'Akau'ola v Attorney General

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 3/97

12 & 20 June 1997

Contempt of court - administration of justice

The facts of this matter are clearly set out in the reports immediately above. One respondent in the court below, the journalist, appealed to the Court of Appeal.

Held:

1. The judge below did not find a contempt in the ordinary sense of an interference with the administration of justice in a particular case. Instead there was a finding of contempt in the sense of a "scandalising the court".
2. It was not easy to see how the paragraph in question could have been held, beyond a reasonable doubt, to have had that effect. Justice is not a cloistered virtue.
3. Although the trial judge held that the Speaker should have known that there could not possibly be any ground for the impeachment of the Chief Justice, on the basis suggested, no such finding was made against the appellant, nor could it have been, at least beyond reasonable doubt..
4. The court, by which the rule of law is maintained and implemented, is at the heart of a free society; but it is not a fragile institution. It is, and must be, robust enough to bear the criticisms of the dissatisfied. It was not set up so much to be protected, as to protect.
5. Accordingly, the publication (by the appeallant) of the remarks of the Speaker cannot be held to justify a finding of contempt of court. The appeal should be allowed, the orders against the appellant set aside and the motion against him dismissed.

Cases considered:

St. James's Evening Post case (1742) 2 Atk 469
R v Gray [1900] 2 QB 36
Ambard v A.G. (Trindad & Tobago) [1936] AC 322
Sol. Gen v Radio Avon [1978] 1 NZLR 225

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Cauchi

Judgment

This is an appeal against a conviction for contempt of court, and the imposition accordingly of a fine of T$500.

The circumstances have achieved some notoriety in Tonga, the background to the case being an order of the Supreme Court made 14 October 1996 for the release of three persons from imprisonment under a warrant issued by the Speaker of the Legislative Assembly. It was the Chief Justice who made that order, which is also the subject of an appeal to this Court. Following the release of the three persons, one of them, the appellant, who is a journalist and assistant editor of a newspaper circulating in Tonga, on 14 November 1996 interviewed the Speaker of the Legislative Assembly, seeking his reaction to the judgment of the Chief Justice. An article written by the appellant then appeared in an issue of the newspaper dated 27 November 1996. The appellant explained that publication of the article had been delayed, pending the lodgment of an appeal against the Chief Justice's decision, at the request of the Speaker.

Two of the three men released were the editor and assistant editor (the appellant) of the newspaper, the third being a member of Parliament named 'Akilisi Pohiva who had given them information for a "scoop", so the article could hardly have been supposed by any reader to be an attack on the Chief Justice. However, it reported the events at some length, and that the Government was lodging an appeal. One paragraph was alleged, however, to amount to a contempt of Court. It read to the following effect:

> "In a statement by Fusitu'a [i.e. the Speaker], he said that he was dissatisfied with the judgment of the Hon. Chief Justice and he also said: if there is an appeal and the Legislative Assembly is right, may be it is correct to do work [sic] to the Hon. Chief Justice to impeach."

Unfortunately, on 25 November 1996, a trial had commenced before the Chief Justice and a jury, in which Mr Pohiva was accused of criminally libelling the King; and on 29 November 1996, the Chief Justice disqualified himself from continuing to preside over that trial.

In these circumstances, it is not surprising that the Attorney-General instituted proceedings for contempt of Court against the Speaker and the editor and assistant editor of the newspaper. There must have seemed to be a likelihood that the timing of the article was not coincidental, and that it had been a major embarrassment in relation to an important criminal trial, which had to be aborted as a consequence. However, the timing was explained at the hearing by the Speaker's request for delay. What the judge held was that the Speaker "intended to interfere with the proper course of the administration of justice by putting about misleading information." His Honour added: It is an interference with the administration of justice and accordingly a contempt of Court". This is not a finding that the publication was calculated to interefere with the due course of justice by causing the Chief Justice to disqualify himself from continuing to hear the trial of Mr Pohiva. That is to say, there was no finding made of contempt in the ordinary sense of an interference with the administration of justice in a particular case.

Instead, the judge at first instance found a contempt in the sense conveyed by Lord Hardwicke's phrase (in the St James's Evening Post case (1742) 2 Atk. 469) "scandalising the court". That form of contempt was said by Lord Russell of Killowen CJ (in R v Gray [1900] 2 QB 36 at 40) to consist of "any act done or writing published calculated to bring

a court or a judge of the court into contempt or to lower his authority."

But it is not easy to see how the paragraph in question could have been held beyond a reasonable doubt to have had this effect. Mere criticism, even strong criticism, is not enough. In a celebrated passage, Lord Atkin said (in Ambard v Attorney General for Trinidad and Tobago (1936) AC 322 at 335):

> "But whether the authority and postion 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 much be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

The reference to "cloistered virtue", in this context, is obviously meant to recall Milton's famous defence (in the Areopaqitica) of the freedom of the press. The New Zealand Court of Appeal (Richmond P., Woodhouse and Cooke JJ) was (with respect) right in Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225 at 230 when it added, after citing Lord Atkin's pronouncement:

> "The right of the press or the public to criticise the work of the courts was again strongly upheld by the Court of Appeal in England in *R v Commissioner of Police, Exp Blackburn (No.2)* [1968] 2 QB 150; [1968] 2 All ER 319. The courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice."

When the Court comes to apply these statements of the law to the facts of the present case, it must remember that the appellant was held to have reported faithfully a comment made to him by the Speaker of the Legislative Assembly. The judge held that the Speaker should have known there could not possibly be any ground for impeachment of the Chief Justice on the basis suggested. But no such finding was made against the appellant, nor could it have been, at least beyond reasonable doubt. So far as he was concerned, the suggestion had been made by the Speaker of the Legislative Assembly to which the power of impeachment was entrusted by cl.75 of the Constitution.

Also, though it was indeed "wrong headed" of the Speaker to think (if this is what he alluded to) that the allowance of an appeal against the Chief Justice's orders could trigger the application of that part of cl.. 75 which refers to "incompetency", or (supposing the only possible alternative) that the bona fide exercise of a jurisdiction to review the constitutionality of the Legislative Assembly's action could amount, within the meaning of cl. 75 to "breach of the ... resolutions of the Legislative Assembly", that sort of wrong

headedness is just what Lord Atkin declared does not amount to contempt. Indeed, as the view of a member of the Legislative Assembly, the Speaker's comment had serious public importance. It was not expressed in inflammatory or abusive language. Far from denigrating the Chief Justice, the publication of the Speaker's remark might well have been taken to indicate that Tonga had the great benefit of an entirely independent judiciary, properly free of subservience to any other branch of government.

In Borrie and Lowe: The Law of Contempt, 3rd ed. (1996), at 347, the learned authors, having referred to Lord Atkin's endorsement of the right of criticism, refer also to newspaper articles "in the most intemperate language ... accompanied by cries for the judge's resignation or dismissal", but they do not suggest these articles have led or should lead to any convictions for contempt. Indeed, they indicate (at 351) than in the previous 65 years there had been no "successful prosecution for contempt by scandalising ... brought in England and Wales". The Court, by which the rule of law is maintained and implemented, is at the heart of a free society; but it is not a fragile institution. It is, and must be, robust enough to bear the criticisms of the dissatisfied. It was not set up so much to be protected, as to protect. Of course, the extremes of calumny, which might weaken even the strongest institution, need to be repelled. But contempt of court by scandalising the court should be found only in those extremes cases. Public reference to a constitutional provision for impeachment will not, in itself, be such a case.

Bearing in mind the requirement that the tendency to scandalise the Court be shown beyond reasonable doubt, the publication of the remarks of the Speaker cannot be held to justify a finding of contempt of Court. Accordingly, although, for the reason stated earlier, the prosecution of this matter by the Attorney-General was entirely appropriate, yet on the evidence adduced and the findings made at trial, the appeal should be allowed with costs; the orders made against the appellant should be set aside; and the motion should be dismissed as against the appellant. However, as the bringing of the motion was at least contributed to by the appellant's own action in procuring the publication of the article at the very time when the trial of Mr Pohiva was proceeding, there should no order as to the appellant's costs of the motion.