

Attorney General v 'Akau'ola

Supreme Court, Nuku'alofa

Lewis J

C.197/97

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7, 9 & 14 April, 1997

Contempt of court - penalty - retraction - failure to comply with court order

The respondent failed to publish the retraction as ordered (see the judgment reported immediately above).

Held:

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1. The cause of the failure was the wrong advice given the respondent by his lawyer. No stay pending appeal had been applied for.
2. The absence of compliance with the earlier court order made the contempt of the respondent a continuing one and more serious.
3. The respondent could not shield himself behind the erroneous advice of counsel.
4. The motion was found proved but in view of the apology and explanation costs only were ordered to be paid by the respondent.

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Note : The respondent later succeeded on appeal from the main judgment. The Court of Appeal judgment is reported immediately following.

Case considered: M v Home Office [1992] 4 All ER 97

Rules of Court considered: Supreme Court Rules 1991, O26

Counsel for Attorney General : Mr Cauchi

Counsel for respondent : Mr Tu'utafaiva

Judgment

On 3 February 1997 after a contested allegation of contempt of Court by the Respondent to this motion, Filokalafi 'Akau'ola, the Respondent was found in contempt of this Court and fined. That contempt was found to arise from his participation in the publishing in Taimi 'o Tonga Newspaper of a contempt by Hon. Fusitu'a.

By the same Order by which the fine was imposed, the Respondent was required to publish a retraction and apology the form of which was to be settled by the Solicitor General of the Kingdom of Tonga. The Order contemplated that the draft apology be presented to the Solicitor General in time for it to be considered, altered if necessary and then presented for Publication in Taimi 'o Tonga in its next edition.

No such publication has occurred to the date of this Judgment in spite of numerous approaches by Mr. Cauchi of counsel for the Hon. the Attorney General to the Respondent, and in spite of warnings given in Chamber hearings by Mr. Cauchi leading to the open Court hearing today.

'Akau'ola has been represented by Paluvava'u Taufateau in both the former and the present Motions. The Respondent now has Siosifa Tu'utafaiva as leading counsel. It became necessary because it has now emerged (although it has only emerged just before this final hearing,) that the cause of the failure of the Respondent to retract and apologise for his original contempt is the consequence of wrong advice given him by his representative Mrs. Taufateau.

It is most regrettable that the Respondent has been placed in such an invidious position. The Respondent says and his legal adviser accepts that he had prepared the letter of apology and retraction and that he had delivered it to the Crown Law office. On the 14 February 1997 the wording of it was settled with Crown Law. On the Sunday following the 14 February the Respondent met his legal adviser at church. He says that at that meeting Mrs. Taufateau told him to withhold the publishing of the apology and retraction because the decision of the Court had to be appealed. On the basis of the advice given him by Mrs. Taufateau he stopped the publishing of the Apology and retraction.

An Appeal was filed in this court and served on the Crown Law Office against the findings and Orders of Lewis J made in the matter of Fusitu'a and 'Akau'ola by the Respondent (but not by the Hon. Fusitu'a) weeks after the due copy date for the Taimi 'o Tonga. Moreover no attempt to stay the Order of 3 February was made.

It does not appear to have been comprehended by the legal representative for 'Akau'ola that his undertaking to make a retraction and apology was a factor affecting the leniency which was extended to the Respondent. Indeed Mrs. Taufateau's client consented to the Order made. It does not end there.

The absence of compliance with the Order of 3 February (i.e. the failure on the part of the Respondent to retract and apologise) makes the contempt a continuing one and therefore far more serious than it was initially.

If there was any procedural uncertainty in the mind of the Respondent's legal adviser then it was her clear duty to seek the advice of counsel. It must be said, it should have been as clear as it could possibly be to counsel that her first duty was to file an Appeal Notice within the time limit set for the publication of the retraction and apology and within that same time constraint to apply before a Judge in chambers for a Stay of the Orders under Appeal. The path of events would then have been open for the publication to have been deferred until after the decision of the Court of Appeal.

Counsel for the Crown submits that the Respondent cannot shield himself behind the erroneous advice of his counsel. He cites M v The Home Office [1992] 4 All ER 97 per Donaldson M.R. at 132 in submitting that Akau'ola is bound by what his counsel has said to the Court and bound by the advice given him when he chooses to act on it in cases such as the present. I accept that submission.

90 I conclude this judgment by commenting on the lamentable way this matter has been managed by the Respondent's legal adviser. In so saying I take into account the matter referred to in para 4 of her affidavit sworn on 8 April 1997. Wherever counsel or solicitors find themselves in predicaments whether of their own making or not, the first and only course to take it to either refer the matter to a senior colleague or to take advice of Senior Counsel.

I am satisfied from the material before me and from those matters of which I am entitled to take Judicial Notice that the Respondent has committed a continuing contempt of Court by disobedience and non compliance with the Order of this Court date 3 February 1997 in that he failed or omitted to publish on page one of the edition next after 3 February of "Taimi 'o Tonga" newspaper a retraction not smaller in prominence than the article complained of to be written in such a fashion as shall be approved of the Solicitor General acting on behalf of the Attorney General.

100 Counsel for the Respondent submitted that there has been a noncompliance with RSC Order 26 Rule 12 by the Crown in the present case. I do not propose to make a ruling on that submission. It does not reflect well on the Respondent to have it made. There has been a submission to the jurisdiction of the Court to hear and determine this matter on the Motion and indeed an apology for the breach has been made through his now Counsel.

For the sake of completeness I choose to proceed to deal with this matter pursuant to Order 26 Rule 12 (3) (vi) invoking as I do the inherent power and jurisdiction of this Court to make an Order of its own motion.

110 I find the matters set out in the notice of motion proved. Taking into account all the circumstances in this case including the fact that Respondent apologies for the breach since its beginning, I consider that the Respondent should pay the Costs of these proceedings to be taxed or agreed. I make no further or other Order.