

Attorney General v Moala & Akau'ola

Supreme Court, Nuku'alofa

Hampton CJ

10 C.162/96

21 June 1996

Contempt of court - caution - unlimited power

Practice and procedure - adjournment - dismissal - onus of proof.

Contempt of court - evidence - proof

20 The defendants were prosecuted for committal for contempt of court arising from a newspaper article published in a newspaper of which the first respondent was allegedly the publisher and editor and the second respondent the deputy editor. One defendant (the second) was served, the first was not. The second respondent appeared at trial, but the prosecution sought to adjourn the trial against him.

Held:

1. The powers of a court to commit for contempt being unlimited, and indeed somewhat arbitrary, should always be exercised with the greatest of caution.
2. The prosecution against the second respondent was based on the allegation that at all material times he had been responsible for the article concerned.
- 30 3. The matters had been set for trial for some 3 months. The second respondent had filed, 2 months before trial, an affidavit saying that he had no knowledge of the article and was on vacation leave overseas.
4. The prosecution attended trial anticipating the matters against both respondents proceeding. The first respondent not having been served, an adjournment against both was sought. The prosecution did not have evidence to call against the second respondent and in particular to meet the assertion of his being overseas. His name did not appear on the mast head of the particular edition of the newspaper, whereas his name appeared on other editions, and that indicated some substantiation of his claim.
- 40 5. The Crown had had some 2 months at least to prepare its case yet it came to court anticipating the matter proceeding. An adjournment of the case was refused and the proceedings against the second respondent dismissed.
6. The Crown was granted leave to serve the first respondent out of the jurisdiction.

[NOTE - The judgment against the first respondent immediately follows].

50 Counsel for prosecution : Mrs Taumoepeau
Counsel for second respondent : Mrs Taufaeteau

Judgment

The powers of a Court to commit for contempt, being unlimited, and indeed somewhat arbitrary, should always be exercised with the greatest of caution.

It is with that in the back of my mind that I approach this particular matter.

The proceedings originated from a publication in the newspaper "Taimi 'o Tonga", the edition Vol.7 number 50 published 27 December, 1995.

It is an editorial article on page 4 of that edition of the newspaper which has brought the Attorney General's contempt proceedings against Filokalafi Akau'ola as Deputy Editor and against Kalafi Moala as the Editor and Publisher of the newspaper.

I will not go into the details of the editorial article itself, because it is irrelevant to the judgment which I am giving in relation to Mr. 'Akau'ola.

These proceedings started with a motion by the Attorney General seeking the committal for contempt of Kalafi Moala in relation to this newspaper editorial which I have referred to.

Those proceedings were commenced on the 20th February this year. On receipt of that motion I directed that there should be an affidavit or affidavits filed setting out the evidential basis for the application, including exhibited copies of the newspaper and a verified English translation.

An affidavit was filed confirming the newspaper and the translation which had been supplied but going on to refer in paragraph 2 of the affidavit of Joanna Weigall to defamation proceedings which are, and were, completely irrelevant to the editorial published which has been complained about, and to these present proceedings.

It may be that the Crown has to look at that affidavit and what is said in it because, it seems to me, that if as claimed this complained about editorial interfered with the course of justice in particular legal proceedings then it is those particular legal proceedings which the affidavit should refer to, not some quite unrelated or irrelevant defamation proceedings. The particular proceedings which are claimed to have been effected are criminal, or private prosecution, proceedings in the Magistrates Court, presently on appeal to this Court. That is something of a side wind but none the less I feel constrained to mention it in relation to the state of this file.

On the 18 March 1996, I granted leave to the Attorney General to issue a summons to Kalafi Moala directing him to appear in this Court on Friday 29 March to show cause why he should not be committed for contempt of court; and I directed that the Attorney General should serve Kalafi Moala with the summons, my order of 18th of March, the notice of motion and the affidavit.

Later today I will come back to that aspect of service in relation to Kalafi Moala because it seems that the proceedings against him have not been properly served on him and the summons against him will have to be further enlarged to enable service to take place.

On the 29 March application was made on behalf of the Attorney General, (that application being supported by an affidavit to which I will come shortly) to join or to add as a respondent Filokalafi 'Akau'ola, the Deputy Editor of the newspaper. Mr 'Akau'ola, in person and with counsel, was present on the 29 March when an order was made adding him as a respondent to the contempt proceedings.

That order was made on the basis of an affidavit on behalf of the Attorney General, sworn by the Acting Solicitor General, that, inter alia, stated and I quote "printed in every

issue of the Taimi 'o Tonga is the fact that Filokalafi 'Akau'ola is the Deputy Editor of the Taimi 'o Tonga" and further "at all material times Deputy Editor of the Taimi 'o Tonga, Filokalafi 'Akau'ola, had been responsible for the said editorial of the Taimi 'o Tonga "Vol.7 No.50", during the absence overseas of the Editor and Publisher of the Taimi 'o Togna, Kalafi Moala".

On the 29 of March 1996, not only did I make an order joining Filokalafi 'Akau'ola as a respondent to the contempt proceedings but I also set the matter down for hearing against both men (the question of service on Kalafi Moala not having being raised at that time) the trial to take place today Friday 21 June 1996.

110 The matter has been set down for trial, then, for some three months or so. In response to a direction made by me that any affidavits, to be filed in reply by the respondents (if such affidavits were to be made - and there is no complusion in that regard, these being criminal proceedings, to which the usual criminal onuses and standards apply) but as I say in response to that direction the respondent Filokalafi 'Akau'ola on 16 April 1996, swore, and filed in this Court, an affidavit in these proceedings.

In it he took issue with the wrongful mention of the defamation proceedings in the affidavit of Ms Weigall yet no step seems to have been taken by the Crown to rectify that position (and that is the matter that I have already referred to) but he also, firstly and more importantly, said this: He "fully denied" the allegations saying:- "That I have no knowledge to the publication of this article appearing on Taimi 'o Tonga Vol 7 No.50, 27/12, because I was on vacation leave overseas".

He went on to point out the difficulty about the defamation proceedings and, other than that, he asked for an order that the action be struck out against him, with costs.

As I say that affidavit was filed on 16 April 1996, over 2 months ago. The affidavit, according to the certificate of service on my file, was served on Crown Law on 17 April. Certainly the Acting Solicitor General today in front of me does not argue that the Crown did not know of the affidavit.

130 Today, I came into court anticipating that the contempt proceedings would be heard against both respondents. I anticipated the respondents presence today to answer the allegations. So, likewise, as Mrs. Taumoepeau frankly conceded to me, did the Crown anticipate their presence. That being so in effect the Crown anticipated (as I did) the matter, the application for committal for contempt, proceeding today.

As it has turned out Kalafi Moala is not present and, as I have said, there have been problems in relation to service, which I will deal with subsequently.

140 Filokalafi 'Akau'ola however was present and he, both in person and through his counsel, acknowledged service on him of the summons and of the earlier documentation and indeed he acknowledged service of those documents in his affidavit, which I have already referred to.

When I raised with Mrs. Taumoepeau the matter of proceeding against Mr. 'Akau'ola today, he having appeared to answer, she indicated that she sought an adjournment of the proceedings against him. She rather based her position in this way: that because of the defects in the service on Mr. Moala and because of the both respondents in relation to these proceedings and their positions in relation to the same article, therefore the proceedings against Mr. 'Akau'ola should be held over until Mr. Moala is properly served and before this court.

150 She frankly conceded that she did not have evidence available to her today to call

in relation to the case against Mr. 'Akau'ola and, in particular, in relation to his denial on oath that he had no knowledge of the publication of this article, because he was "on vacation leave overseas".

Mrs. Taumoepeau indicated that the prosecution against Mr. 'Akau'ola was brought on the basis that he was the Deputy Editor and that he is normally shown on the mast-head of the newspaper as being the Deputy Editor.

180 Interestingly enough on the mast-head of the particular edition of the newspaper in question that is of 27 December 1995 Mr. 'Akau'ola's name does not appear. Mrs. Taumoepeau submitted that previous and subsequent editions of the newspaper showed him as being the Deputy Editor. If that in fact is so, and given the absence of his name on the edition in question, that in my view indicates some substantiation of what Mr. 'Akau'ola himself has said on oath in his affidavit namely that he was away at the time of this particular publication on 27 of December last year.

Mrs. Taumoepeau indicated to me that she did not have available to her any evidence on this point; that is she could not call evidence to indicate to his court involvement by Mr. 'Akau'ola in this particular edition, let alone that he had some responsibility in relation to the actual editorial under question.

170 The Crown have had some 2 months, at least, to prepare its case; it came along to court today anticipating the matter proceeding. How, it was going to do that against Mr. 'Akau'ola in the face of his denial of involvement of any sort I cannot comprehend at this stage.

That being the position I am not prepared to grant an adjournment of this case against Mr. 'Akau'ola. It has been set down now for 3 months, and for at least 2 months of which the Crown have known of his denial of involvement and of responsibility. Given that and given the concessions made to me today and, as I say, given the caution with which contempt proceedings should be approached generally (as I remarked at the start of this judgment), I have reached the clear view that these proceedings against Mr. 'Akau'ola (and I emphasize that it is only in relation to him) should be dismissed. That I now do. The application, in so far as it relates Mr. 'Akau'ola for committal for contempt of court in relation to the article in the Taimi 'o Tonga of 27 December 1995 is dismissed.

I am also of the view, in the circumstances, that he is entitled to costs and failing agreement as to costs then costs will be as fixed on taxation by this court.

190 That completes the judgment so far as it relates to Mr. 'Akau'ola. Mrs. Taumoepeau, in relation to Kalafi Moala, accepts that personal service has not been effected on him, of the summons and all of the other documents such as the notice of motion and affidavits, the translation of the article in question. I am told, by Mrs. Taufaeteau, that Mr. Moala is presently in New Zealand, and is resident there. Mrs. Taumoepeau has applied for leave to serve the proceedings on him, out of the jurisdiction. In the circumstances I am prepared to make such an order.