Sanft and Siale v. Masao Paasi

Privy Council Court of Appeal, Nuku'alofa
H.M. The King, Ministers of the Crown, Sir Clinton Roper presiding
3 August 1987

Constitutional law – Constitution – Legislative Assembly – election – bribery – unseating by the Legislative Assembly – Article 66 and section 9 of the Legislative Assembly Act.

Constitutional law – Constitution – Legislative Assembly – election – Tongan nationals only can be candidates – Articles 64 and 65 and section 4 of the Nationality Act.

Constitutional law – interpretation – gap in the law – application of the Civil Law Act – application of the Representation of the People Act 1983 (U.K.).

In a preliminary hearing, Martin J. held that 'Ipeni Siale was not a Tongan subject and therefore not eligible to be elected a representative of the people. Article 66 of the Constitution and section 9 of the Legislative Assembly Act provide that a member proved to use threats or bribery to vote for him shall be unseated by the Assembly. Section 9 also provides for the police to prosecute but there is a gap in the law in that there is no provision whereby an elector or candidate could question an election where bribery had occurred. Paasi, an unsuccessful candidate, issued civil proceedings against Sanft and Siale alleging that each had acted unlawfully in the course of the election process in that each had used threats and bribery for the purpose of influencing electors to vote for him. Bribery was proved against the plaintiff and defendants and Martin J. declared the defendants' election void.

HELD: Appeal dismissed.

(1) Martin J. was correct in holding that Siale was not a Tongan subject and was not qualified to be an elector or candidate: *l.* 480.

(2) Martin J. was correct in relying on the Civil Law Act to apply the Representation of the People Act 1983 (U.K.) for there is a gap in the law whereby an elector or candidate could question an election where bribery has occurred: *l.* 510.

(3) By Article 66 of the Constitution the right to unseat a member of the Assembly who has used bribery for the purpose of persuading persons to vote for him remains with the Assembly and has not been delegated to the courts: *l.* 610

Legislation referred to in judgment:
Civil Law Act
Constitution Act section 1, 64, 65
Constitution Offences Act section 8
Legislative Assembly Act sections 5, 9

Nationality Act sections 2, 4
Representation of the People Act 1983 (U.K.)

Other sources referred to in judgments:
Parker, *Conduct of Parliamentary Elections* (1970)

Civil Proceeding:
This was an appeal by the defendants from Martin J.'s declaration that their election was void.

Tevita Fa for Hopate
L.M. Niu for 'Ipeni' 'A. Siale
W.C. Edwards for Masao Paasi

[Two Supreme Court judgments of Martin J. (12 May 1987 and 2 June 1987) in the case of *Paasi* v. *Sanft and Siale* are set out below. The judgment of the Privy Council, where the defendants appear as appellants, in *Sanft and Siale* v. *Paasi* follows.]

MARTIN J.

Judgment of 12 May 1987:

I am required to decide as a question of law whether the second defendant 'Ipeni Siale was properly qualified to be a candidate in the recent election. I shall assume for the purpose of this ruling that what he pleads in his defence is correct. What he says is:

He was born a Tongan subject. But he is now and was at all material times a naturalized citizen of U.S.A. He became a U.S. citizen in 1984. He did so because his sister and her husband were likely to be deported as overstayers. When he became a U.S. citizen they were allowed to remain as his "immediate family". But he had no intention of losing his Tongan connection. He wished to remain Tongan. It was purely a device for the benefit of his family. Presumably this information was not disclosed to the U.S. authorities. His application was granted but he returned to Tonga soon afterwards and was duly registered as elector.

The relevant law is this:

Clause 64 of the Constitution:

> Every Tongan subject . . . [subject to various matters which do not apply here] . . . shall be entitled to vote in an election for representatives of the people to the Legislative Assembly . . .

Clause 65 of the Constitution:

> . . . any person who is qualified to be an elector may be chosen as a representative [of the people] . . . [again subject to various matters which do not apply here].

What is a Tongan subject? Section 2 of the Nationality Act (Cap. 32) defines that. 'Ipeni Siale was born a Tongan subject.

Section 4(1) of that Act says this:

> A Tongan subject who when in any foreign state and not under disability by

obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall henceforth be deemed to have ceased to be a Tongan subject.

That seems to accord with common sense. One would expect that if you renounce your allegiances and your country you lose your privileges as a citizen of that country. 'Ipeni Siale became a citizen of U.S.A. On the face of it he ceased to be a Tongan subject. Among other things he renounced the right to vote in elections in Tonga, because he was no longer a Tongan subject.

Mr Niu argues that only applies if, when he became naturalized he was "not under disability." I agree entirely. The question is: What does "disability" mean in that context?

Mr Niu argues that it means any circumstances which force a person to act in a way which is not truly voluntary. Indeed his argument seems to go much further than that, and includes circumstances which tip the balance so that he makes one decision rather than another.

In my view that is not even an arguable defence. "Disability" in this context must mean a general disability recognized by law, such as infancy or lack of mental capacity. It may include misrepresentation or duress. But it cannot be extended to include the situation which Mr Siale describes. All he did was to weigh up alternatives and make a reasoned decision.

He was not "under disability" when he became a U.S. citizen.

Mr Niu has a further point. Section 4 of the Nationality Act is, he says, contrary to the Constitution. It takes away the basic rights of every native-born Tongan. He refers to the 1875 Constitution to explain what the present Constitution means. He is not entitled to do that. The old constitution was amended and amendments are intended to change what is thought to be wrong or out of date. One can only refer back in this way if the meaning of the present words is unclear. In my view they are entirely clear. The Constitution itself does not define the rights of a Tongan subject. There are no entrenched rights. There is no conflict between section 4 of the Nationality Act and the Constitution. It would be strange wouldn't it if the Constitution preserved the rights and privileges of a person prepared to renounce his obligations as a Tongan?

'Ipeni Siale is not a Tongan subject. He is not therefore "qualified to be an elector." He was not therefore eligible to be chosen as a representative of the people.

Mr Niu has a final argument. He says that this Court has no power to make a ruling whether 'Ipene Siale was entitled to vote. He argues in this way: persons entitled to vote are all those whose names appear on the register of electors; Mr Siale was registered as an elector; the method of correcting errors in the register is prescribed in section 5(e) and 5(g) of the Legislative Assembly Act. No action has been taken under those sections; and a court cannot interfere unless those steps have been taken first. And he points to section 56(3) of the (English) Representation of the People Act 1983. This provides that where an appeal against an entry in the register has not been determined when an election is announced, the original entry in the register remains in force. That must apply also, he argues when an election is over before an objection is made.

There is no specific provision in Tongan law or English law to say what happens if a candidate's eligibility is challenged after the election. Mr Niu argues that there is

no remedy even if there were deliberate fraud (I hasten to say that that is not alleged against Mr Siale).

I find help in the standard text book on the subject – Parker's *Conduct of Parliamentary Elections*. At p. 274 (1970 edition) it states "a person disqualified at common law (e.g. a peer) or by statute (e.g. a minor) is subject to a legal incapacity to vote *and is not entitled to vote though his name be on the register*". The learned author goes on to quote a number of authorities in support of this statement. These show that the register is *not* conclusive as to a person's right to vote.

But I base my decision on a much broader ground. Where there is a wrong, the law must provide a remedy. If a person becomes a candidate by fraud which is only discovered after the election, I have no doubt that the Court could investigate under its inherent authority. There is no difference in principle between that situation and that I will presume to be the situation here – where a candidate misunderstands his position. There is no specific statutory authority. It is therefore open to the Court to exercise its inherent jurisdiction.

And there is a further consideration. Clause 65 of the Constitution permits only a properly qualified candidate to be elected. If for whatever reason a person who is not properly qualified is elected that election is of no effect. It is not in accordance with the Constitution. The Court does not have a discretion whether or not to set aside his election. If he was not properly qualified for whatever reason the Court must declare his election void.

Accordingly I find that this court has jurisdiction and on the admitted facts that at the material times:

(i) 'Ipeni Siale was not a Tongan subject. He was a subject of the U.S.A.
(ii) He was not therefore qualified to be an elector in Tonga.
(iii) He was not therefore eligible to be elected as a representative of the people.

And I declare that his election as a representative of the people for the district of Vava'u was void.

That finding is sufficient to dispose of this action in respect of the second defendant. But in case I should be wrong I propose also to hear and determine the allegations of misconduct by him.

MARTIN J.

Judgment of 2 June 1987:

This action was brought to challenge the result of the election for the electoral district of Vava'u held on 19 February 1987. The plaintiff and the first and second defendants were all candidates. The first and second defendants were elected. I have already ruled that as a matter of law the second defendant 'Ipeni Siale was not qualified to be a candidate and my reasons appear elsewhere. At an early stage in the trial the plaintiff abandoned his allegations that the Kingdom of Tonga had failed to ensure the proper conduct of the election and that part of the claim was dismissed. The action continued on the plaintiff's allegations of bribery by the first and second defendants; and on the first defendant's counterclaim alleging bribery by the plaintiff.

The findings of the jury may be summarized by saying that they found

(i) that the first defendant, Hopate Sanft, made a total of twenty three

payments to various persons with the intention of obtaining votes or of influencing electors in their votes; and that he provided free transport for electors with the same intention;

(ii) that the second defendant, 'Ipeni Siale, made two different promises of money to a local college, with the intention of obtaining votes or of influencing electors in their votes; and

(iii) that the plaintiff, Masao Paasi, made a total of nineteen payments to various persons with the intention of obtaining votes or of influencing electors in their votes.

Bribery was therefore proved against each of these parties. In view of the jury's findings, the plaintiff did not pursue his allegations against the first defendant of undue influence, and the technical offence of hiring transport for the conveyance of electors to the polls. In order to provide some guidance for the future I will state my views on the law relating to those matters – with the reservation that the matter was not fully argued and my views are necessarily obiter.

The statute law of Tonga relating to election is fragmentary.

The procedure for elections is set out in Section 5 of the Legislation Assembly Act (Cap. 4).

Electoral offences are created by sections 8 and 9 of that Act. They are criminal offences. Section 8 makes it an offence to deceive or attempt to deceive a registration officer. Section 9 makes it an offence "to use threatening language or bribery for the purpose of obtaining votes or of influencing electors in their votes, and any person" (whether or not a candidate) "found guilty of such shall on conviction be punished according to the law of bribery."

It is not entirely clear what that means. There is no offence of simple bribery in the Criminal Offences Act (Cap. 15). Section 50 of that Act creates the offence of bribery of a public servant. It does not appear to be illegal to bribe any one else. A candidate is not "a government servant". It is open to doubt whether section 9 creates an offence at all, because it purports to incorporate an offence which does not exist. But even if it does, this section creates only a criminal offence.

Section 9 goes on to require the Legislative Assembly to unseat any member convicted of bribery; and empowers the Minister of Police "to prosecute all parties concerned in the offence".

There is another provision. Clause 66 of the Constitution states:

> Any person elected as a representative who shall be proved to the satisfaction of the Assembly to have used threats or offered bribes for the purpose of persuading any person to vote for him shall be unseated by the Assembly.

So the law of Tonga provides two means of dealing with a candidate who gives bribes:

(i) under section 9 (assuming that this *does* create an offence) a power to a criminal court to punish him; after which the Assembly is required to unseat him.

(ii) under clause 66, a power to the Assembly itself to investigate and unseat him.

It is argued by the plaintiff that section 9 creates a separate offence of "influencing electors". In my view it does not. The words "... or of influencing electors in their

votes" relates to the purpose of the payment. It does not create a separate offence.

It was also suggested that it can be an electoral offence to display posters and distribute pamphlets; and to set up stalls in the vicinity of a polling station in order to supply information to voters. It is not illegal under Tongan law. Nor was it forbidden in the regulations made by the Chief Returning Officer. Nor is it illegal under Tongan law to provide free transport to convey voters to the polls – provided that this is not done as a bribe, for the purpose of obtaining votes or of influencing electors in their votes.

There is no other provision in Tongan law relating to misconduct at elections. There is no provision for any elector or candidate to question a parliamentary election in civil proceedings. As Mr Martin, as amicus curiae, pointed out, if unlawful payments are made, and the Minister of Police does not prosecute under section 9, and the Legislative Assembly takes no action under clause 66, Tongan law provides no remedy. Those provisions do not debar any other form of action, but none exists. There is a gap in the law.

It is this situation for which sections 3 and 4 of the Civil Law Act (Cap. 14) provide.

> 3 Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England.
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> 4 The common law of England, the rules of equity and the statutes of general application referred to in section 3 of this Act shall be applied by the Court –
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> (a) only so far as no other provision has been ... made by or under any Act or Ordinance in force in the Kingdom; and
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> (b) only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary.

No "other provisions" have been made in Tongan law. The law relating to elections in England is contained in the Representation of the People Act 1983. That is "a statute of general application". It is a statute which is of general relevance to conditions in other countries; and it is not based on circumstances peculiar to England.

That Act should be applied to empower the Court to hear and determine civil proceedings brought to question an election, and to set aside the election if bribery is proved. "The Court" is not an election court of two judges without a jury, as created by the English Act, because Tongan law suffices. "The Court" must mean the Supreme Court with its jurisdiction conferred by clause 90 of the Constitution "in all cases in Law and Equity arising under the Constitution and Law of the Kingdom ..." (subject to exceptions which do not apply) and by section 4 of the Supreme Court Act (Cap. 8) which gives this Court jurisdiction "... in any other matter not specifically allotted to any other tribunal". The parties have the right to elect jury trial conferred by clause 99 of the Constitution.

That is as far as the English Act should be applied. It is only the remedy which Tongan law fails to provide. In all other matters only Tongan law should apply – because there *is* local provision, and because it is quite unreasonable to expect people to obey a law which was not previously known in Tonga, and could only have

been ascertained with great difficulty.

Section 9 of the Legislative Assembly Act provides two grounds upon which a Member may be unseated. It would be wrong to introduce the further grounds upon which an election may be set aside under the English Act. I therefore adopt the definition of bribery set out in section 9. By the same reasoning, the civil penalty should not exceed that provided by Tongan law, namely unseating. It would be wrong to introduce the further penalty of disqualification provided by the English Act.

There is a conflict between the Tongan and the English version of section 9. The English version refers simply to the use of "bribery" in the purpose of obtaining votes, etc. The Tongan version refers to *totongi fakafūfū* – a secret payment. In the English version it makes no difference whether the payment is open or secret. The point is important because (as is not disputed) the payments made by Mr Sanft were made openly.

Section 31 of the Interpretation Act (Cap. 1) provides that in criminal matters, where the Tongan and the English versions conflict "the court shall be guided by what appears to be the true meaning and intent of the Tongan version". By contrast, section 10(2) of the Laws Consolidation Act 1966 says that where there is difference between the two versions "the English text shall be held to give the true meaning of such passage".

This is not a criminal case; section 31 of the Interpretation Act does not apply. The provision in the Laws Consolidation Act 1966 applies the English meaning of the word "bribery". In any event, the mischief which section 9 seeks to prevent is the payment of money, openly or secretly, to obtain votes. Accordingly I hold that "bribery" for the purpose of this action means any payment, and not merely a secret payment, made for the purpose of obtaining votes or of influencing electors in their votes. A payment for the provision of free transport for electors can be bribery, if made with the requisite intention.

One other matter was argued by the first defendant, He says that whatever he has done the plaintiff has also done (as the jury found). He says the plaintiff does not come to court "with clean hands", and is therefore estopped from proceedings. In my view this doctrine cannot apply in this case. The plaintiff does not seek equitable relief; and it is not relevant in a case involving a matter of public interest.

Applying the law as set out above to the facts found by the jury, I made an order in the terms announced at the conclusion of the trial.

JUDGMENT OF THE PRIVY COUNCIL:

This is an appeal against the judgment of Martin J. in a case concerned with the election for the electoral district of Vava'u held on 19 February 1987.

All three parties to this appeal were parliamentary candidates at the election, but in the result Sanft and Siale were elected as the district's representatives in the Legislative Assembly.

On 3 March 1987 the unsuccessful candidate, Paasi, (and another plaintiff who withdrew from the proceedings at an early stage) issued civil proceedings against Sanft and Siale alleging that each had acted unlawfully in the course of the election process in that each had used threats and bribery for the purpose of influencing electors to vote for him.

Twenty three specific instances of the payment of money or presentation of goods

were alleged against Sanft, and other conduct calculated to unduly influence electors. As for Siale, it was claimed that he had made promises of money to a college and a church if he was elected. It was further alleged against Siale that in fact he was not entitled to be registered as an elector, or to stand as a candidate, because he was a naturalized citizen of the United States of America and not a Tongan subject.

The relief sought in Paasi's statement of claim deserves more than passing mention. The first order sought was a declaration that Sanft and Siale had acted unlawfully, contrary to section 9 of the Legislative Assembly Act (Cap. 4).

That section reads:

> 9. It shall be unlawful to use threatening language or bribery for the purpose of obtaining votes or of influencing electors in their votes and any person found guilty of such shall on conviction be punished according to the law relating to bribery and if he be a member of the Legislative Assembly he shall be unseated by the Legislative Assembly and it shall be lawful for the Minister of Police to prosecute all parties concerned in the offence.

Martin J. had reservations whether section 9 created criminal offences but we are satisfied that it does. The offences are "using threatening language *or* bribery for the purpose of obtaining votes *or* of influencing electors in their votes." On conviction the sentence is as provided for bribery, namely three years. The reference to it being lawful for the Minister of Police to prosecute all parties is a little curious but presumably authorizes prosecution of both the giver and recipient of the bribe, although the law relating to "parties" in section 8 of the Criminal Offences Act would already cover that.

The second order sought is that the election of Sanft and Siale be declared void. We will have more to say on this aspect later but at this stage we note that there are two provisions in Tongan law dealing with the situation where a member of the Legislative Assembly has resorted to threats or bribes to obtain votes. Section 9 of the Legislative Assembly Act, referred to above, provides that he shall be "unseated" by the Assembly; and Article 66 of the Constitution reads:

> 66. Any person elected as a representative who shall be proved to the satisfaction of the Assembly to have used threats or offered bribes for the purpose of persuading any person to vote for him shall be unseated by the Assembly.

"Unseated" simply means that he will be deprived of his seat in the Assembly.

The third order sought is directed at the removal of Siale because of his American citizenship and no more need be said about that at this stage.

The last prayer that need be considered seeks an order declaring that the whole of the general election throughout Tonga was unlawful and ordering a new election. The basis for this relief is the allegation that Sanft and Siale displayed posters and distributed pamphlets urging electors to vote for them, and that this was common practice throughout the other electoral districts and was unlawful. It seems that Paasi interpreted section 9 of the Legislative Assembly Act as containing a separate offence of "influencing electors", which of course, is not the case. Influencing electors is what an election is all about provided it is not accomplished by threats or bribery or other unlawful means.

The appellants filed statements of defence denying Paasi's allegations, and a counter-claim in which they alleged that Paasi himself had been guilty of threats and bribery in the course of the election. They gave nineteen instances when it was alleged money was paid, goods delivered or services rendered, with a view to influencing electors. They too sought an order that Paasi had been guilty of bribery under section 9, and a direction to the Minister of Police to prosecute.

390 There were certain interlocutory proceedings which we need not deal with.

The trial commenced on 11 May 1987 before a jury and continued for some two weeks. The question of Siale's residential disqualification was dealt with as a preliminary question of law in the absence of the jury. After legal argument Martin J. held that Siale was not a Tongan subject but a citizen of the United States of America and was not qualified to be an elector or candidate. He then declared his election as a people's representative void.

We will deal now with Siale's appeal against that decision.

Articles 64 and 65 of the Constitution provide, so far as is relevant to the case, that every Tongan subject of or over the age of twenty one is entitled to vote, and be
400 chosen as a representative of the people. A "Tongan subject" is defined in section 2 of the Nationality Act and, American naturalization aside, Siale comes within that definition, being a person born in Tonga of a Tongan father. It was accepted that Siale became a naturalized citizen of America in 1984, so that prima facie section 4(1) of the Nationality Act applies. It reads:

> 4. (1) A Tongan subject who when in any foreign State and not under disability by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall henceforth be deemed to have ceased to be a Tongan subject.

410 That would appear to be conclusive of the issue whether Siale could vote, or be an elected representative of the people, but Mr Niu submitted otherwise. His first submission on this aspect was that section 4(1) was ultra vires the Constitution in that it took away a "Tongan subject's" constitutional right to vote and be elected. It is true that where a statute conflicts with a written Constitution the latter will prevail, but there is no conflict in this case. All that section 4(1) does is grant to the Tongan subject the right to *voluntarily* surrender his status as a subject. Indeed, it would be contrary to the Constitution if the law was as Mr Niu would have it, namely, that there is no way a Tongan subject can ever lose that status even though he does not wish to remain a Tongan subject. That would be contrary to Article 1 of the
420 Constitution, which contains the declaration of freedom – "... therefore shall the people of Tonga ... be free for ever." That must surely include the freedom to decide whether one remains in Tonga, or continues to be a Tongan subject bound by the laws of Tonga.

Mr Niu's next submission was that at the time Siale became a naturalized American he was under a "disability" in terms of section 4 (1) so that his act of naturalization was ineffective. The "disability" relied on by Mr Niu was "duress". "Disability", as that term is used in section 4 (1), must mean a legal disability, such as infancy or insanity, and that certainly didn't apply to Siale. What the submission really amounted to was that Siale's naturalization was not a "voluntary" act because
430 he was acting under duress.

Siale's professed reason for becoming naturalized in America was that his sister

and her husband, who were in America, were in danger of being deported as overstayers and to save them from that Siale became an American, so that they could remain there as his "immediate family". Siale returned to Tonga shortly after. It appears from the evidence that Siale has spent a considerable time in America which may account for the fact that he obtained the American citizenship instead of his sister and her husband.

Duress, in law, simply means the compulsion under which a person acts through fear of personal suffering, through bodily injury or from confinement actual or threatened. Accepting that Tongans have a particularly close family relationship, all that happened in the present case was that Siale voluntarily became an American subject to prevent his relations being returned to their homeland, and that does not amount to duress. Equity will possibly grant relief in cases where the compulsion is not so extreme as referred to above, but we are not in an equity jurisdiction in this case and in any event Siale's conduct would preclude recourse to that relief.

Mr Niu's final submission on this aspect of the case relied on the provisions of the Legislative Assembly Act relating to the compilation of the register of qualified electors, which must be kept in each district, and the means whereby names may be removed from it, or reinstated if wrongly removed. Section 5(e) empowers a returning officer to correct mistakes in the register, to reinstate persons struck off the register by mistake or inadvertently omitted, and to strike off disqualified persons. Section 5(f) and (g) read:

> 5.(f) The persons entitled to vote at any elections shall respectively be all persons whose names are included in the electoral register for the electoral district to which that election relates;
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> (g) His Majesty in Council shall appoint an Electoral Appeal Committee in each electoral district consisting of a chairman and not less than two or more than five other persons for the purpose of hearing appeals against the decision of a returning officer in respect of registration;
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> Any duly qualified elector whose application for registration as an elector has been refused, or whose name has been wrongfully removed from the register, may appeal in writing to the Electoral Appeal Committee. On any such appeal the Electoral Appeal Committee may give any such directions in the matter as they think proper and the order of the Electoral Appeal Committee shall be final and conclusive and not subject to appeal to any other body.

Mr Niu's submission regarding those statutory provisions, and it was a bold one, was that pursuant to section 5(f) the register was made conclusive. If the name was on the register then the person could vote and be elected even though he might not be a Tongan subject, or may have disqualifying convictions, or be under twenty one, or be insane, which are some of the disqualifying provisions. Mr Niu went on to submit that if objection is to be taken to the qualification of an elector it can only be done before the election pursuant to section 5(g) and before an Electoral Appeal Committee. Mr Niu argued that as Paasi had not challenged Siale's qualification as an elector before the election he could not do so now and the Court had no jurisdiction to inquire into the matter.

We are concerned with Siale's election to the Assembly rather than his right to vote and we cannot accept that the law is powerless if a disqualified person is so

elected. Apart from anything else his presence as a member in the Assembly is contrary to Article 65 of the Constitution and Mr Niu's interpretation of section 5(f) and (g) is ultra vires the Constitution.

We conclude therefore that Martin J. was right when he held that Siale was not eligible to be elected. We will consider the effect of that conclusion later.

We turn now to the appeals by Sanft and Siale against the procedure adopted by Martin J. in dealing with the bribery allegations. Mr Fa presented the submissions on these appeals on behalf of both appellants.

As stated earlier the only statutory provisions bearing on bribery and voting are section 9 of the Legislative Assembly Act, which creates an offence, with Members of the Assembly to be unseated if they offend; and Article 66 of the Constitution which again provides for unseating if the Assembly is satisfied that a Member has offered bribes.

Martin J. concluded that there was a gap in the law in that there was no provision whereby an elector or candidate could question an election where bribery had occurred; or, we might add, where disqualified persons had voted or been elected. He therefore relied on the provisions of the Civil Law Act (Cap. 14) and applied the Representation of the People Act 1983 (U.K.), which contains a code for questioning an election on various grounds, including "corrupt practice", which includes bribery. The proceedings are civil, although there are separate provisions for criminal proceedings for corrupt practices.

Mr Fa presented detailed submissions to the effect that there was no "gap" in the law of Tonga and that the provisions of the English Act should not have been applied.

If that Act is not applied the public is left without an effective remedy unless it can prevail on the Assembly to make inquiry or the police to prosecute, when proof would have to be to the criminal standard. In the case of a disqualified elector or member the public has no remedy whatever.

In our opinion Martin J. was correct in applying the English Act and we reject that ground of appeal.

Mr Fa's next submission concerned the word "bribery" and the direction Martin J. gave the Jury upon it. Counsel made the point that to a Tongan bribery is "totongi fakafūfū" – a secret payment, whereas what was alleged to have been done by Sanft and Siale (and indeed Paasi) was to make payments that were open and apparent. It was said that the Trial Judge should have directed the Jury in Tongan terms and told them that if the payments were not "totongi fakafūfū" then it was not bribery. We have no record of the Judge's directions to the jury on this point but according to counsel it was to this effect:

> There is some difference between the Tongan and English meaning of the word bribery. (You are) not to be too concerned with the question of "totongi fakafūfū" but the payments made by the parties. What they were for, the amount, the dates when they were made and the intent of the donor at the time when the payments were made.

The Judge was correct in applying the English translation of the word, this being a civil case and in our opinion it would be difficult to improve on the direction he gave. The intent behind the payments was the important element. It is also relevant that in the questions put to the Jury for its answers the word "bribery" is not mentioned.

This is an example:

> Was any one or more of the payments made by ... and alleged in the Statement of Claim made with the intention of obtaining votes or of influencing electors in their votes?

It would make nonsense of the law if candidates could lawfully buy votes provided the payments were openly made and we see no fault in the Trial Judge's direction.

Mr Fa's next submission was that Martin J. erred when he failed to apply equitable principles and refuse Paasi the relief he sought on the basis that Paasi had not come to the Court with clean hands, he being guilty of the same conduct he alleged against the appellants. Regardless of the way Paasi framed his proceedings the case proceeded under the Representation of the People Act and equitable principles had no place. Furthermore, it was, as Martin J. said, a case in which the public had an interest.

We deal now with Paasi's appeal, which was based substantially on the ground that the jury's verdict finding him guilty of nineteen acts of bribery was against the weight of evidence.

As a preliminary point Mr Edwards for Paasi submitted that no liability can arise for bribery with the intent of influencing votes until after the offender has become a candidate. Electors and candidates can be guilty of bribery both under section 9 of the Legislative Assembly Act and the Representation of the People Act; and it would be a curious thing if a person who intended to become a candidate could bribe with impunity. We see nothing in that point.

Turning now to Mr Edwards' submission concerning proof, which he really restricted to only two of the nineteen allegations of bribery on which the Jury found Paasi guilty. The first was said to be a payment of $1000 made to the Vava'u Catholic School Centenary Committee. In evidence in chief Paasi's main points seemed to be that he contributed as an old pupil and that the payment was made before he had declared himself as a candidate. However, he had been a member of Parliament for twenty one years and would undoubtedly have been regarded as a potential candidate by the public. Some publicity was given to the donation and a jury could reasonably attach some significance to the timing of it. The second payment challenged was one of $512, although Paasi said it was $300, for return tickets on the *M.V. Olovaha*, provided by Paasi in the month before the election. According to Paasi he provided the tickets to allow villagers to attend the funeral of an estate holder Luani. It was for the jury to decide the intent behind the payment.

The jury heard the evidence, the addresses of counsel and the Judge's direction calling for "strict" proof and reached its decision. Nothing Mr Edwards had said has convinced us that its verdict cannot be sustained.

At the conclusion of the case Martin J. made the following orders on 27 May 1987:

On the claim against the First Defendant:

(1) It is declared that the First Defendant Hopate Sanft, prior to and at the election on 19th February 1987, made payments to and provided free transport for electors, with the intention of obtaining votes or of influencing electors in their votes.

(2) It is further declared that the election of the First Defendant Hopate Sanft is void.

(3) It is ordered that the First Defendant do pay the plaintiff's costs of the claim against him, to be taxed if not agreed.

On the claim against the Second Defendant:

(4) It is declared that the Second Defendant 'Ipeni Siale, prior to the election on 19th February 1987, made promises of money with the intention of obtaining votes or of influencing electors in their votes.

(5) It is further declared that the Second Defendant 'Ipeni Siale was not qualified to be an elector, and was not therefore qualified to be elected a representative of one people.

(6) It is further declared that the election of the Second Defendant 'Ipeni Siale is void.

(7) The Chief Returning Officer for the Kingdom of Tonga is hereby ordered to remove the name of the Second Defendant 'Ipeni Siale from the register of electors.

(8) It is ordered that the Second Defendant do pay the plaintiff's costs of the claim against him, to be taxed if not agreed.

On the counterclaim:

(9) It is declared that the plaintiff Masao Paasi, prior to the election on 19th February 1987, made payments with the intention of obtaining votes or of influencing electors in their votes.

(10) It is ordered that the plaintiff do pay the First Defendant's costs of the Counterclaim, to be taxed if not agreed.

He also reported to the Speaker of the Legislative Assembly on the jury's findings, and that the election of Sanft and Siale had been declared void, as required by the Representation of the People Act 1983.

No comment is called for on the orders made by Martin J. in respect of Siale and Paasi, but it is our conclusion that the order declaring Sanft's election to the Assembly void must be struck out, and for this reason: In England the House of Common has, since 1868, delegated its right to be the judge in controverted elections by legislation similar to that now found in the Representation of the People Act, but in Tonga the right to unseat a member of the Assembly who has used bribery for the purpose of persuading persons to vote for him remains with the Assembly pursuant to Article 66 of the Constitution. Although the matter may be academic, Martin J.'s order that Sanft's election was void usurps the Assembly's constitutional power to unseat. The same does not apply to the order declaring Siale's election void (except in so far as it was so declared because of the finding of bribery) because he was also found to be a disqualified candidate, and the Constitution does not reserve to the Assembly the sole right to unseat for that reason and indeed makes no mention of it. The order that Siale's election was void, stands, but so far as Sanft is concerned it remains for the Legislative Assembly to decide his fate.

We therefore dismiss all appeals, but strike out the order of Martin J. that the election of Hopate Sanft was void.

There will be no orders for costs.

Reported by: T.K.F.