commonly used and driven by him - and indeed he seems to have allowed others to use it, so that particular finding, of itself, may not be determinative.

350 But even if it was his to "give" out the use of (as I find he did on occasions) I find it proved on the balance of probabilities that the giving for use on election day was not for the purpose of influencing voters (applying for the present the reverse onus under S.21(3)).

In fact as alleged it is claimed that this giving of the truck was "to influence..... Taufu 'Otuhouma to vote for him". There is no evidence at all that Taufu 'Otuhouma was an elector in this district. He was, before his clerkship here, on Tongatapu, and is again resident there. So the allegation would fail on that basis alone (as Mr. Niu accepted, when put to him, by the Court, in closing argument).

360 Again there is no evidence at all in my view (and certainly no satisfactory evidence) that Taufu 'Otuhouma was a campaigner for or indeed, (and I will deal with it now) a



"strong supporter" of the First Respondent' (as alleged further in para 6. of the Petition). The Petitioner referred to the 2 men as being friends and attending the same kava gatherings. And in the end that is all that anyone's evidence came to. Both the First Respondent and Taufa 'Otuhouma were cross-examined closely as to their relationship. Nothing was revealed to me other than a certain degree of familiarity and friendship based on a general age similarity and a living in the same very small community.

That basis of the claim in 4(e) is rejected as well. I add that the claim of "campaigning for" is irrelevant in terms of S.21 (1) (a) in any event.

370 In para.36 I applied the reverse onus in S.21 (3). But given the words used in that section, of "given ..... in the absence of good consideration" and given my findings in para 34 above, I hold that in fact S.21(3) does not apply. So it is, and was, for the Petitioner to prove that the giving of the truck, for consideration, was to influence Taufa 'Otuhouma as to his vote. That she has not done. However, if I am mistaken as to that aspect then, as I have said in para.36 above, even applying the reverse onus this claim must fail. It is dismissed.

380 Para 4f. is a claim that on election day the First Respondent "gave or allowed ..... L3920 which he commonly used and with which the people and voters of Niuatoputapu had associated him as owner, to be used to transport voters from their villages and homes ..... without payment ..... for the purpose of influencing them to vote for him ....."

I have already made comment on this truck and its use. I do not doubt the bona fides of its use, on election day. In effect it is alleged that the Government Representative (only here then some 7 or so months) and his clerk entered into some sort of conspiracy to aid the First Respondent to obtain election. There is no foundation for such and I reject it absolutely and vehemently. It is worthy of note that there were no campaign ribbons, regalia, notices or the like on the vehicle. It is also worthy of note that the First Respondent's brother in law (Faenga Iloa) did not drive it on the day but that a secondary school teacher, unrelated and not a campaigner or supporter of the First Respondent (as I find), was asked by or on behalf of the Government Representative to drive it - as he did from the other 2 villages on some 6-7 occasions.

390 I find nothing offensive or offending in any of those arrangements. I have already commented on the lack of motor vehicles. That is one of the reasons why it was important that I should sit here in Niuatoputapu and get the correct flavour of matters, judge matters in proper context.

I find that the First Respondent himself did not know in advance of the hire of the vehicle L3920. It is not proved by the Petitioner, that the First Respondent gave or allowed directly or indirectly its use as alleged, (e.g. the school teacher did not approach him) nor is it proved by the Petitioner that its use was to influence voters as alleged (given the hire aspect and what I have said in paras.34 and 40 above). I go on to add, repeating what I said earlier in para 36, that even if the reverse onus applies, on the evidence it is proved that the use was not to influence electors' votes.

I dismiss this allegation also. Which means that I reject all the allegations of offences of bribery, under S.21(1)(a), claimed to have been committed by the First Respondent.

#### General Corruption - Use of Vehicles

410 I have already referred to S.33 and it having reference to "widespread and general malpractice" - see paras.3 and 4 above.

The allegation are set out in paras.5 to 12 incl. of the petition. I will refer to those paragraphs.

Para 5 relates to the appointment of the Government Representative as returning officer for the district and the appointment of 2 named assistant returning officers (all appointments being admitted by both Respondents). The duties and obligations of such officers are spelled out, inter alia, in S.23A. I do not intend reading them out in detail; but all the provisions enjoin and ensure secrecy-important obligations to ensure secrecy of voting.

420 I have already commented on my view of the bona fides of the Government Representative. This was the first election he had been responsible for, in this way. From what I have heard he took great pains - indeed as might be expected he probably took greater pains to try and comply with the Electoral Act than others who had been through it before (the "I have done it before, so I know it all" syndrome). He acted as best he could, with the aim of ensuring and achieving a fair, free and just election, within the limits of what was available to him here. As an example he was given only a copy of the 1989 Act (just before the election and only after repeated requested by him) and not the 1992 Amendment Act, although he knew of changes through other written instructions from the Second Respondent. But that is not good enough. A person in the Government  
430 Representative's position must be given all the legislation (whether Acts, amendments, regulations, rules, Gazette Notices, or whatever) which may be relevant. The Government must do better-disasters could easily result.

He, the Government Representative, had, I find, no personal axe to grind; nor did his clerk, Taufa 'Otuhouma. The latter person, along with Pomana Hui, were the 2 assistant returning officers named in para 5 of the Petition.

Para.6: claims that Taufa 'Otuhouma was a strong supporter and campaigner for the First Respondent. As I said in para 38 above on the evidence I find that that is not proved by the Petitioner.

440 Paras 7 and 8: claims that Pomana Hui is the wife of Fe'ao Hui who was a strong supporter of and campaigner for the First Respondent and the owner of a van L1. He is the son of the District Officer of Niuatoputapu (Ngatu Hui). Further it is said that that District Officer was "a strong supporter of and campaigner for the First Respondent" and the voters knew him to be such. Whilst the family ties of these 3 persons, the Huis, are admitted, the supporter and campaigner aspect is denied.

The Petitioner herself said of the Huis that she did not know whether the son had any connection with the First Respondent except the First Respondent at a candidates' meeting had mentioned getting him to carry people on election day. She said nothing of the father's alleged relationship to the First Respondent. The only evidence of that and  
450 I find it unsatisfactory, given what I will say soon as to it, is from a cousin of the Petitioner who claims to have seen the District Officer with Lapuka Maea on election day, when Mr Maea was canvassing, it was claimed, for the First Respondent. Such a remote, and once only, connection, on the evidence is not sufficient to prove any such claimed relationship let alone an agency for the First Respondent by the District Officer and in the light of the authorities in Parker already mentioned. The First Respondent, in evidence, denied any such campaign or support relationship. That is the extent of the evidence. No connections as claimed are proved. The son had a truck, but I will come to that when I  
460 come to para.12.

Para.9 makes a similar claim (strong supporter and campaigner and owner of a vehicle T260) in relation to Lapuka Maea. The Petitioner claimed that he was a supporter of the First Respondent on the basis only of the First Respondent's statement at the meeting about use of Mr Maea's vehicle for transporting voters.

A cousin of the Petitioners claimed that on election day she saw and heard Lapuka Maea entreating a voter to come and vote for the First Respondent, having just pulled up in his car. This evidence, if accepted, would be some proof of the allegation, although, not necessarily, of knowledge of this in the First Respondent or, more importantly, knowledge of this in the Government Representative and his clerk (given the corruption allegations against the Government Representative and his clerk which this claim leads up to and which are made in para.12).

However, standing alone as this evidence does, I do not find it reliable, or sufficiently reliable, to found proof, to the requisite standard, of the allegation. I say that, in particular, because the witness claimed that the District Officer (Ngatu Hui) was with Mr Maea in his car, at between 9-10am, and at a time when I find it well established that that District Officer was in a position on the verandah of this court house, with Town Officers, identifying their flocks for the assistant returning officers. On the evidence I heard, and which I accept, Ngatu Hui, was in that position throughout the 9am to 4pm voting day.

The First Respondent, in evidence, denied any such campaign or support relationship with Lapuka Maea. As with Fe'ao Hui's vehicle he mentioned Mr Maea's car and Mr. Hui's truck at a candidate's meeting - as a suggested means to transport elderly in particular. But having heard the response of the Government Representative (which was not in black and white terms as candidates, or those I heard from on this issue, believed, but really left it over to candidates to decide what was appropriate) the First Respondent, I find, did not himself persist with any arrangements for the use of either of those (or any other) vehicles.

Para 10 and 11: touch on meetings such as I have just mentioned. The Petitioner understood what the Government Representative said in black and white terms i.e. that a vehicle of a candidate, or of the candidate's representative (whatever that means), was not allowed to carry voters to and from the voting area on election day. The Government Representative, in effect, said in evidence, that, at the meeting, he said he believed it would be wrong if someone acting in the capacity of the representative of the candidate used a vehicle to transport voters. He did not prohibit, he says, as such. His stress was on the person, not the vehicle. The difference between the 2 views is really, I believe, just one of perspective (see e.g. the first Respondent's view as commented on in para.57 above). I accept what the Government Representative says he told the meetings.

Para 12: is the heart of this general corruption allegation. In view of the factual findings already made I reject as unproved the claim that the Government Representative "approved and allowed the use of ..... L3920" "contrary to his advice as stated" in paras.10 and 11 of the Petition. The use of L3920 was not contrary to any earlier advice by the Government Representative whether at fonos (for voters) or at candidates' meetings. It was sensible to arrange to hire the vehicle which was associated with Government work (particularly road maintenance or it got around the villages and would have been seen doing Government work) and, importantly, to arrange an independent driver, not associated with any candidates in particular (that driver, the school teacher, did not even know whose truck it was which rather gives the lie to the Petitioner's claim that

"the voters of Niuaotupapu associated him (the First Respondent) and the owner".)

The allegation then goes on that the Government Representative approved and allowed the use of Mr Maea's car and Mr Hui's truck to transport voters to and from the voting area without charge. There is no evidence to support that; it is unfounded; I reject it. I accept the Government Representative's evidence that he did not do so.

Indeed the claim that these 2 vehicles were used at all to transport voters on election day is, at best, vague and unspecific. The school teacher's evidence was to the effect that he saw both vehicles on the road that day, Mr Maea's car some 6 times, but whether used as a taxi or not he did not know (it has a "T" i.e. taxi registration) and Mr Hui's truck once. The Petitioner's cousin's evidence as to Mr Maea I have already commented on, adversely (paras 55-56 above). There is no other evidence. There is no reason why a taxi, hired, should not be used quite independently of candidates, by voters.

Para 12 of the Petition then claims that the Government Representative in approving and allowing the use of the 3 vehicles (which I reject as unproved, as above) committed "a corrupt practice and it was committed by the returning officer or assistant returning officer for the purpose of promoting or procuring the election of the First Respondent".

I stop there - a most serious - a startlingly serious allegation against electoral officials, (and in particular against both a senior Government official holding responsible office, the Government Representative, and his clerk). I waited for evidence to support such a grave allegation. And I waited. None-absolutely none in my view - was forthcoming. In my view Mr Niu really was asking this Court to indulge in speculation and not act on evidence. I do not believe, looking back at my note, that Mr Niu put the allegation as such (or even indirectly really) to them. I put that to Mr Niu in his closing address; and he acknowledged that that was so, in effect. There was, I suggest, no basis for him to put that. The claim is not just one of dereliction of duty - it is a claim of deliberate dishonesty of the highest order - an attempt to distort, improperly, a people's election. I find there is, and was, no basis for that grave allegation. It is not proved.

The balance of para 12 relates to the claim (necessary under S.33 if the Petitioner is to be successful) that this alleged corrupt practice (rejected, adamantly, by me) extensively prevailed to such an extent that it might "reasonably be supposed to have affected the result at Niuaotupapu." There was no corrupt practice; therefore it did not, because it could not, extensively prevail.

I reject and dismiss as unproved, and as unfounded, this claim of general corruption.

#### General Corruption - Cubicles and Returning Officers

I remind myself, again, as to S.33. The allegations are in para. 13 of the petition. As I said (in para.2 above), there are 3 allegations.

First there is reference to the claimed duty in the Second Respondent through his returning officers to provide voting cubicles, to afford secrecy and freedom of voting, and the failure to fulfill such a duty. Particulars are pleaded describing the steps taken, the tables and places visited, on the way to the actual voting tables and thence to the ballot box. I will deal with those factual matters first; and dispose of the other 2 allegations before returning to the question of voting cubicles.

In para.13(a) there is a complaint, in effect, about the presence of officials on the verandah outside the courtroom, where the voting took place. I see nothing in that complaint. The officials had their backs to the voting room. Only limited numbers of potential voters were allowed on the verandah at any time, to go through the various

preliminary voting steps (checking identity and rolls, issuing ballot papers, marking off master roll and so on). Order was maintained, and supervision to ensure a free and fair election kept, by police officers (refer S.18).

570 Implicit in para. 13(a) of the Petition is a complaint about the presence of 2 persons who I have already mentioned, Pomana Hui and Ngatu Hui. I have already found not proved the allegations of the Huis as supporters and/or campaigners (paras 52-53 above). There was no basis for the removal of those 2 from the verandah; no complaint about them was ever made; it is apparent to me that the names of assistant returning officers were known to candidates before the election and the Petitioner, and that knowledge was instrumental in having 2 proposed assistant returning officers (brothers in law of the First Respondent) removed from the list and not appointed (Exhs D to G show that transaction). If she had real (or any) concerns about the Huis I am sure she would have done something similar - or even protested about their presence on the day - she voted at about 10:30 am and so could have tried to alter this (and indeed alter things physical inside the voting room, when we come to that) if she had wanted to.

580 Para 13(b) alleges the presence in the voting room itself of the final officials' table, at which were Taufua 'Otuhouma, the clerk to the Government Representative, and a woman police officer. The Petitioner gave evidence and said they were there inside the courtroom and thereby affecting the freedom and independence of voters - particularly the presence of Taufua 'Otuhouma as a claimed strong supporter of and campaigner for the First Respondent. That aspect I have rejected (paras 38-39 above,) and I repeat that rejection. I also repeat what I have just said in relation to the Huis (para.69 above) - the Petitioner if concerned about Taufua 'Otuhouma could have taken steps to have him removed (and I note that he had occupied the same position in Niuatoputapu at the previous (1993) election at which she, the petitioner, had voted). No protest before, during or after the election however - until the petition.

590 Furthermore the Petitioner is clearly wrong in what she has said as to the position of the woman police officer and Taufua 'Otuhouma (and their table). It was outside the court room on the verandah facing away from the court room. All other witnesses agree with that position. I do not intend detailing them.

600 Para 13(c) I will return to containing, as it does, detailed references to the actual voting arrangements inside the courtroom; but I do note that it is wrong, (and the Petitioner's evidence was wrong), as to Taufua 'Otuhouma being in the room and the voter marking his ballot paper in "full view of Taufua 'Otuhouma and the police officer from where they were seated .....". That does affect my view of the credibility of the Petitioner, as well, for e..sample some of the matters I have mentioned above (paras 69 and 70 for example as to lack of complaint by her, whether about personnel or lay out).

Para 13(d) is a claim that the presence of Taufua 'Otuhouma" in the courtroom and in a position to see the votes cast by each voter, whilst he was a supporter ..... of the First Respondent, a fact of which the voters were aware, would reasonably be supposed to have affected the result of the election".

610 For the reasons already, exhaustively, traversed, I reject that entirely. It is factually incorrect in that Taufua 'Otuhouma was not physically present; even if he were he could not have seen the votes cast, given the position of the table the Petitioner alleged; there is no proof of his being a supporter; even if he were (and he was not) there was no evidence to show voters were aware of that.



Accordingly there was and is no basis for the claims that the Second Respondent should have replaced Taufu 'Otuhouma as an assistant returning officer, or removed him from the Court room. I reject and dismiss those claims as unproved (and unfounded) and as unable to found any basis for a general corrupt practice allegation.

620 Which leaves then the issue of the accepted lack of voting cubicles at this election and in particular as it is spelt out in para 13(c) of the Petition. There it is said that voters were directed (into this court-room) there "to take 1 of 2 tables, each with 1 chair behind it, but each table about 3 metres apart, with no obstruction in between them or around them. The voter would then sit and mark his vote on the ballot paper" (I interpolate - Exh I is an example - one tick only had to be made) \* in the full view of the voter at the other table, and of Taufu 'Otuhouma and the police officer ..... and the returning officer ..... who was also present ..... and of any person who would stand by the door to come in to vote, and of any person who would look through the open louvre windows (which had no curtains) .....

630 The physical layout was as alleged, ie 2 tables facing towards each other, one on either side of this room, with a sizeable gap between them (3 metres, as pleaded, although it may not have been quite that gap). Leaving aside the other voter for the moment I deal with the claimed "full view" of the voting by various persons. The claimed view of Taufu 'Otuhouma and the woman police officer is clearly wrong - see paras. 71 and 74 above.

640 The claimed "full view" by the returning officer I reject on the basis of what he said in evidence with, I add, some support by some other witnesses. I also reject the claim that other voters or potential voters could view the marking of ballot papers. In a general sense anyone looking in could see persons marking papers, but in a specific sense of actually knowing what was being marked, or which candidate was being ticked, I reject that. In addition the evidence indicates that positive steps were taken to prevent "busy bodies" in the waiting voter queue peeking through at those inside voting.

650 But the unease and/or lack of freedom which some voters spoke of in evidence should not and cannot be written off - the perception of even a possibility of a lack of secrecy is a concern which should and must be addressed. The Second Respondent must see that funding is available and that directions are made and carried out to ensure not only secrecy, but an assured feeling or perception of secrecy, within voters. Voters should not have to feel that they need to guard their ballot papers with their hands. Secrecy is rightly regarded as sacrosanct.

660 I return to the "full view" of the voter at the other table. On all the evidence it has not been proved that that was so, given the distance the tables were apart. Examinees are almost invariably much closer together (and in every direction). But again perceptions are important on this highly personal matter of voting. I will return to what might be considered appropriate soon.

670 However, even if I were to find, as a fact, that all the Petitioner's allegations as to voting cubicles and lack of secrecy were true, (which I do not) there is still a fundamental stumbling block (and it is a block for the replacement and/or removal claims in relation to Taufu 'Otuhouma as well). It is that it is said that all or any of these things (ie in combination, or alone) amounted to a corrupt practice, committed or omitted by the Second Respondent (through his returning officers) "for the purpose of promoting or procuring the election of the First Respondent ..... and that it extensively so prevailed during and at the election that it may reasonably be supposed to have affected the result

I need not repeat what I have said in relation to the some aspect of the other general corruption allegation i.e. as to the corrupt purpose claimed against the Government Representative and his clerk-see paras. 62-63 above. Again this is an allegation of the gravest kind, quite unsupported by any evidence. There is, and was, no basis for it.

This claim is also rejected as unproven. I know I have not dealt with the claim that there was a duty to provide voting cubicles, but it is unnecessary in view of the above which disposes completely of the matter. But I will return to that claim shortly.

#### Certificate

Having rejected and dismissed all of the Petitioner's complaints of bribery and corruption I now, formally, dismiss the petition. The First Respondent, I determine was properly, and is duly, elected and the election is not void. I certify to the Speaker of the Legislative Assembly that determination accordingly; and a copy of this paragraph of the judgment should be forwarded (perhaps telegrammed) to the Speaker forthwith (s.37).

#### Future election in Niuatoputapu - recommendations

I have already commented on the need to properly provide the Government Representative with all legislation and all necessary instructions (para 49 above) - and in good time.

I go on to the lay out of the actual voting area, if this court house is to be used in the future for elections. It was used in 1993 (and previously). In 1993 it is a matter of controversy between witnesses as to the voting room actually used i.e. whether the courtroom or an interior office (and if that office whether 1 desk or 2 desks - I add unscreened in any event, so open to the same complaint as this time around - and if I am told aright in 1990 on the pangai at Nuku'alofa no flax screens, as now used there, were then present. So perhaps there is some historical basis for no screens, gradually being remedied.)

I do not have to resolve what the position was in 1993. I do observe however that it was not only Taufa 'Otuhouma who claimed that the courtroom, in a similar layout or arrangement, was used in 1993. So too did 'Isitolo Kivalu and another witness said this courtroom was used in 1993, but with just one table. One, would have though the clerk, as the assistant returning officer in 1993, would know the position. The Government Representative thought he was following the same pattern and layout in 1996 as had been done, without complaint in 1993.

If the verandah is used for the preliminary steps, as in 1996, and that seems to me to be sensible - under shelter yet nearby - then not only should the middle and eastern most doors into this room remain shut (as they were in 1996) but also the 3 sets of louvre windows on the verandah side should be covered, temporarily, with some light material preventing vision in but not excluding all light. Perceptions are important as I have said.

The western most door should remain open and there should be a separate exit door (as in 1996).

Voting should take place either:-

- (a) in this courtroom, with the desks at a distance and a screen of some sort (flax, or even Mr Niu's string with a sheet draped over it) between and around the two;
  - or
  - (b) in the offices off the courtroom using the existing partitions and ensuing



that the exterior windows are suitably covered in some way or that, if uncovered, no one can approach them to look inside (in fact the 2 offices on the Western side of the building are probably the best and there are curtains already in place).

None of these suggestions should be seen as any adverse reflection on the methods employed in 1996. They are not. Any system is capable of improvement. But if people, when voting, feel uneasy then that should be dealt with, if at all possible. However the fact that no voters complained in 1993, or at the time in 1996, or subsequently (until the petitioner took steps, filed her petition and found witnesses) probably says something generally as to the 1993 and more importantly the 1996 elections being conducted "freely and fairly" (s.18).

Mr Niu (and the Petitioner) referred, in relation to voting cubicles, to s.3(3) of the Act and to a claimed mandatory duty to provide such cubicles. S.3(3) says that the Second Respondent "shall have the general control over and supervision of ..... the preparation and distribution of ..... voting cubicles and other fixtures needed .....". That does not say, and mean, that voting cubicles have to be provided at every voting place.

Indeed S.12(4) makes that clear. It says that "the elector shall retire to a voting cubicle or some private space in the voting area and mark his ballot paper .....". That is what has to be done - provide a voting cubicle or some private space. The Second Respondent must ensure that his returning officers provide such cubicle or space. The ballot is to be secret; voters should feel secure, and sure, that that is so (and Mr Niu is right when he refers to the Electoral Act underlining the secrecy of the ballot in e.g. S12(4), S.18, S.23 A, (3) and (4)). That is why I have made the suggestions in paras 88-90 above.

#### Costs

I will need to hear counsel as to costs (and I refer counsel to S.38 of the Electoral Act).

Having heard counsel I reserved overnight the question of costs (because of the lateness of the hour and failing light). I recognise some force in what Mr Niu has said on behalf of the wholly unsuccessful petitioner. Normally costs should follow the event. They will here, but I will temper the orders somewhat recognising.

- (a) the geographical isolation which made and make for difficulties over such as the 28 day limit for filing a petition - either take your chance and file your petition without your counsel being able to get proofs of evidence, or miss out entirely; and the difficulty, or indeed impossibility, for counsel to brief potential witnesses at all until the Court came here for the trial, given the distance and costs, and the absence of any means to talk coherently, let alone privately, to persons here where telephone communications are through one very public radio-telephone.
- (b) the public interest and stake in such a matter and the importance of the provision of proper voting facilities.

In the circumstances the Petitioner should pay the full disbursements and witnesses expenses of both Respondents and a contribution to each Respondent's costs in the sum of \$2,500.00.