Sanft and Fuko v. Fotofili and others

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

Constitutional law – constitution – courts – jurisdiction – investigating the Legislative Assembly's "internal proceedings" – Article 90.

Constitutional law – interpretation – gap in the law – application of the Civil Law Act – common law rule of the courts investigating "internal proceedings".

Constitutional law – Constitution – Legislative Assembly – freedom of speech – members right to speak governed by Standing Orders.

A bill for an Act to amend the Bank of Tonga Act was introduced into the Legislative Assembly but because of opposition the bill was withdrawn on its second reading. After some lobbying the bill was re-introduced with the Chairman disallowing further debate although Mr Sanft wished to speak. The bill passed its second reading and on its third reading Mr Fuko was refused permission to speak. Sanft and Fuko seek declarations that the Bill had been passed unlawfully, the Minister seeking support outside the House was unlawful, the Chairman and Speaker not allowing the appellants to speak was unlawful, and an order restraining the Assembly from omitting anything from the journals of the House. The plaintiffs, claim was struck out by Martin J. on the grounds that the Supreme Court had no jurisdiction to make the orders sought.

HELD:

(1) Compliance with the Assembly's rules in the course of the passage of a bill through the House is not a condition of the validity of the resulting Act: p. 200.

(2) The constitutional requirement of Article 72 is for the votes for and against every motion and resolution to be recorded in the Assembly's journal: p. 210.

(3) Assembly Members' right to speak in the Legislative Assembly is governed by Standing Orders and there is no "constitutional right" to speak in the Assembly: p. 220.

Cases referred to in judgment:

Bradlaugh v. *Gossett* (1884) 12 Q.B.D. 271

Fotofili and others v. *Siale*, supra at p. 339

British Railways Board & Anor v. *Pickin* [1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All E.R. 609

Namoi Shire Council v. *Attorney-General for New South Wales* [1980] 2 N.S.W.L.R. 639

Legislation referred to in judgment:
Constitution Articles 56, 62, 72
Bank of Tonga Act 1972

Civil Proceeding
This was an appeal by the plaintiffs from Martin J. striking out their application.

L.M. Niu for the appellants
D. Tupou for the respondent

The judgment of Martin J., Supreme Court 9 January 1987, is set out below. The judgment of the Privy Council follows.

MARTIN J.

Judgment:

The plaintiffs are representatives of the people in the Legislative Assembly. They seek an order that a bill to amend the Bank of Tonga Act 1972 has not been validly passed by the Legislative Assembly to become law.

On 21 November 1986 I directed the trial of a preliminary issue, namely: whether this Court has jurisdiction to determine the issues revised in this action. The defendants have applied to strike out the plaintiff's claim on the grounds that this Court has no such jurisdiction; and that the action is "frivolous, vexatious and an abuse of process", which is a long-winded way of saying "hopeless".

For the purpose of this hearing I must assume that the matters pleaded in the statement of claim are correct. If the plaintiffs prove all they allege, are they entitled to the orders which they seek?

What is alleged, and as I understand it not seriously disputed, is this. On 1 September 1986 the Minister of Finance introduced into the Legislative Assembly "A Bill for an Act to Amend the Bank of Tonga Act". It was given its first reading in the normal way and referred to a committee for its second reading. The committee debated the bill for two days. There was opposition to the bill, including from the plaintiffs. Eventually, without a vote being taken, the bill was withdrawn.

There followed certain discussions outside the Legislative Assembly, during which certain members were persuaded to withdraw their objections. On 9 September 1986 the Minister of Finance re-introduced the bill. It was referred again to the committee where further debate was not allowed by the Chairman. The first plaintiff, Mr Sanft wished to speak. He was not allowed to do so, and he then left the House. The bill was voted upon and passed by 14 votes to 2. The committee resolved into the Assembly and the bill was ordered to be read a third time. The second plaintiff, Mr Fuko, wished to speak. He was not allowed to do so, and he too left the House. The bill passed its third reading by 15 votes to 1.

It is alleged that the refusal to allow the plaintiffs to argue their case invalidates the action taken by the Legislative Assembly. Consequently, the plaintiffs say, the bill has not been properly passed and the Act is therefore invalid.

It is also alleged that the journal of the House does not contain a full record of the discussion and I am asked to direct the Legislative Assembly in that respect. I am also asked to declare that the action of the Minister of Finance, in soliciting support for the measure outside the House, is unlawful; and that the actions of the

Speaker and the Chairman of Committee in forbidding the plaintiffs to speak were unlawful.

Like the previous action, this claim raises issues which are more important than the proposed amendment to the Bank of Tonga Act, important as that is. The Rules for Proceedings of the Legislative Assembly provide (Rule 51) "A member may speak to any question before the House . . ." It is fundamental to the democratic process that a member should not be prevented from speaking without good reason. *If* elected members were refused the right to speak, and *if* there were no sufficient reason for that, there is cause for grave concern. But that has not yet been investigated. I do not know what happened, and I express no opinion.

As in the previous action, the issue I have to decide is whether this Court has any power to adjudicate on those proceedings in the Legislative Assembly.

For the reasons given in my previous judgment, which I will not repeat here, I hold that this Court does have the power to decide whether a constitutional or statutory requirement has been observed. If not, any act of the Legislative Assembly in contravention of that condition would be invalid. But this Court has no power to pronounce on the validity of the "internal proceedings" of the House. That, in my view, includes the procedure adopted within the House to conduct its business.

I turn back to the words of Stephen J. in *Bradlaugh* v. *Gossett*:

> . . . the House . . . has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and . . . even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly.

Even if the Rules of Procedure were breached (and I can make no finding whether or not this was so) this is a matter over which this Court has no jurisdiction.

Nor has this Court the power to direct the House what to include in its journal. Clause 72 of the Constitution merely requires a journal to be kept. The form of the journal is not specified. It is for the members to ensure that the record is adequate and correct. It is not subject to the supervision of the Court.

Nor can this Court declare that the actions of the Minister of Finance were unlawful; and if the power existed, I would unhesitatingly say that there is nothing objectionable in any member seeking support for his cause in discussions with other members outside the House. Such discussions happen all the time.

Accordingly I hold that this Court has no jurisdiction to make any of the orders sought by the plaintiffs. If I were to hold otherwise, any member dissatisfied with a decision of the House could come and ask the Court to overturn that decision. It is not the function of this Court to become involved in the legislative process.

The claim will be struck out on the grounds that this Court has no power to make the orders sought.

JUDGMENT OF THE PRIVY COUNCIL:

[The plaintiffs in the Court below became the appellants in the Privy Council.]

This is an appeal against the decision of Martin J. wherein he struck out the appellants' proceedings in which they claimed inter alia, that a certain bill had not been passed lawfully by the Legislative Assembly.

At the relevant time the appellants were duly elected representatives of the people in the Legislative Assembly and the respondents were Speaker of the House, Chairman of the Committee of the Assembly, and Minister of Finance respectively.

The facts are not in dispute. On 1 September 1986 the Minister of Finance introduced into the Legislative Assembly a bill for an Act to amend the Bank of Tonga Act. The bill only contained one clause and that sought to increase the authorized capital of the Bank from T$1,000,000 to T$3,000,000. The bill was given its first reading in the normal way and was then referred to the committee for its second reading, where the single clause was debated for two days. Because of opposition to the bill it was withdrawn without a vote being taken. It appears that a certain amount of lobbying then went on, and on 9 September the Minister re-introduced the bill. It was again referred to the committee, where the Chairman disallowed further debate although Mr Sanft wished to speak. The bill was then put to the vote and passed by 14 votes to 2 although by that time Mr Sanft had left the House in protest. The bill then came before the Assembly for the third reading and on this occasion Mr Fuko was refused permission to speak. He then left the House. The bill was then read a third time and passed by 15 votes to 1.

On the 9 October 1986 the appellants issued their proceedings in which they sought a variety of declarations and orders which can be summarized thus:

(1) Declarations that the bill had not been lawfully passed and the Act which followed was invalid.

(2) Declarations that the acts of the Minister of Finance in seeking support for the bill outside the House, and of the Chairman, and later the Speaker in refusing to allow the appellants to speak were unlawful.

(3) An order restraining the Assembly from omitting anything from the journals of the House. This order is sought on the basis that what passed between the appellants and the Chairman and Speaker when the appellants were refused the right to speak does not appear in the journals.

The respondents then moved to have the proceedings struck out on the ground that the Court lacked jurisdiction. On that application Martin J. held that he had no power to inquire into the actions of the Speaker and Chairman in internal proceedings of the House, not to direct the House as to the contents of its journal, and found nothing objectionable in a Member seeking support from Members outside the House. He therefore struck out the appellants' claim.

The provisions of the Constitution having some bearing on this case are:

> *Article 56.* The King and the Legislative Assembly shall have power to enact laws, and the representatives of the nobles and the representatives of the people shall sit as one House. When the Legislative Assembly shall have agreed upon any Bill which has been read and voted for by a majority three times it shall be presented to the King for his sanction and after receiving his sanction and signature it shall become law upon publication. Votes shall be given by raising the hand or by standing up in division or by saying "Aye" or "No". (Law No. 1 of 1914).
>
> *Article 62.* The Assembly shall make its own rules of procedure for the conduct of its meetings, and
>
> *Article 72.* A journal of the proceedings of the Legislative Assembly shall be kept and the votes of each member present for and against every motion or resolution shall be recorded in the journal. (Law No. 1 of 1914).

This is another case concerning the Court's involvement in the internal

proceedings of the Assembly. We have already dealt in some detail with the law on that subject in the appeal of *Fotofili and others* v. *Ipene Siale* (supra at p. 339) and what we had to say there applies with equal force to this appeal and need not be repeated.

The appellants' first ground of appeal was that Martin J. had been inconsistent in that in the *Fotofili* appeal (referred to above) he had held that he had power to make enquiry, albeit a limited one, into the Assembly's decision on allowances, but had declined to make inquiry into the circumstances of the passing of the Tonga Bank Act. The short answer to that submission is that by our decision on the *Fotofili* appeal we have removed the inconsistency.

Mr Niu's next point was that the refusal to allow the appellants to speak to the bill on the second and third readings was in breach of Standing Orders (which it probably was), and that as those Orders were made pursuant to Article 62 of the Constitution they had the same force as a provision in the Constitution. That Article gives the Assembly power to make its own rules, but it is well established that compliance with them in the course of the passage of a bill through the House is not a condition of the validity of the resulting Act. So much is clear from the speeches given in the House of Lords in *British Railways Board* v. *Pickin* [1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All E.R. 609; and, probably of more importance, from the decision of McLelland J. in *Namoi Shire Council* v. *Attorney-General for New South Wales* [1980] 2 N.S.W.L.R. 639, for in that case the Standing Orders were given statutory force by a written Constitution.

Mr Niu's next submission concerned the journal, which Article 72 of the Constitution requires to be kept. The only constitutional content required is the votes of members for and against motions and resolutions. Beyond that it must surely be in the discretion of the House as to what is recorded. Speeches in the House are recorded in detail and it is certainly not up to the Court to direct the Assembly what should be recorded in its journal. Copies of the journal are made available to members and they can request rectification of an entry or inclusion of an omission. The appellants made no such request.

Mr Niu's most important submission was that his clients had "a constitutional right" to speak on the occasions on which they were silenced. There is no such constitutional right. Their right to speak was governed by Standing Orders and, as has been said, failure to comply with them does not go to the validity of the Assembly's proceedings, and any failure cannot be enquired into by the courts. It is not a case where the appellants were silenced completely. They did speak during the two-day debate on the aborted second reading of the single clause.

As we said on the *Fotofili* v. *Siale* appeal, provided the constitutional requirements are met, the Court has no jurisdiction to inquire into the "internal proceedings" of the Assembly. The constitutional requirements of Article 56 were met – the bill was read and voted for by a majority three times; the journal recorded the votes of each member for and against the Bill. Beyond that we are in the realm of "internal proceedings" of the House, and the Court does not venture there.

The law aside, we consider that the appellants should have been given the opportunity to have their say, no matter how hopeless their cause appeared to be on the voting. For the reasons stated the appeal must be dismissed but we make no order as to costs.

Reported by: T.K.F.