

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION

AC 6 of 2020

BETWEEN:

SIONE TUI'ONE PULOTU

Applicant

-and-

REX

Respondent

Application for leave to appeal and bail pending appeal

RULING

Before: Lord Chief Justice Whitten QC
Counsel: Mr D. Corbett for the applicant
Mr T. 'Aho for the respondent
Date of hearing: 16 December 2020
Date of ruling: 16 December 2020

1. The recitals to the directions made on 4 December 2020 in this matter set out the background and identify the issues for consideration on the application. Whilst Mr Corbett initially filed an application for bail pending appeal, it was evident during the course of discussions on the last occasion, that his client in fact required leave to appeal against both conviction and sentence.
2. The directions made that day included that the transcript in the proceeding below be provided to the parties by 4 PM that day and for the required application for leave to appeal and for bail pending appeal to be adjourned part heard to 10 December 2020. Due to delays in provision of the transcript to the parties, the return date was extended to today.
3. The last directions also required Mr Corbett to file a memorandum by 8 December 2020 advising whether his client wished to proceed with the applications. A commensurate extension of that date was directed to 14 December 2020.
4. At 8:54 AM today, Mr Corbett filed a memorandum in which he stated, in summary, that:

08 JAN 2021

JK

- (a) his client accepted that the statement made by the complainant purportedly dated 21 July 2018 was not tendered as evidence during the trial below nor did the applicant cross examine the complainant about the statement;
 - (b) he proposed to ask the Crown to approach the complainant to see whether she is prepared to submit an affidavit stating she did make the statement on "21 July 2018 shortly after the commission of the offences on or about the third week of July 2018 that she did not wish the case against the appellant to proceed"; and
 - (c) the applicant effectively sought leave to amend the notice of appeal to abandon the application for leave to appeal against conviction and to only seek to appeal against sentence in purported reliance upon s.16(b) of the *Court of Appeal Act* as being a question of mixed fact and law.
5. After hearing further from Mr Corbett in relation to the contents of his memorandum, it was clear that the application was misconceived and both legally and factually defective.
 6. Firstly, s.16(b) only relates to appeals against conviction, not sentence. Subsection (c) requires leave to appeal against sentence whether the sentence is not otherwise fixed by law.
 7. Secondly, Mr Corbett's proposed course of asking the Crown to see if the complainant would swear an affidavit about her statement was irregular to say the least. There is no legal compulsion on the Crown to agree to the proposal. Given the lateness of the filing by Mr Corbett of his memorandum, Mr 'Aho, who appeared for the Crown had not had an opportunity to consider the proposal. For the reasons which follow, it was unnecessary to do so.
 8. Thirdly, and after some debate and deductive reasoning by reference to 2018 2019 calendars, Mr Corbett eventually accepted but the date of the statement in question was not 21 July 2018 but rather 21 June 2019. It was therefore not made "shortly after the commission of the offences". In that regard, the date in the indictment and summary of facts of 2019 was amended at the outset of the trials to 2018. That date was confirmed in evidence and recorded in the verdict.

As such, Mr Corbett agreed that the statement, even if it were placed before the court on this application or on any appeal, would have no bearing on the sentence imposed bearing or the applicant's complaint that the sentence was not fully suspended.

9. Accordingly, Mr Corbett agreed that there was in fact no actual ground or basis for his client's amended application for leave to appeal against sentence and he agreed that the applications for leave generally and for bail should be refused.
10. I therefore order that the application for leave to appeal and the application for bail pending appeal are refused.

NUKU'ALOFA
16 December 2020



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC LCJ
PRESIDENT