IN THE SUPREME COURT OF TONGA C.APP. 176/99
CIVIL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : 1. SIOSIFA FIFITA
2. SIMI TEKITEKI
: **Appellants**

AND : 1. TAVAKE FUSIMALOHI
2. TONGA BROADCASTING COMMISSION
: **Respondents**

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : Mr S. Tu'utafaiva for Appellants
: Mr P. Muller for Respondents

Date of Hearing : 30 September 1999
Date of Judgment : 11 October, 1999

JUDGMENT OF WARD CJ

The appellants in this case were the plaintiffs in an action for defamation in the Magistrates' Court. The defamation alleged in each case was contained in a radio message broadcast by the second respondents on 22 April 1998.

The appellant, Simi Tekiteki, is the supervisor of Elections and the appellant, Siosifa Fifita, works in the same department. At the time the message was broadcast, Fifita was on 'Atata island working as an Election Officer.

Tekiteki and the first respondent were both drinking in the Nuku'alofa Club in company with a number of others all of whom meet there regularly for a social drink. All witnesses accepted that they were good friends who spend much of their time there teasing and making jokes, hua, about and at each other. On the evening of 22 April there had been hua as usual and, in the course of that, the first defendant had suggested putting out a notice on Radio Tonga addressed to Fifita. It had been a long running joke that Fifita did not get as many trips abroad as Tekiteki and the message was an oblique repetition of that joke.

The message as stated in the claim was:

> "To Siosifa Fifita, Royal Sunset, 'Atata. Thank you for doing the work; do it seriously; do it to the best; be thankful that you have a visit to 'Atata. Next time you will go to Niua. From your leader. Simi Tekiteki."

When the first respondent suggested sending a message, Tekiteki was present and joined in the discussion although it is not clear from the evidence whether the actual wording had been decided at that stage. He did not demur from the suggestion that a message should be sent. His only comment was to suggest it should be sent out as having been signed by another member of the usual group by the bar.

In the event, neither Tekiteki nor Fifita heard the message on the radio but it was broadcast and was certainly heard by a number of people some of whom mentioned it to them.

In a lengthy and carefully reasoned judgment, the magistrate rejected the claim against both defendants.

Both appellants have submitted identical grounds of appeal. The first three are that the magistrate failed to consider the claims of the appellants separately, that he failed to consider the evidence in full and his finding that the evidence was insufficient to support that appellants' claim is contrary to the evidence called.

I can deal with those very shortly. Counsel for the plaintiffs at the trial asked for both cases to be heard together. The evidence of the defamation was similar in both cases and it was a sensible request. I can see nothing in the judgment to suggest that the magistrate failed to consider the issues separately in relation to each appellant. On the contrary, more than once, he specifically refers to the difference in the circumstances of the incident as they related to each plaintiff and the effect on each of them.

I can also see nothing in the judgment to suggest the magistrate did not fully consider the evidence or came to a wrong conclusion on its sufficiency. The judgment sets out the evidence in considerable detail and evaluates it with clarity. An appellate court will only, in the clearest cases, interfere with the magistrate's finding of fact and I see no support for the appellants' claim in the first three grounds.

The problem the plaintiffs faced at the trial and which was accurately identified by the magistrate was that none of the witnesses who had actually heard the announcement and were called to prove its defamatory meaning considered it had any such meaning. Other witnesses spoke of their view that it did have such a meaning but they had heard the words repeated by others and inaccurately.

The fourth ground is that the magistrate failed to consider the effect of section 16(1)(c) of the Defamation Act. As far as relevant, that section reads;

> "16. (1) In any civil action for defamation of character.... if the defamatory matter consists of spoken words which.... (c) are uttered of any person in connection with his trade business or calling ; .... it shall not be necessary for the plaintiff to prove that he has sustained any monetary or actual loss by reason of the publication of such defamatory matter."

This is a restatement of the common law exception to the rule that slander is only actionable on proof of actual loss or damage.

I do not accept the magistrate erred in this aspect of the case. The judgment shows that he was concerned throughout with the question of whether the words could in fact have had the defamatory meaning suggested or any defamatory meaning. There is nothing to suggest that he reached his conclusion against the plaintiffs because of any failure to prove actual loss. He more than once considered the effect the words may have had on the reputation of the plaintiffs without any mention of a need for the evidence to go any further. This ground fails.

Ground five is that the magistrate erred in his application of section 17 of the same Act:

> "17. If at the trial of any civil action for defamation of character if appears to the judge or magistrate that the words complained of are not reasonably capable of a defamatory meaning he shall enter judgment for the defendant but if the judge is satisfied that the words are reasonably capable of a defamatory meaning he shall leave it to the jury to decide whether the words have in fact a defamatory meaning."

I can find no justification for this ground. The magistrate was correct in considering it as he did. He correctly applied the test of whether the words were capable of a defamatory meaning both in their actual meaning or in any inference and also went on to consider whether they did in fact have such a meaning.

The final ground is that the magistrate erred in his decision that the Tonga Broadcasting Commission could not be liable. In view of the decision that the matter was not defamatory, that decision had to follow. However, it is correct that the basis upon which the magistrate reached the conclusion to absolve the second defendant from liability was flawed. The media carry a special responsibility and cannot avoid the consequences of broadcasting a defamation just because it was paid for by the author and they knew nothing of the meaning. Had the magistrate found the message was defamatory, in the absence of any special defence by the second defendant, it would have been liable.

Counsel in the lower court provided the magistrate with lengthy submissions on the law and I acknowledge with gratitude the equal care with which the case was

argued before me. I intend no disrespect to counsels' endeavours if I do not set those out specifically but this was a case in which the magistrate tackled a difficult aspect of the law and a considerable volume of evidence with great care and accuracy. It is clear he was very sensitive to the effect such things may have in the particular circumstances of Tongan society. I cannot find anything to persuade me he went wrong in any of the matters raised in this appeal with the exception of his reasons for the finding for the second defendant

I cannot avoid the comment that this was a stupid action made worse by the fact that it was effectively an abuse of the position of the man who did it. He should have been working to stop the radio from being used for this type of potentially offensive message - not using it that way himself. The practice of teasing, hua, in Tonga is a common and normal part of any informal gathering but it always runs the risk that it will go too far and cause hurt or distress to the person at whom it is directed. This was just such a case but it fell far short of establishing a case of defamation. Both the plaintiffs gave evidence of the distress it caused them but the evidence as a whole failed to establish that the words broadcast conveyed the meaning to anyone else that they suggested.

The appeal is dismissed. However, in view of the comments I have made about the actions of the first defendant, I shall make no order for costs of the appeal.

SUPREME COURT TONGA

NUKU'ALOFA: 11th October, 1999 **CHIEF JUSTICE**