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IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION AC 7 of 2019

NUKU'ALOFA REGISTRY [CR 7 of 2019]

BETWEEN : ATTORNEY GENERAL

- Appellant

AND : RODNEY TOMASI

- Respondent

Coram : Handley J
Blanchard J
White J

Counsel : Mr. T. 'Aho for the Appellant ✓
Respondent - unrepresented

Hearing : 2 September 2019

Date of Judgment : 6 September 2019

JUDGMENT OF THE COURT

[1] The Attorney General appeals under s.17D of the *Court of Appeal Act* against the acquittal of the respondent, Rodney Tomasi, on a charge of offering to bribe a member of the Tonga Police (s.165(1) *Tonga Police Act*). The respondent has not participated in the appeal process but, by virtue of s.17D(5), he is no way prejudiced. That subsection provides that determinations by this Court of a question of law submitted by the Attorney General to the Court "shall not in any way affect or invalidate any verdict or decision given at the trial".

The facts

[2] The alleged act of bribery occurred following the arrest of the respondent by a member of the Tonga Police after he was found in a motor vehicle with illicit drugs. The search of the vehicle was carried out without a warrant. For reasons which are not relevant to this appeal, Lord Chief Justice Paulsen found that the search was unlawful and excluded the evidence of the finding of the drugs. As a result, he found that charges relating to them were not proven. On this appeal the Attorney General accepts that because the search was unlawful the arrest of the respondent was also unlawful.

[3] The charge under s.165(1) related to an event that occurred after the arrest and when the respondent was being driven to a police station. Two Police officers were present in the Police car. The respondent asked them "what is your number to release me?" At trial the respondent did not challenge the prosecution evidence that he had said this. The Judge found that the respondent's words were "a clear invitation to accept a payment to release him".

[4] Section 165(1) of the *Tonga Police Act* reads as follows:

> "A person commits an offence if the person gives, or offers to give, to any member of Tonga Police, or to a person performing functions on behalf of Tonga Police, any money or other benefit as an inducement to do or refrain from doing any act in the

execution of the police officer's duty as a member or in the performance of the person's function on behalf of Tonga Police".

The Supreme Court judgment

[5] The Lord Chief Justice focused upon what he termed the requirement that the inducement be offered to a police officer in the execution of his duty. He referred to the decision of the High Court of New Zealand in *Webster* v *New Zealand Police* [2019] NZHC 1335. That case involved a charge of assaulting a police officer in the execution of his duty. A police officer had entered Mr Webster's property and was told by him to leave. When he did not, Mr Webster had pushed him. That was the alleged assault. The New Zealand Court found that the police officer had no legal justification for remaining on the property after being told to leave. It followed that, although Mr Webster had undoubtedly assaulted the police officer, it had not been proved that he was lawfully on the property when the assault occurred. Therefore the police officer was not at this time acting in the execution of his duty. Mr Webster was not guilty of the offence charged.

[6] Lord Chief Justice Paulsen considered that because the search of the respondent's vehicle was not lawful, there was no basis for his arrest. Therefore the prosecution had failed to prove that the police officers to whom the bribe was offered were, when offered the inducement, acting in the execution of their duty as police officers. He consequently dismissed the bribery charge and acquitted the respondent.

The question of law

[7] In the notice of appeal the Attorney General formulated the following question of law under s.17D(1):

> "Does an unlawful search, leading to the arrest of a defendant, result in any further offences committed by the defendant, upon arrest, being null and void?"

[8] It will be observed that, as we have already recorded, the question assumes and accepts that the arrest was unlawful. It also, incorrectly, treats the matter as one of nullity, rather than of an offence that was not committed because one of its ingredients was not proven, as the Judge found. However, the real vice in the question is that it is far too broad and is not addressed to what in fact s.165(1) proscribes. We therefore re-formulate it as follows:

> "Did the prior unlawful arrest of the respondent have the effect of preventing the Crown from proving that the respondent had committed an offence under s.165(1) of the Tonga Police Act?"

Analysis

[9] We begin by pointing out that the Lord Chief Justice was obviously *not* saying that because what would otherwise be an offence was committed at the time of or after an unlawful arrest, by that fact alone no offence could have been committed. The offence might be a quite separate matter unrelated to whatever it was that caused the arrest to be unlawful. Thus if an unlawfully arrested person then kills or injures the officer who purported to arrest him, the unlawfulness of the arrest would provide no defence or make evidence of the killing or injury inadmissible. And even if the offending were related to the circumstances that led to the arrest, such as the discovery of drugs for which a police officer was searching without a warrant, a charge involving their possession might still be able to be brought successfully in reliance upon evidence of their discovery. The court has a discretion to admit such evidence notwithstanding any unlawfulness of the search: see, for contrasting approaches in the United Kingdom and Australia to the admissibility of unlawfully obtained evidence, R v *Sang* [1980] AC 402 (HL), on the one hand, and R v *Ireland* (1970) 126 CLR 321 and *Bunning* v *Cross* (1978) 141 CLR 54 (HCA), on the other. The present case is not a suitable one for resolving any differences between those approaches, both of which permit the admission of unlawfully obtained evidence in the exercise of the court's discretion.

[10] What the Lord Chief Justice was concerned with in the present case was a much narrower issue, namely whether as a result of an arrest now accepted to have been

unlawful, the prosecution was able to prove all the essential ingredients of the particular offence under s.165(1) despite the reference therein to the "doing of an act in the execution of the police officer's duty as a member..... of the Tonga Police". Was it necessary to prove, inter alia, that at the time of the alleged offending – the time of the offering of the bribe – the officers were acting in the course of their duty?

[11] The Lord Chief Justice thought that it was necessary. He had found that because the arrest was unlawful they were not so acting at the relevant time. He did not explain why this was so. It was suggested to us in argument for the appellant that the police officers were continuing to perform the duty of conveying the respondent to a police station. On the assumption that the arrest was unlawful and therefore should never have occurred, we do not accept that submission. If the detention was unlawful the defendant was entitled to be set at liberty immediately. That situation existed before the offer of the bribe. The Lord Chief Justice may therefore have been correct in determining that the police officers had ceased to act in the performance of their duty before the act of bribery.

[12] It does not follow, however, that an offence under s.165(1) could not have been committed. The concentration in the Supreme Court on the reference in the subsection to the duties of the police officer tended to obscure what it is that the sub-section is proscribing. What is central to it, in our view, is (i) the offer of a bribe (the "inducement") and (ii) the purpose or intention of the person who offers it, that is, that the police officer will not fulfil his duty; a gift or offer of money or other benefit to the police officer coupled with a corrupt intention on the part of the giver or offeror.

[13] The *actus reus* of the s.165(1) offence is the offering of the inducement to a police officer. The *mens rea* is that the offer is made with the intention that the police officer will thereby be persuaded to commit a breach of his duty. The offence is complete if there is the holding out of the inducement to a police officer with the corrupt intention. It is not necessary that there is actually a duty to be performed in the particular circumstances (the defendant may be mistaken about that), and there need not be any

non-performance of duty for the offence to have been committed. Any performance or non-performance of duty will be something that will occur after the offending is complete.

[14] In contrast, in the *Webster* case the punishable act was an assault which had to have been committed in a specified circumstance, namely when the assaulted officer was engaged in the performance of his duty. So there was no offence as charged unless the officer's duty was being performed contemporaneously with the assault. There had to be an actual interference, by assault, with the performance of his duty. In *Webster* it happened that the constable was acting outside his duty, because he was a trespasser, when pushed by Mr Webster.

[15] For these reasons, we allow the appeal and answer the re-formulated question as follows:

Question:	Did the prior unlawful arrest of the respondent have the effect of preventing the Crown from proving that the respondent had committed an offence under s.165(1) Tonga Police Act?
Answer:	No.

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Handley J

COURT OF APPEAL TONGA

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Blanchard J

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White J