INSPECTOR OF POLICE v. TAGALOA AND FUATAGA

HIGH COURT. 1927. 8, 11, 14 July. WOODWARD C.J.

Banishment order - Samoan Offenders Ordinance 1922 - validity of order made thereunder - whether Ordinance ultra vires as repugnant to law of England - Samoa Act 1921 ss. 46, 349 - form of punishment not contemplated by law.

Accused was ordered by the duly authorised Acting Administrator under the power contained in clause 3 of the Samoan Offenders Ordinance 1922 to "leave the District of Tuamasaga North and remain outside...for 3 months". The order was served on the following day and accused was found on the next following day within the prohibited area. On information for breach and at the close of the prosecution's case, the accused moved to dismiss the charge on the grounds (a) that the Ordinance was ultra vires as being repugnant to the laws of England and as creating a species of penalty not contemplated by law, and (b) that the order itself was not validly made.

HELD: (1) That the Ordinance was validly made under the powers contained in section 46 of the Samoa Act 1921 and was not repugnant to that Act or to any other Act of the Parliament of New Zealand or of the United Kingdom or to the law of England.

Phillips v. Eyre (1870) 40 L.J. Q.B. 28, followed.

(2) Further, that no impropriety was disclosed in the exercise of the power by the Acting Administrator.

Jones v. Robson (1901) 70 L.J. K.B. 419 applied.

Accused convicted.

PROSECUTION for breach of banishment order under Samoan Offenders Ordinance 1922.

McCarthy, for informant.
Slipper, for accused.

Cur. adv. vult.

WOODWARD C.J.: The accused Tagaloa is charged that on 7 July 1927 he was found in the District of Tuamasaga at Apia in disobedience to an order of the Acting Administrator signed on 5 July 1927 and made under clause 3 of the Samoan Offenders Ordinance 1922, being contrary to clause 5 of the said Ordinance.

The prosecution has proved that an order was on 5 July 1927 made by the duly authorised Acting Administrator under clause 3, ordering the accused to forthwith leave the District of Tuamasaga North and to remain outside of an area which includes that district for 3 months. The order was served on the 6th instant. He was found in Apia which is within the said district on 7th instant. Clause 3 of the Ordinance reads:-

> "If the Administrator is satisfied that the presence of any Samoan in any village, district or place, is likely to be a source of danger to the peace, order or good government thereof, the Administrator may by order signed by him, order such Samoan to leave any village, district or place in Samoa and to remain outside such limits for such time

as the Administrator shall think fit and by the same or any subsequent order the Administrator may order such Samoan to reside in any place specified in such order."

The order states, following the wording of the Ordinance, that the Administrator is satisfied that the presence of the accused within the area in question is likely to be a source of danger to the peace, order, and good government thereof.

Counsel for the accused moved at the close of the case for the prosecution on 8th instant, to dismiss the charge on the grounds (a) that the Ordinance is ultra vires as being repugnant to the laws of England and as creating a species of penalty not contemplated by law, and (b) that the order itself is not validly made.

Counsel's argument on 8th instant gave the Court little assistance in the way of authority. On 11th instant I consented in view of the importance of the issue involved, to his argument being re-opened for the purpose of his quoting further authorities. At the conclusion of his further argument he intimated that he did not propose to call evidence and that his case was closed.

The original grounds taken are amplified in the subsequent argument.

I deal first with the contention that the Ordinance is void for repugnancy. Sections 46(1) and 349 of the Samoa Act read as follows:-

46. (1) "The Administrator, acting with the advice and consent of the Legislative Council of Western Samoa, may make laws (to be known as Ordinances) for the peace, order and good government of the Territory not being repugnant to this Act or to Regulations under this Act, or to any other Act of the Parliament of New Zealand, or of the United Kingdom in force in the Territory or to any regulations there in force."

349. (1) "The law of England as existing on the fourteenth day of January in the year eighteen hundred and forty (being the year in which the Colony of New Zealand was established) shall be in force in Samoa, save so far as inconsistent with this Act or with any Ordinance or regulation or inapplicable to the circumstances of the Territory:

Provided that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said fourteenth day of January in the year eighteen hundred and forty shall be in force in Samoa unless and except so far as it is in force in New Zealand at the commencement of this Act,

(2) For the purposes of this section all rules of common law or equity relating to the jurisdiction of the superior Courts of common law or of equity in England shall be construed as relating to the jurisdiction of the High Court of Western Samoa."

These sections are relied on as showing that if repugnant to the "law of England" the Ordinance will not stand. In using the words "law of England" I use counsel's own words and the words of section 349.

The argument will be clarified by an enumeration of the possible meanings of the words "law of England" in the context of section 349. I apprehend that this phrase - taken in the widest meaning that it is capable of bearing in the context - cannot include more than 3 elements. First

- Acts of the Parliament of England or of Great Britain or of the United Kingdom which were current on 14 January 1840 and which were in force in New Zealand at the commencement of the Samoa Act. Secondly - the undeclared Common law of England, and thirdly the principles of natural justice inherent in English law.

It was said by Willes J. in Phillips v. Eyre (1870) 40 L.J. Q.B. 28, a case in which a similar objection to that taken in this case, was raised to an Act of Indemnity of the Jamaica Legislature:

> "It was further argued that the Act in question was contrary to the principles of English law and therefore void. This is a vague expression and must mean either contrary to some positive law of England or to some principle of natural justice the violation of which would induce the Court to decline to give effect even to the law of a foreign sovereign state. In the former point of view it is clear that the repugnancy to English law, which avoids a Colonial Act, means repugnancy to an Imperial Statute...applicable to the Colony by express words or necessary intendment."

In that case it was not necessary to consider the Common law at all for reasons that appear from the judgment.

The meaning of repugnancy must next be considered. Its meaning is shown in an Australian case quoted by the Crown Prosecutor, Attorney-General of Queensland v. Attorney-General of Commonwealth. The note on that case in the English and Empire Digest Vol. 17 p. 424 is as follows:-

> "No Colonial Act can be repugnant to an Act of the British Parliament within the meaning of the Colonial Laws Validity Act 1565 unless it involve, either directly or ultimately, a contradictory proposition, probably contradictory duties and contradictory rights."

The root idea of repugnancy is a warring on contradiction. The inferior law would be repugnant to the superior law if it purported to take away a right expressly conferred by the superior. The fact that the inferior law creates a restriction which is not found in the superior law does not make the inferior repugnant.

Is this Ordinance then repugnant to the "law of England" on any of the three elements I have named? Taking the first, I know of no Act of Parliament, Charter or Statute which gives persons under all circumstances a right to go and remain where they please or deals in any way with the subject matter of this Ordinance. It was not suggested that any such existed. Mr Slipper quoted paragraphs from Halsbury's Laws of England under the heading Constitutional Laws. The Royal Prerogative which show the limits imposed by the great Charters of English liberty upon the powers of the Crown and its Ministers in respect of the liberty of the subject.

These matters are beside the point. The Ordinance is not made in virtue of the Crown's prerogative but in virtue of a power of legislation delegated to the Administrator in Council by the New Zealand Legislature.

Taking the second element, the undeclared Common law. If this Ordinance is repugnant to the Common law the same objection applies to the whole of the large body of legislation which abridges Common law rights. Obviously as the undeclared Common law does not expressly define rights, no substantive law can be said to be repugnant to it. Halsbury's Laws of England at Vol. VI 461 reads:

> "Apart from the general provisions...contained in the four great charters or statutes which regulate the relations between the Crown and the people, the liberties of the subject

are not defined in any law or code and provided he does not transgress the substantive law or infringe the legal rights of others he may say or do what he pleases."

Substantive law such as this Ordinance continually creates restrictions on Common law rights. The Crown Prosecutor quoted statutes which illustrate this. They are not ultra vires on that ground.

Taking the third element. It appears from the quotation I have read from the judgment in the case of Phillips v. Eyre (supra), that if the Act of Indemnity there in question had been found to outrage natural justice the Court would have declined to give effect to it.

The Ordinance in the present case is undoubtedly a serious restriction on personal liberty. It seems necessary to examine it closely.

The preamble indicates that the practice of what is there called "local banishment" was prior to 1901 a custom among the natives themselves and that from that date up to the date of the Ordinance, upwards of 20 years, the practice was recognised and controlled by law. The Ordinance has placed in the hands of the highest and most responsible officer of the Government of this Territory a power formerly exercised by Samoan natives.

Turning to clause 3, it is made a condition of the exercise of the power that the Administrator shall be satisfied that the presence of the person intended to be dealt with is likely to be a source of danger to peace, order and good government. The purpose then of the Ordinance is the highest and main purpose of Government, namely, the maintenance of peace and order and the Ordinance may not lawfully be used for any other purpose. The terms of the Ordinance ensure that the degree of liberty of movement of the person dealt with shall be left as wide as is consistent with attaining that purpose. The Ordinance can be applied only to those to whom the native custom of local banishment was formerly applied, viz., to Samoan natives.

It may well be that in a native community where the power of prompt and peremptory local banishment - not to mention more drastic measures - has been traditionally exercised by chiefs, it would be subversive of all authority and order if the head of the Government were discovered to be lacking in that power however abundantly he and his native advisers might be satisfied of the necessity for its exercise.

It may well be that natives of such a community, understanding nothing of the constitutional aspect of Government and accustomed to look up to the head of the Government as the repository of all authority, would, whether well or ill disposed to the Government, view the absence of such a power as clear proof of the Government's weakness or timidity and, if ill disposed, be induced to treat it with the contempt which in their view it would deserve.

It may well be that a line of conduct pursued by an individual native though not amounting to a breach of the law, though perhaps never contemplated as a possibility to be provided against by law, may yet in a native community become a serious menace to its peace and progress which it would be impossible to deal with unless some such power as this is promptly available to remove the individual from the locality where he is making mischief.

The Ordinance aims at the promotion of the general welfare of the native people and it is entirely consistent with natural justice and legislative precedent to subordinate where necessary, the rights of the individual to the welfare of the people as a whole. Considering the history of this piece of legislation, its purposes, the safeguards it contains and the community for which it is made I cannot regard it as contrary to any principle of natural justice inherent in the law of England.

The Ordinance is in no sense repugnant to the law of England. Counsel said he was prepared to contend that if the terms of the Samoa Act permitted

the local Legislature to make such an Ordinance as this the Act itself is ultra vires. He did not seriously follow up that argument. Similar considerations to the above would be fatal to it.

That it is competent to the Legislature in a proper case to authorise an officer of State to make orders involving even more serious restrictions is shown in the case of R. v. Leman St. Police, 89, J. K.B. p. 1201, which goes further than it is necessary for me to go in this case, in that it shows that the power of enquiry into the facts alleged to justify the order can be absolutely taken away from the Court.

It was also argued that the Ordinance is ultra vires in that it creates a kind of punishment not contemplated by law. This is not so. The injury, if any there be, inflicted on a Samoan by his being required to quit a given district and reside elsewhere, is incidental only to the purpose of the Ordinance which is the removal of disturbing elements from districts where they are a source of danger. Injury of the same kind results from laws empowering a Health Officer to restrict peoples' movements in order to prevent the spread of epidemic diseases. The only punishment contemplated by the Ordinance is punishment by the Court under clause 5 for disobedience to the order.

The second main ground taken was that, assuming the Ordinance to be valid, the Order made under it was not validly made. It was said that the words "If the Administrator is satisfied" necessarily implied that certain steps must be taken by the Administrator by way of enquiry into the matter of which he is to be satisfied. It was objected that no evidence was given of these steps having been taken. Counsel for the accused truly remarked that this Court does not know how the Administrator was satisfied. The case of Jones v. Robson (1901) 70 L.J. K.B. p. 419 was an appeal from a conviction for breach of an order made under power given by section 6 of the Coal Mines Regulation Act 1896 (United Kingdom) which reads as follows:-

> "A Secretary of State on being satisfied that any explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine..."

At the hearing a copy of an order purporting to have been made by the Secretary of State under section 6 was handed in. In giving judgment Bruce J. said:

> "Two points have been taken in this case. The first relates to the question whether the Order of the Secretary of State is valid and binding. The provision for making the Order is contained in section 6 of the Coal Mines Regulation Act, 1896. It was contended that it did not appear that the Secretary of State had been satisfied or that any evidence had been laid before him that this explosive was or was likely to become dangerous. I think the fact that the Secretary of State has made the Order is sufficient evidence that he was satisfied that the explosive was likely to become dangerous."

The judgment appears to have been an application of the maxim "omnia rite esse acta presumuntur". In the present case the Order states that the Administrator is satisfied. It is on the face of it a valid Order and I am of the opinion that the maxim applies and that in the absence of any evidence to the contrary the Order must be presumed to have been validly made.

The objections taken to the validity of the Ordinance and of the Order having failed and disobedience to the Order having been proved, the accused Tagaloa is convicted.

Similar facts are shown in Fuataga's case and the same argument covered both cases. Fuataga is also convicted.