

Tuvalu

Alama v. Tevasa

High Court of Tuvalu
Donne C.J.
10 August 1987

Elections – corrupt and illegal practices – whether election may be declared invalid on the grounds of corrupt or illegal practices committed in connection with an election by a person who was not a candidate at the time of commission but who subsequently became a candidate and was elected – Electoral Provisions (Parliament) Ordinance (1980) (Cap 102), section 41(1).

Alama was a candidate at a by-election held for the island of Nukulaelae. He was unsuccessful. The successful candidate was Tevasa. Alama commenced an Election Petition seeking an order invalidating the by-election pursuant to section 41 of the Electoral Provisions (Parliament) Ordinance (1980) (Cap 102). The grounds on which the petition was based were various allegations of "treating" and undue influence allegedly committed by Tevasa or by agents on his behalf. The respondent argued a preliminary point that he was not a candidate for the election at the time each influence was said to have occurred. He accepted nomination at a later date. Accordingly he argued that there was no basis to invalidate the election since section 41(1) required, as a prerequisite to such an order, that the corrupt or illegal practice be committed by the "candidate elected or his agent". The intervener (the Attorney-General) argued that the term "candidate elected" was intended simply to identify one of the persons whose corrupt or illegal practices would invalidate an election, not to prescribe the time at which corrupt or illegal practices could invalidate an election.

HELD:

- (1) The term "candidate elected" in section 41(1) is intended simply to identify that class of persons whose corrupt or illegal practices would, if committed in relation to that election at any time, invalidate that election. It was not intended to provide that only corrupt or illegal practices committed after nomination as a candidate could invalidate an election. Accordingly the preliminary point argued by the respondent failed: *l.* 200.
- (2) The standard of proof in an election petition, while high, remains a civil standard, that is, on the balance of probability, not the higher standard required by the criminal law (see *l.* 2400).
- (3) The petitioner's allegations of corrupt and illegal practices were not established by the evidence: *ll.* 280, 320, 350 and 430.

OBSERVATION: In the culture of Tuvalu, the authority of the Matais requires them to make decisions to guide the people and foster their welfare. It was consistent with the traditional role of Matais that they be concerned with politics and express their views to the people. In so doing they could not be regarded as agents of political

candidates, but were exercising their authority to which their status entitled them. The silence of the respondent at meetings where the Matais exhorted the people to votes for the respondent could not make the Matais the agents of the respondent: l. 400.

50 **Cases mentioned in judgment:**

Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970

Islington, West Division Case Medhurst v. Lough and Gasquest (1901) 5 O'M. & H. 120

Marsh for petitioner

Falvey Q.C. for respondent

The Attorney-General in person

60 Solicitor for petitioner – *The People's Lawyer*, Funafuti

Solicitor for intervener – *Crown Law Office*, Funafuti

DONNE C.J.

Judgment:

This is an Election Petition commenced in this Court seeking an order invalidating the election of the Parliament of Tuvalu for the Island of Nukulaelae conducted at a by-election held on 24 March 1986. The grounds alleged by the petitioner for such an order are that the respondent and/or his agents committed corrupt and illegal practices in connection with the election contrary to Section 41(1) of the Electoral Provisions (Parliament) Ordinance 1980 (Cap. 102) (hereinafter called "the Act"). The petition was heard on the 24 March 1987 and leave was given for written submissions to be presented. The last of these submissions was received by me on 22 June.

The petitioner was a candidate at the by-election which was won by the respondent. The corrupt practices he alleges against the respondent are set out in the petition as follows.

1. *Treating*

The Respondent, by himself or his agents, was guilty of "treating" under section 47(1)(a) of the Electoral Provisions (Parliament) Act, prior to the election, in that:

- 80 (a) During the month of February, 1986, a large feast was held at the island manepa in Nukulaelae. After the feast, the hosts of the feast addressed the guests and advised them that a special meeting of elders and local dignitaries had decided that all registered voters for Nukulaelae should vote for the Respondent. Some spokesmen stated that the donation of food by the hosts of the feast was made for the purpose of persuading the guests to vote for the Respondent.
- (b) During the feast and speeches referred to in paragraph 1(a), the Respondent was present and did not protest.
- 90 (c) During the two weeks immediately prior to the election, two separate "island nights" were held by elders of the island for the young people of

the island. A generator and fuel were provided by the Respondent's brother to power lighting for the entertainment. The "island nights" were intended to persuade the guests to vote for the Respondent.

2. Undue Influence

The Respondent, by himself or his agents, was guilty of "undue influence" under section 48(1) of the Electoral Provisions (Parliament) Act, prior to the election, in that:

- 100 (a) During the latter half of January 1986, at a feast for the outgoing member for Nukulaelae, Mr Henry Naisali and the Hon. Metia Tealofi, Minister for Social Services, Mr Maisali and the Hon. Minister for Social Services did address the electors and both did threaten that serious economic and social hardship would befall the island and the whole country if the Respondent was not elected in the coming by-election.
- (b) A few days following the feast referred to in paragraph 2(a), the elders and local dignitaries addressed electors and threatened that they would suffer serious consequences if the Respondent was not elected, including electors who did not vote for the Respondent and their families would be banned from sports events, feasts and public meetings. The Respondent was present at this meeting.
- 110 (c) At the feast in February referred to in paragraph 1(a) hereof, the Secretary of the elders and other local dignitaries told electors that at a special meeting of elders recently held, the elders agreed that all electors should vote for the Respondent. The electors were further told that votes would be checked after the election and those who did not vote in accordance with the elders' directive would suffer serious consequences, including those consequences threatened at the meeting addressed by Mr Naisali and the Hon Minister for Social Services, referred to in paragraph 2(a).
- 120 (d) At a meeting in Funafuti of Nukulaelae electors in early March, 1986 Fuiono Peifaga Pita read a letter to the meeting from the Secretary, Island Elders, Nukulaelae, stating that all Nukulaelae electors in Funafuti had to vote for the Respondent, because the elders had decided the Respondent was to succeed the outgoing member for Nukulaelae.

130 The petition also alleges that the alleged corrupt practices affected the result of the by-election. It should be pointed out that when the corrupt practices are carried out by the elected candidate or his agent it is not necessary in order to invalidate the election for the petitioner challenging to prove that the result was in fact affected thereby. The burden of proving that any election was not affected in a proved transgression, if such proof is necessary, is on the respondent. *Islington, West Division Case Medhurst v. Lough and Gasquest* (1901) 5 O.M. & H. 120, 130 per Kennedy J.

By way of a preliminary point the respondent submits that the alleged corrupt offences in the Petition relate to matters occurring before he was "nominated" as a "candidate" in the election and even if he were guilty of these offences the election could not be declared invalid under section 41(1) of the Act referred to above. It reads:

No election shall be valid if any corrupt or illegal practice is committed in connection therewith by the candidate elected or his agent.

140 The respondent submits the word "candidate" has the narrow meaning given to it by Section 2 of the Act and it follows that any illegal act or practice of the candidate or his agent to allow a successful application under section 41 must have occurred on or after the nomination date, which, in this case, is 13 March 1986.

I must therefore consider the Act and in particular the relevant sections thereof.

150 The principles applicable to the interpretation of statutes are well established and have been comprehensively and competently covered by counsel in their submissions. I do not find it necessary to dwell on them save as to say that in interpreting Section 41, Part VI of the Ordinance in which it is contained, can usefully be explored. It deals with election offences of corrupt and illegal practices and the consequences of the commission of them such as the imposition of either a fine or imprisonment or both in cases under sections 42, 43, 44, 49, 52 and 55, disenfranchisement in the case of section 51 and the invalidation of the election in the case of section 41.

160 What is clear is that, in the case of Section 41, the Court is not dealing with an offender. It is concerned with an election and its validity and its purpose is to ensure that the person who wins the electoral race does so fairly. Consequently, while the sections relating to specific corrupt and illegal practices can be invoked and punishment imposed for the commission of them by any person concerned with the election, it is only in the case of the commission of such practices by the person elected, that Section 41(1) can be invoked for the purpose of declaring the election invalid. The Court, therefore, in dealing with that section, looks into the conduct of the election, finds whether there has been within the meaning of the Act, any "corrupt or illegal practices" committed in respect of it and, if it so finds, it then turns to the election result. If it is found that there has been a commission of any corrupt practice by the person elected, named in the section as "the candidate elected", or his agents in connection with the election then by virtue of Section 41 the Court must declare the election void and in such case, it must certify to the Minister to that effect.

170 It is not submitted by the respondent that an elected candidate cannot be guilty of any corrupt or illegal practice before he is "nominated" as a candidate. Indeed that could not seriously be contended since all corrupt and illegal practices including the two alleged here, "Treating" (section 47 and "undue influence" (section 48) apply to the commission thereof by *any* person and the former can cover acts "during or after an election".

180 The respondent however, submits that if any corrupt offences were in fact committed by a candidate elected in an election before his nomination then such offences cannot be used to invalidate the election. He says that the acts of "agents" are also restricted to those occurring after the principal's nomination and suggests that all the allegations in this case occurred prior thereto.

The Attorney-General submits that the word "candidate" cannot be read in isolation and the other words of section 41(1) must be looked at. He argues that the subsection is framed in wide terms and it is intended to cover a broad scope rather than narrow detail: "No election" and "any corrupt or illegal practice" are the words are used and that in particular "candidate" cannot be separated from "elected" and the words "candidate elected" must be read together. He says when this is done it

190 can be seen that if taken too literally the two words would contradict each other completely and would create ambiguity, for a person cannot in a strict sense be a candidate and elected at the same time. His contention is that the words are used as a label to describe one of the persons whose corrupt or illegal practices will invalidate an election, not to limit the doing of corrupt or illegal acts in point of time. That limitation, he says is provided in the section by the words "in connection therewith" i.e. with that election. On the point as to the acts of agents he submits there is no restriction on the meaning of "agent" in section 41(1) as this word is not defined. So a corrupt or illegal practice committed by an agent before nomination would invalidate the election, whereas the same act committed by the candidate would not if "candidate" is restricted to the short period from nomination. The Attorney-General's submissions are substantially supportive of those made by the petitioner.

200 Counsel for respondent in reply submitted that the word "candidate" cannot be interchangeable with the word "person" used in relation to the offences in Part VI of the Ordinance.

In my view the Attorney General is correct in contending that the words "candidate elected" are used as a label to designate the persons whose corrupt or illegal practices give the Court the grounds to consider invalidating the election. The evils aimed at in section 41 are corruption and illegality in connection with the election. That is the gravamen of the section, but, it is only when the offences have been committed by a classified or designated person i.e. the candidate who has been elected, as opposed to any other offender, that the section can be availed of to avoid
210 an election.

I am therefore led to the conclusion that the preliminary submission of the respondent must fail and I so hold.

The petitioner's case has closed and I now consider it since the respondent has submitted that there is no evidence to support the allegations upon which the petition is founded. Dealing firstly with the allegation of "treating" which is defined in section 47 of the Act; it is a "corrupt practice" by virtue of section 45. Section 47 reads as follows:

- 220 (a) any person who corruptly, by himself or by any other person, either before, during or after an election, directly gives, or provides, or pays, or promises to give, provide or pay, wholly or in part, the expenses of giving or providing any food, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person, or any person to vote or refrain from voting at such election, or on account of that person or any other person having voted or refrained from voting at such election; and
- (b) any elector who corruptly accepts or takes any such food, drink, entertainment or provision.

230 By this section the following elements in this case must be established: that the respondent by himself or any other person on his behalf:

- (a) gave, provided, paid for any food, drinks or entertainment for or promised to do so, to, the electors of Nukulaelae, and
- (b) such giving, provision or payment was for the purpose of influencing the electors to vote or refrain from voting at the by-election, and
- (c) such giving or providing or paying was with a corrupt intent and

(d) the "treating" was either before, during or after the election.

240 As to the standard of proof required in proceedings such as these it is clear that they are civil and although the Court is concerned with an offence under the Act, the standard of proof is still that which applies in civil cases, namely on the balance of probabilities. However, as was stated in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034 [1956] 3 All E.R. 970 the standard of proof required in such circumstances is high. It is put this way in the *Hornal* case at p. 258 (Q.B.); p. 1041 (W.L.R.); p. 973 (All E.R.):

... the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law.

250 I now proceed to consider the two allegations of alleged treating. The first is contained in paragraph 1(a) of the petition. The offence is alleged to have taken place in February 1986 at Nukulaelae. The petitioner claims that the respondent and/or his agents on that occasion hosted a large feast at the Island Mancapa for all young persons registered as voters. At the feast it is alleged that the young guests were told by their hosts that the elders of the island had decided that all should vote for the respondent and further that some of the speakers at the feast told the guests that the food was donated by the hosts for the purpose of persuading them to vote for the respondent.

260 I have carefully considered the evidence adduced to support this allegation. It undoubtedly refers to the feast on the island which celebrated the completion of the workshop thereon held by the school teachers of Tuvalu. I am satisfied it was instituted by the matai of Nukulaelae for the sole purpose, as deposed to by Mr Selau Toe, "to pay off the youth for their work at the workshop". There is clear evidence that the food was provided by the whole community and certainly not by the respondent and his supporters as alleged. I accept Mr Liva Fousaga's evidence as to this and am also satisfied that there was no political motive in the calling of the meeting. Mr Fousaga, as Secretary of the Nukulaelae community observed the usual custom of reading at the function the minutes of the previous meeting of the community: that meeting had been held on about 24 January. It had been called by the elders to discuss various matters including the forthcoming by-election. Liva said, and I accept it, "that is what usually happens. It is in accordance with our customs and traditions". This allegation, however, may be disposed of by a consideration of one only of the ingredients which it is essential for the petitioner to establish, namely that the provision of the food for this feast was by the respondent or other person on his behalf. As I have said, there is no evidence whatever to substantiate this. The evidence clearly establishes that purpose of the feast was to celebrate the completion of the workshop. It was called by the Matais for that purpose and the food for it was contributed by the whole of the island community. All witnesses who were at the feast agree on that. Consequently the absence of proof of this essential element is fatal to the petitioner's case as to this allegation and it must fail. As to the second allegation of "treating" in paragraph 1(b) namely that relating to two "island nights" during the two weeks immediately prior to the selection, there is no evidence whatever to support it and I accordingly hold it also fails.

280 I turn now to the allegation of "undue influence" which is a "corrupt practice" by

virtue of Section 45 of the Act. The "practice" is dealt with in section 48 which reads:

Any person who directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence, or restraint, or inflicts or threatens to inflict by himself or by any other person, any injury, damage, harm or loss, upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who, by abduction, duress, or any fraudulent contrivances, impeded or prevents the free use of the vote by any elector and thereby compels, induces or prevails upon any elector either to give or refrain from giving his vote at any election, shall be guilty of undue influence within the meaning of this Part of this Ordinance.

In the petition there are four allegations of "undue influence" allegedly committed by the respondent or other persons on his behalf. The "influence" must of course relate to voting and the nature of influence exerted on the electors as alleged is that of threats of economic loss, banishment from community functions, the checking of votes after the election and punishment unless the electors voted for the respondent. I shall deal with each allegation as it appears in the petition.

Paragraph 2(a) relates to a feast at Nukulaelae for Mr Naisali who had resigned as the Member for the Nukulaelae Constituency. He and the Honourable Mr Metia, the Minister of Works, were present. The function was in January 1986. Three witnesses deposed as to this event. Mr Fousaga could not recall the by-election being discussed, but the other two, Mr Dick Ioane and Mr Selau Toe, said that Mr Metia addressed the meeting urging those present to "think properly who should be elected because if the wrong person was elected all the government projects on the island would cease". Present at the feast were most of the island community including the respondent who, at that time, had neither been nominated as a candidate nor considered by the Nukulaelae matais as a possible one. He certainly was not referred to by the Minister or any of the other speakers on this occasion and there is no evidence to conclude Mr Metia was referring to him. I am satisfied that the respondent did not identify himself as a possible candidate and there is nothing in the evidence to suggest he was present on this occasion in any other capacity than as a member of the Nukulaelae community. I should say that I do not find the Minister went beyond the bounds permissible for a politician in "pushing" his party's cause in the coming by-election. But irrespective of this, the petitioner has not satisfied me that the respondent was a party to any corrupt practice nor do I find on the evidence, that any corrupt practice was committed by any person at this meeting. I therefore, hold this allegation to be unsustainable.

Turning to paragraph 2(b) the petitioner alleges "undue influence" at a community meeting called by the elders or matais also in January 1986 a few days after the feast referred to in the preceding allegation. It is alleged that at this meeting the matais threatened the electors present that if the respondent were not elected all would suffer severe consequences and in particular those who did not vote for him would with their families, be banned from the sporting events, feasts and public meetings. The only evidence on this comes from Mr Fousaga and I accept it. He was at the time Secretary of the Nukulaelae community and he took the minutes of this meeting which he considered took place about 24 January. He said "the respondent was present . . . The elders spoke . . . Josefa, Nukulasi, Kelesa and

Faiea. There were some others, but I cannot remember who they were. All I can remember is the whole community came and they were discussing who should become the member . . . Some of the speakers mentioned who should be chosen. That is usually what happens. It is in accordance with our customs and traditions. When they were discussing, the first one named was Telava Tevasa. He declined, Toe Samualla was then named. The people at the meeting decided Telava should be
340 nominated although he declined. They decided this because in 1960 Telava had done a very important task for the island and the people thought he should be rewarded. The President Nukulasi made the announcement . . . he was not the President - he was the oldest elder. I cannot remember his exact words. I remember he stood up and impressed on the people the good things Telava had done in 1960. As far as I am aware all those present supported Nukulasi. I think he did what was usual . . . It is the usual custom for all the people to meet and discuss matters such as these for the benefit of the community . . . I kept minutes of the meeting."

A report of this meeting was sent by letter written by Mr Fousaga to the Nukulaelae people living at Funafuti. It will be considered later, but, it is sufficient
350 for the purpose of this allegation to say what was established as being in this letter was in line with what Mr Fousaga said happened at the meeting. There is no evidence whatever of any threat being made at this meeting. I am bound therefore, to say that this allegation cannot stand on the case as presented and it must be rejected.

As to allegations 2(c) the thrust of it is that at the feast in February at Nukulaelae for the workshop helpers, the respondent through his "agents" the elders and the Secretary Mr Fousaga, exerted "undue influence" on the electors by telling them that they, the elders, had agreed the respondent should receive the electors' votes and that those who did not vote for him would suffer certain serious consequences. It has
360 been established that Mr Fousaga at the feast read the minutes of the meeting of 24 January. Those minutes according to him recorded "what elders had decided for the welfare of the community. They said about the election. (They) recorded who the elders considered should be nominated - Telava. Many speeches were made at the feast. I cannot remember any speeches about the election. The respondent made a speech at the feast. It was not a speech about the election." The only other witness on this point was Mr Dick Ioane. His version of the event confirmed that the minutes were read by Mr Fousaga. He said "they contained many matters I cannot remember them all. Only one I remember about the election. The elders said that everyone should vote for Telava and if they didn't he or she would be punished by
370 the elders. Faiva then stood up and made a speech supporting the decision. I heard from Sio, one of the matais, that everyone should vote for Telava." There is thus a conflict of evidence between these witnesses of the petitioner. The burden is for him to establish his case. I am not prepared to hold the evidence of either of the witnesses tilts the balance of probabilities one way or the other. But in coming at a conclusion as to this allegation, I remind myself that this was a community meeting not concerned with the coming by-election but with the celebration of the completion of the workshop.

It was not a treat provided by the respondent. Furthermore I do not find any sinister motive in the reading of the minutes of that previous community meeting
380 which was concerned with the coming of the by-election. That was done in accordance with the custom observed by the island on such occasions; nor am I

prepared to hold, for reasons that appear later in this discussion, that the matais could be held to be agents of the respondent. This is an essential element to be established by the petitioner. These facts cause me to arrive at the conclusion that the allegation in this paragraph cannot stand and I reject it.

390 Finally, as to the allegation in paragraph 2(d) alleging "undue influence" on the Nukulaelae people at Funafuti by the reading at a meeting in March 1986 at Funafuti of a letter written by Mr Fousaga as Secretary of the island elders of Nukulaelae, which letter was read by the organizer of the meeting at Nukulaelae in
400 January called by the elders to discuss, in the main, who should be nominated for the coming by-election. As to exactly what was said in the letter there is again another conflict of evidence. One witness, Mr Ielemia, said it informed the meeting that the elders had decided that the respondent should be "nominated" and gave two reasons for the decision - that the Government should not be changed and that if it continued as Government it would ensure that the culture and traditions of the island would be retained. Another witness, Mr Paeniu, deposed that the letter demanded that all the community "must vote" for the respondent - for the same reasons. The only other witness on this was the writer of the letter Mr Fousaga. He said it told the leader of the Funafuti community "who was nominated" and I accept
410 that as being correct. Mr Peoni considered the letter threatening. Clearly he was not intimidated by it because he spoke after it was read urging those present to vote for whom they preferred, I cannot be convinced that the letter constituted any threat.

420 However, even if the letter could be held to have "unduly influenced" the Funafuti electors (which I hold it did not) the burden is on the petitioner to prove that the elders or matais who caused it to be written and read were agents of the respondent. I feel I should make some observations on the position of the matais in relation to such an allegation. This requires a consideration of the status of matais in Nukulaelae and, indeed all matais in Tuvalu. That status has been clearly defined by
430 all witnesses who deposed as to it. The authority of the matais is founded in the values and cultures of Tuvalu. It is the linchpin of the life and laws of Tuvalu protected by the Constitution. The authority of matais requires them to make decisions to guide the people and foster their welfare. This means that in Nukulaelae and elsewhere in Tuvalu the matais necessarily and legitimately exert great influence and their decisions carry great weight. Their concern with politics and the way they expressed it in this case is consistent with their role as matais and I am satisfied that what they did was in accordance with the customs and traditions of Tuvalu. In making the decisions they did, they certainly were not acting on behalf or against the respondent. The petitioner established no such relationship and, indeed, in view of
440 the status of the matais in Tuvalu it would be extremely difficult to establish them as acting in the subservient role of agents. The petitioner sought to imply agency in the fact that the respondent being present at the meetings at which the decision to support him was made and announced, did not object. I doubt whether in places elsewhere with no traditional constraints as in Tuvalu that silence by a principal in such circumstances would impute consent to the commission by others of offences on his behalf. However, in the case of the matais of Nukulaelae I have no doubt whatever that they acted in all respects as traditional leaders in their own right and with the authority to which their status entitled them. Their decision was in conformity with custom and tradition and it would not have been in accordance with

430 custom and tradition for the respondent to challenge his matais' decision.

For the reasons above stated I consider the allegation in paragraph 2(d) has not been sustained.

In the result, the petitioner is dismissed and pursuant to section 58(3) of the Act, I certify this decision to the Minister in charge of the Act.

Reported by: P.T.R.