IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 32 of 2021
(CV 23 of 2021)

BETWEEN LORD TU'IVAKANO
Appellant

AND 1. POLICE COMMISSIONER
2. THE ATTORNEY-GENERAL
3. KINGDOM OF TONGA
Respondents

Court: Blanchard J
Hansen J
Randerson J

Counsel: William C Edwards for Appellant
Sione F Sisifa for Respondents

Hearing: 20 May 2022

Judgment: 25 May 2022

JUDGMENT OF THE COURT

Introduction

[1] This appeal is against a judgment of Lord Chief Justice Whitten dismissing a claim for damages by the appellant against the respondents for malicious prosecution. The history of the relevant proceedings is lengthy and complex but we have the benefit of a comprehensive judgment expressed with admirable clarity.

[2] In brief, the appellant was charged and tried in the Supreme Court on five counts of accepting a bribe as a Government servant, as well as single counts of money laundering, perjury, making a false statement for the purpose of obtaining a passport, and possession of a firearm and ammunition without a licence.

[3] The trial before Judge and jury commenced on 10 February 2020. In the fourth week of the trial, the Crown entered a *nolle prosequi* in respect of the bribery and money laundering charges. The appellant pleaded guilty to the charge of possession of a firearm but was found guilty on the perjury and false statement charges as well as the charge of possession of ammunition.

[4] The appellant successfully appealed against all but one of his convictions. This Court acquitted him on the perjury and false statement charges and dismissed the appeal in respect of the ammunition.[1]

[5] The appellant then commenced a proceeding against the respondents claiming a total of TOP $5.75 million in damages for malicious prosecution. An alternative cause of action based on misfeasance in public office was ultimately abandoned.

[6] The main focus of the Crown case against the appellant related to the bribery and associated money laundering charges. The charges arose from the Crown allegation that the appellant along with others had been involved in a fraudulent scheme to issue Tongan passports for foreign nationals in exchange for money. The prosecution case was that Chinese nationals had worked together with two Tongans, Satua Tu'akoi and 'Ileana Taulua, to lodge forged passport applications with the Immigration Division of the Ministry of Foreign Affairs. It was further alleged that the scheme was to have those applications approved by the appellant in his

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1 *Tu'ivakano v R* [2020] TOCA 8; AC 1 of 2020.

capacity as the then Prime Minister of Tonga and Minister of Foreign Affairs in return for payments made by one Sien Lee and his wife Ying Lee as bribes to gain his approval.

Processes leading to the bringing of the charges

[7] The Lord Chief Justice has helpfully detailed the lengthy processes of investigation of allegations of passport fraud involving a number of individuals other than the appellant and those associated with him. It is sufficient if we summarise the key points. A number of Government agencies were involved in the investigation including the Police, the Ministry of Foreign Affairs and Trade, the Office of the Director of Public Prosecutions (DPP) and a special crime unit established to investigate passport fraud known as the Serious Organisation Transnational Crime Unit (SOTCU).

[8] During 2013, one individual was convicted and sentenced and a number of persons of interest were identified including the appellant, Satua Tu'akoi and 'Ileana Taulua. Investigations of banking transactions were made. During the investigation, the Police Commissioner and the Acting Solicitor-General and DPP at the time, 'Aminasi Kefu, were regularly briefed on the progress of the investigation. Any major decisions during the investigations were reached through consultation between the SOTCU investigation team, the Police Commissioner and Mr Kefu. This process continued during 2014 and 2015.

[9] During 2015, the appellant was succeeded as Prime Minister by Mr Pohiva and the appellant was appointed Speaker of the Legislative Assembly. Prime Minister Pohiva made media statements in 2016 and 2017 in which he associated the appellant with passport fraud and money laundering. Police Commissioner Caldwell was concerned about the risk of political interference and asked Prime Minister Pohiva to refrain from making public comment on the issue. He also emphasised at various stages of the investigation that the Police were acting entirely independently from political influence. His unchallenged evidence was that he had observed that independence.

[10] By the end of 2017, SOTCU had completed their extensive investigation and delivered 38 volumes of evidence to Mr Kefu and his team at the Attorney General's office. Commissioner Caldwell sought Mr Kefu's opinion on draft criminal charges which had been prepared. These were to be examined against the evidence provided and an opinion given as

to whether the proposed charges met the requirements of evidential sufficiency and public interest.

[11] Mr Kefu, Mr J Lutui[2] and Mr 'Aho[3] gave evidence that the assessment of the material provided to them was conducted in accordance with the Attorney-General's Office Prosecution Code which is based on the UK Code for Crown Prosecutors. The UK Guidelines provide that a decision whether to prosecute requires either a Threshold Test or a Full Code Test. Mr Lutui said in evidence that the assessment in the present case was conducted in accordance with the Threshold Test which he described as determining whether there is a reasonable prospect of conviction. The guidelines themselves describe the Threshold Test as requiring the Prosecutor to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it in the public interest to charge that suspect.

[12] The team assessing the evidence noted there were some potential deficiencies, for example, lack of direct evidence to prove that the appellant intended to deceive the Ministry of Foreign Affairs, and the absence of any direct correlation between the funds entering the bank accounts controlled by the appellant and the issue of the passports. But counsel were of the opinion that there was reasonable cause to establish these allegations by inference.

[13] The team assessing the evidence recommended that the appellant be charged with seven counts of causing a false statement to be made for the purpose of obtaining a passport, one count of making a false statement for the purpose of obtaining a passport, two counts of perjury and one count of acceptance of a bribe by a Government servant.

[14] Mr Kefu approved the recommendations. He stated in evidence at trial that he was satisfied there was more than sufficient admissible evidence to establish a reasonable prospect of conviction by a jury on the charges laid. He was also satisfied it was in the public interest to prosecute the appellant because the evidence pointed to him, as the then Head of Government, facilitating fraud in the issue of Tongan passports for foreign nationals who were not lawfully entitled to receive Tongan passports. He said that the case had always relied on circumstantial rather than direct evidence. There was no public interest factor pointing against prosecution.

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2 Senior Crown Counsel and later DPP from December 2019.

3 Crown Counsel.

[15] Importantly, Mr Kefu testified that, at no time did the late Prime Minister, Mr Pohiva, or the former Minister of Police, Mateni Tapueluelu, have any role in the investigation or prosecution of the appellant. The decision to prosecute was made solely on the evidence gathered by the Taskforce and no inappropriate factors such as political rhetoric, were considered in making the decision to prosecute.[4] His evidence on this point was unchallenged, Nor was it put to him that he had approved the bringing of the charges for an improper purpose or that he did not honestly believe the appellant was guilty. Rather the focus was on the sufficiency of the evidence.

[16] On 29 January 2018, Commissioner Caldwell and Detective Superintendent Tohifolau[5] met with Mr Kefu and his team to discuss their recommendations. The Commissioner accepted the recommendation to prosecute and agreed that the appellant be charged as recommended. Shortly afterwards, Mr Kefu directed that the charge of money laundering be added. Mr 'Aho explained in his evidence that the formulation of charges did not remain stationary and some other adjustments to the charges were made prior to the appellant being arrested on 1 March 2018. By then the focus had changed to the five bribery charges with only a single charge of making a false statement. These changes were all made by Mr Kefu's team in consultation with police officers in the investigation team.

[17] After the appellant's arrest, Commissioner Caldwell issued a press statement at the time which included this statement:

> The passport investigation was conducted in a methodical, professional and objective manner by an experienced team of hand-picked police Officers whose integrity was beyond reproach and who were ultimately acting under my direction as the Commissioner of Police for the Kingdom of Tonga.

[18] The Commissioner was not challenged on the truth of this statement. After the appellant's arrest, all matters relating to the prosecution of the case were handled by the Attorney-General's office.

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4 At [68] of the judgment under appeal.

5 Who was second in charge of the investigation team.

No case submission at committal stage

[19] In June and July 2018 during committal proceedings in the Magistrates' Court, the appellant's counsel submitted there was no case to answer on any of the charges. Although the appellant had, on legal advice, declined to make any statement to the police, it was asserted on his behalf during the committal proceedings that the money he had received was variously from a casino, borrowed, or a gift.

[20] Mr Kefu, Mr 'Aho and Superintendent Tohifolau were all questioned as to whether they had made further inquiries about the provenance of moneys the appellant had received from China . They explained that the prosecution believed that Sien Lee was promoting the sale of Tongan passports in Hong Kong; it was assumed he would not co-operate and that, while attempts were made to seek the co-operation of other police agencies in the region, these inquiries "came to nothing". Mr Kefu gave evidence that he did not believe the money was from casino winnings and noted the various descriptions given by or on behalf of the appellant as to the source of the payments.

[21] The prosecution reiterated the essence of the Crown case and submitted there was evidence that, in return for approving the alleged forged passports, the appellant, his wife and grandson had received payments directly or indirectly from Mr Lee and his wife. As the Judge below recorded, the fate of the money laundering charge was always derivative upon the outcome of the bribery charges.

[22] On 22 January 2019, Principal Magistrate Mafi found there was a chain of evidence of money flowing from Hong Kong into the appellant's bank account and evidence of a relationship with Mr Lee and Satua Tu'akoi in respect of unlawful passport activity. He was satisfied there was sufficient circumstantial evidence for a jury to infer that the money flow to the Minister was for the purpose of bribery and that he, the appellant, had disguised the payments by placing them into his housing loan account. However, he dismissed four of the bribery charges principally on the basis that the funds the subject of those counts were received either by the appellant's wife or his grandson.

Prosecution appeal against the dismissal of some of the charges

[23] The appellant did not appeal in respect of any of the charges on which he was committed. However, the prosecution appealed the Principal Magistrate's decision to dismiss four of the bribery charges. On 21 May 2019, Paulsen LCJ allowed the appeal and committed the appellant to stand trial on those counts as well.[6] His Honour held:[7]

> Turning to the facts, there is a good deal of evidence that the respondent (appellant) was involved with Sien Lee, Satua Tu'akoi, 'Ileana Taulua and others to obtain fraudulent passports for Chinese nationals and that for his involvement and influence he received payments.

[24] Paulsen LCJ canvassed some of the key parts of the evidence to be adduced by the prosecution including a late night meeting at the Emerald Hotel in October 2012 involving Mr Lee, Satua Tu'aki, the appellant and others following which, at the appellant's direction, a number of passports were printed and issued after midnight. The former Lord Chief Justice concluded:[8]

> I have no doubt that looking at the totality of the evidence a reasonable jury properly directed could logically and reasonably infer that the four payments were made to the respondent or at his direction in return for his assistance in the processing of fraudulent passport applications and convict him on those charges.

[25] The appellant did not appeal this decision and he was subsequently arraigned in the Supreme Court, electing trial by jury.

Strike out application before trial

[26] Lord Chief Justice Whitten presided over the criminal trial and records in his judgment two relevant procedural decisions made before trial. The first of these was a strike out application. On 30 July 2019, the appellaut applied to strike out the bribery and money laundering charges on substantially the same grounds as already argued before Principal Magistrate Mafi and Paulsen LCJ. Applying well established principles guiding strike out

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6 Supreme Court proceeding AM 4 of 2019.
7 At [25].
8 At [31].

applications in criminal proceedings, the Lord Chief Justice found there was sufficient evidence for the trial to proceed on all counts except one.

Refusal of joint trial

[27] On the second procedural issue, the Lord Chief Justice ruled in December 2019 against a Crown application for a joint trial of the charges faced by the appellant with two separate indictments against Ileana Taulua and Satua Tu'akoi. He did so on the ground that only one indictment could be placed before one jury.

The trial

[28] A jury was empanelled on 10 February 2020 with an amended indictment which, in respect of the bribery charges, specified the names of 12 Chinese nationals whose applications for Tongan passports had allegedly been approved by the appellant. The amended indictment resulted from a successful application made without notice by the appellant at the beginning of the trial for further particulars specifying the payments said to relate to each bribery count and identifying which passport each was said to relate to.

[29] During the fourth week of the trial and towards the close of the prosecution case, the Lord Chief Justice called counsel into chambers on 3 March 2020. He expressed concern to the leading prosecutor Mr Lutui about whether there had been, or would be, any evidence adduced of any request of the appellant by Sien Lee in relation to any of the passport applications. The Judge also asked whether there was any evidence which linked, or which could support a reasonable inference of links, between any of the moneys sent by Mr Lee or his wife to the appellant, his wife and grandson and any of the passport applications at issue. The Lord Chief Justice indicated to counsel that if there was no such evidence, he would have to consider whether to direct the jury to acquit on those counts.

[30] Mr Lutui discussed the matter with the Attorney-General Mrs L Folaumoetu'i SC and informed the Court later on 3 March 2020 that the prosecution would continue. Mr Lutui and Mrs Folaumoetu'i explained in evidence that the decision to continue with the bribery and money laundering charges was based on the fact that the appellant was about to give and call evidence and they considered the prosecution case might be enhanced as a result.

[31] During his evidence, the appellant gave evidence that the largest sum of money referred to in the indictment had been won by him at a casino in Macau, with Sien Lee and others, during a trip to China.[9] The Judge noted there was no independent or documentary evidence to corroborate the appellant's evidence of these winnings. However, he also accepted there was no meaningful challenge to the appellant's evidence during cross-examination, observing there could not have been any realistic challenge in the circumstances.

[32] In respect of the false statement and perjury charges, the appellant gave evidence, in essence, that he recognised the two Chinese nationals who were seeking passports as persons he had naturalised the year before, but he did not know they were applying under different names.

[33] On 4 March 2021, during his evidence, the appellant changed his plea on the charge of unlicensed possession of a firearm and pleaded guilty. The following day, after the appellant had completed his evidence, the Lord Chief Justice summoned counsel into chambers again raising concerns about the state of the evidence on the bribery and related money laundering charges. He expressed the view that it appeared it would be unsafe to put those counts to the jury. The following day, Mr Lutui entered the *nolle prosequi* in respect of those counts.

[34] Mr Lutui gave evidence that the prosecution's assessment of the case had not changed until the decision was made to enter the *nolle prosequi*. However, the direction to provide further particulars in the amended indictment identifying the Chinese nationals to which each bribery charge referred had resulted in an additional burden of proof for the prosecution and the inability to conduct a joint trial was also a factor. The decision to enter the *nolle prosequi* was based on his reassessment of the evidence and his conclusion that the prosecution could no longer satisfy the second limb of the test in *R v Galbraith*.[10]

[35] The trial proceeded on the remaining counts of making a false statement, perjury and unlicensed possession of ammunition. The jury convicted the appellant on all three on 9 March 2020.

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9 The Lord Chief Justice noted that a total of HKD$995,000 was at issue of which HKD$900,000 was transferred to the appellant's bank account in Tonga.

10 *R v Galbraith* [1981] 2 All ER 1060; (1981) Cr App Rep 124 (CA) at 127.

[36] As already noted, this Court acquitted the appellant of the false statement and perjury charges and dismissed his appeal against the ammunition conviction.

Approach to the determination below

[37] In the judgment under appeal, the Lord Chief Justice considered a number of authorities including notably the decision of the High Court of Australia in *A v State of New South Wales*[11] and a decision of the Supreme Court of Canada in *Miazga v Kvello Estate.*[12] His Lordship concluded that in order to succeed in an action for damages for malicious prosecution, the plaintiff must establish on the balance of probabilities that:

(a) The criminal proceedings were initiated against the plaintiff by the defendants;

(b) The proceedings terminated in favour of the plaintiff;

(c) The defendants acted without reasonable and probable cause;

(d) In initiating or maintaining the proceedings, the defendants acted maliciously, that is, for an improper purpose, not for the purpose of carrying the law into effect; and

(e) As a consequence, the plaintiff suffered loss and damage.

[38] Before us, counsel accepted this statement of the elements of the tort of malicious prosecution.

[39] The controversy in the present case lay in the third and fourth elements:

(c) Was the prosecution conducted and/or maintained without reasonable and probable cause?

(d) Did the respondents act maliciously, that is for an improper purpose?

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11 *A v State of New South Woles* [2007] 230 CLR 500.

12 *Miozga v Kvello Estote* [2009] 3 SCR 339.

[40] As to the first issue the Lord Chief Justice said the appellant's criticisms of the prosecution could be condensed into two propositions:

(a) There was no direct evidence that any of the moneys received by the appellant or his wife or grandson from Sien Lee or his wife were bribes accepted in return for approving applications by specified Chinese nationals for Tongan passports and;

(b) The prosecution "could have been done better" or could have "taken proper steps, and could have "made better inquiries".[13]

[41] The Lord Chief Justice concluded[14] that the prosecution had reasonable and probable cause to charge the appellant with the bribery and money laundering charges. His reasoning is summarised in this passage:

> 188. In the absence of any exculpatory explanations by the Plaintiff, the Prosecution were left with direct evidence of the Plaintiff's approvals of irregular passport applications, including in the face of legal advice from Mr Kefu that to do so was unlawful, other objective documentary evidence such as emails passing between the Plaintiff and Satua Tu'akoi and others, and the only explanations for the receipt of the moneys recorded on bank documents such as 'fundraising from China', 'purpose gift' and 'loan repayment'. As Mr Kefu identified, none of those referred to any of the funds received as being casino winnings.
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> 189. In my view, the police and the Prosecution (to the extent that they were involved in matters of investigation or advising on same) did all they reasonably could to gather all available evidence upon which to assess and determine whether charges should be laid.
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> 190. Further, even though the brief did not contain any written record of any analysis of the evidence considered against the elements of the relevant offences, I accept that the Prosecution team discussed those matters in arriving at the recommendation to prosecute. Again, that evidence was not challenged.
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> 191. Therefore, I am satisfied that there was circumstantial evidence to support the Crown's case concept as explained by Mr Kefu whereby the Plaintiff was alleged to have been involved with, in particular, Sien Lee and Satua Tu'akoi in a scheme for the fraudulent approval of unlawful Tongan

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13 Judgment, at [180].

14 At [193].

passports. Even though the evidence of the connections between the Plaintiff and the other alleged protagonists, and the purpose of the payments and the basis upon which they were received by the Plaintiff, as alleged by the Crown, was not strong, and that it might well have been refuted or explained at trial, that evidence (in terms of the amounts, frequency and timing relative to the approvals of the relevant passport applications) was sufficient to justify charging him with the bribery and related money laundering offences. The absence of direct evidence of knowing involvement does not mean that there was insufficient evidence, including circumstantial evidence, to lay the charges.

192. There was no issue raised by the Plaintiff as to Mr Kefu's honest belief in the existence of reasonable and probable cause. I am satisfied, on the evidence and circumstances described in the summary of facts, that that belief was reasonable.

193. I conclude therefore, that the Prosecution had reasonable and probable cause to charge the Plaintiff with the bribery and money laundering charges.

[42] The Lord Chief Justice next dealt with the issue of whether it was appropriate for the prosecution to continue after concerns had been raised about the sufficiency of evidence on 3 March 2020. His Lordship concluded[15] that the appellant had not demonstrated an absence of reasonable and probable cause for the commencement of the bribery and money laundering charges or their continuation until they were terminated by the entry of the *nolle prosequi.*

[43] His Lordship's reasoning is best set out in full:

215. I agree with the Plaintiff's submission that the ensuing decision by the Prosecution, as explained in evidence by Mr Lutui and Mrs Folaumoetu'i, to continue with the bribery and money laundering charges in the expectation that evidence from or called by the Plaintiff might 'enhance' the Prosecution case, was erroneous. That rationale either ignored, or at least misapprehended, the legal onus and evidentiary burden on the Prosecution to adduce sufficient evidence to support its case. Once it was apparent that the evidence adduced by the Prosecution was, or was likely to be, insufficient to prove those charges or safely support any inferences required for conviction, in the *Galbraith* sense, it was incumbent on the Prosecution to not proceed further with them.

216. The Prosecution did make that decision a few days after the issue was first raised with Mr Lutui. During that period, the Plaintiff gave evidence. I accept that the evidence he did give, particularly, in relation to his

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15 At [222].

approvals of the clearly invalid, or at least irregular passport applications, was likely to have enhanced the Prosecution's optimism about that aspect of its case. However, none of the Plaintiff's evidence filled the critical 'gaps' in the Prosecution case as described above. On the contrary, the Plaintiff's evidence on the provenance and purpose of the payments from Sien Lee, particularly, the substantial 'casino winnings', could only have dampened, if not destroyed, that optimism. That is, of course, if it were accepted by the jury. Moreover, it was likely to have been the first time during the entire investigation and criminal proceedings, that the Prosecution received any first-hand detailed information about those matters. As such, and unsurprisingly, given the inability of the police and the Prosecution to have earlier investigated such claims, the Plaintiff's evidence, on that issue, was undamaged in cross-examination.

217. I do not agree with the Plaintiff's submission that the Prosecution's failure to immediately terminate the bribery and money laundering charges when the court first raised concerns about the sufficiency of the evidence at trial demonstrated a lack of reasonable and probable cause for the commencement and continuation of that part of the prosecution to that point in time. As I have explained, the two intervening events – the orders for a separate trial and further particulars – could not reasonably have been anticipated by the Prosecution and I am satisfied that they each impacted the Prosecution case, at different times, and in different ways, to the point that, once realised during the trial, it was appropriate to enter the nolle prosequi.

218. Nor do I consider that the decision demonstrated malice. Provided that the motivation was to pursue the interests of justice and the continuation of the proceedings was not therefore actuated by malice, the Prosecution's actions were lawful: *Coudrat v Revenue and Customs Comrs* [2005] All ER (D) 398, CA at [56]. In the absence of any evidence to the contrary, I am satisfied of both. In my respectful view, the decision was more likely the result of inexperience, incompetence, honest mistake or negligence, none of which is actionable: *Elguzouli-Daf v Metropolitan Police Comr* [1995] 1 All ER 833, CA: *Thacker v Crown Prosecution Service* (1997) Times, 290 December; *Ti'ivai v Kingdom of Tonga* [2009] TOCA 30 at [12]; *Langi v Lavaki* [2012] TOSC 89 at [13]; *Grier v Lord Advocate* [2021] COSH 18 at [36] referring to *Miazga* at [78].

219. Further, the intervening few days between when the issue of sufficiency of evidence was first raised and when the Prosecution entered the nolle prosequi were insignificant in terms of the overall duration of the Plaintiff's exposure to the charges and emotional stress and reputational harm, of some two years and eight months all up, for which he now claims damages.

220. I also accept that in those intervening few days, Mr Lutui found himself impelled to review the state of the Prosecution case. In doing so, he concluded, as he explained in his evidence in this case, that the additional

> evidential requirements presented by the added particulars meant that the Prosecution was no longer able to satisfy the second limb of the *Galbraith* test. By that, I understood him to mean that even though there was some evidence to support the bribery charges, it was of such a tenuous, inherently weak or vague character, even when taken at its highest, that the jury, properly directed, could not properly convict upon it. In my view, that was a sound assessment. However, it could only have come after the order for particulars, and an appreciation that the evidence available to be adduced at trial, which had been determined to be sufficient for those charges to proceed to trial before the order for particulars was made, would no longer be sufficient to support the particularised case.
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> 221. Ultimately, on this issue, the Plaintiff placed too great an emphasis on the lack of, and need for, direct evidence of aspects of the bribery and money laundering charges; and the Prosecution appears have placed too great a reliance on the strength of its circumstantial case and its ability to support inferences necessary to secure convictions on those charges. However, that reliance was only undermined, critically, by the orders for the Plaintiff to be tried separately and then for the indictment to be amended at trial by the inclusion of specific particulars.

The false statement and perjury charges

[44] The appellant's counsel did not address in his oral submissions any argument to support the proposition that there was an absence of reasonable and probable cause in relation to the false statement and perjury charges. The essence of these charges was that the appellant had made a false statement in a letter addressed to an immigration officer during his tenure as Prime Minister, to the effect that Mr Hua Guo and Ms Xing Liu were naturalised as Tongans on 29 October 2014. The letter sought the assistance of the Immigration Division to facilitate the issue of passports to replace their lost passports. The perjury allegation relied on a similar statement by the appellant in an affidavit.

[45] The Crown case was that the appellant knew that the statement made was materially false and issued the letter for the purpose of misleading the Immigration Division. The Crown alleged that Mr Guo and Ms Liu had previously applied for and were issued with Tongan passports but under different names. As noted, the jury convicted the appellant on these counts but the verdicts were set aside and the appellant was acquitted on appeal.

[46] This Court's decision on the appeal was that there was no direct evidence that the appellant intended to deceive and nothing from which such an intention could be inferred. The appellant's consistent position had been that he could not remember the names of the two

individuals but he recognised them on sight as being the same people to whom he had administered an oath of allegiance the year before. The appellant's case at trial was that he had relied upon the fact that naturalisation certificates had been issued the year before to the two individuals, albeit under different names, and that passports had previously been issued to them in those names. Because the individuals seeking the relevant passports were the same persons who had been naturalised previously, the statements made by the appellant were true, or at the least, there was no intention to deceive or mislead. This Court made no finding that there was an absence of reasonable or probable cause to bring the false statement and perjury charges.

[47] In the Court below, His Lordship found that the appellant had failed to establish on the balance of probabilities an absence of reasonable or probable cause for commencing and/or maintaining the false statement and perjury charges. The full reasoning of His Lordship is set out in the judgment[16] but may be summarised as follows:

(a) This Court's retrospective analysis of the evidence and issues at trial was primarily based on textual consideration of the relevant parts of the letter and affidavit and an examination of how the prosecution case was conducted at trial. In contrast, the damages claim for the tort of malicious prosecution commenced at the other end of the timeline and called for consideration of whether the prosecution had reasonable and probable cause for laying the charges and, thereafter, for maintaining them through to verdict.

(b) The appellant had the onus of proof, yet little attention, if any, had been given by the appellant in cross-examination of the Crown witnesses about the reasons for the decision to prosecute on these charges.

(c) There was no evidence the prosecutors did not honestly believe in the sufficiency of the case on these charges.

(d) The decision to prosecute was based almost entirely on the apparent falsity of the key assertions and the prosecution must have proceeded on the basis that, if that evidence alone was placed before a jury, there was a reasonable prospect of a conviction.

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16 At [235]–[243].

(e) In light of the plaintiff's refusal to be interviewed, the prosecution would have had no idea of any possible explanation or defence which might have revealed the appellant's true state of mind.

(f) Apart from the no case submission in the Magistrates' Court, counsel for the appellant had not made any further attempts to have these charges struck out for insufficiency of evidence.

(g) Despite the appellant's evidence at trial, the jury had nevertheless accepted the Crown case at trial.

Did the respondents act maliciously, that is for an improper purpose?

[48] In an earlier part of his judgment, His Lordship recorded that the appellant had not adduced any evidence to support the proposition that the Police were actively instrumental in making or prosecuting the charges against him.[17] It was clear that the Commissioner did not undertake any independent analysis or decision to lay the initial charges, but rather accepted and acted on the legal advice of Mr Kefu. There is no challenge by the appellant on appeal to His Lordship's finding that it was the prosecutors who made the ultimate decision to prosecute and to maintain the proceedings until the entry of the *nolle prosequi* during the trial.

[49] His Lordship correctly stated that the burden of proving that a professional prosecutor acted with malice is a heavy one.[18] He adopted descriptions of malice in *A v New South Wales* as "acting for purposes other than a proper purpose of instituting criminal proceedings,[19] where "the sole or dominant purpose of the prosecutor is a purpose other than the proper invocation of the criminal law" or an "illegitimate or oblique motive".[20] Although malice may in some circumstances be inferred from the absence of reasonable and probable cause[21] if the prosecutor honestly believes in the guilt of the plaintiff, malice is not to be inferred if the only evidence of it is the absence of reasonable and probable cause.[22]

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17 At [158].
18 Citing *Wood v State of New South Wales* [2019] NSWCA 313, at [49].
19 At [55].
20 At [91].
21 *Clifford v The Chief Constable of the Hertfordshire Constabulary* [2011] EWHC 815 (QB) at [43].
22 *Clifford v The Chief Constable of the Hertfordshire Constabulary* (supra).

[50] In the Court below, the appellant had pleaded that the Police investigation and subsequent prosecution was politically motivated, relying on the public statements by the late former Prime Minister Mr Pohiva already mentioned and an assertion that the former Minister of Police was responsible for instigating the Police investigation which targeted the appellant. His Lordship firmly rejected these allegations on the basis that there was no evidence to support them. To the contrary, there was uncontroverted evidence that Commissioner Caldwell and Mr Kefu were at pains to caution the former Minister and Prime Minister, respectively, against making public statements or doing anything which could compromise the investigation and the decision to prosecute and had issued media statements to similar effect, to reassure the general public of the propriety and independence of the investigation.[23] The appellant did not challenge these conclusions on appeal.

[51] The main basis advanced on the issue of malice was the absence of reasonable and probable cause. In that respect, His Lordship referred to his earlier finding that there was reasonable and probable cause both to bring the charges and then to pursue them at trial. He found[24] that, even if there had been no reasonable and probable cause such as to support an inference of malice, he would have tended to the view that the prosecution was more likely to have been the product of inexperience, incompetence or negligence rather than any form of improper purpose or other malice.

[52] We also note the earlier finding by His Lordship[25] that the decision not to immediately terminate the bribery and money laundering charges when the Court first raised concerns about the sufficiency of evidence did not demonstrate malice. In the absence of evidence to the contrary, His Lordship was satisfied that the motivation was to pursue the interests of justice and that the continuation of the proceedings was not therefore actuated by malice.[26]

Submissions on appeal

[53] The appellant's written submissions and the oral submissions ably made on his behalf by Mr Edwards focussed primarily on the bribery and money laundering charges. It was submitted that the Lord Chief Justice had erred in finding that the prosecution had reasonable

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23 Judgment, at [255].
24 At [259].
25 At [218], cited at para [43] above.
26 Citing *Coudrat v Revenue and Customs Commissioners* [2005] All ER (D) 398, CA at [56].

and probable cause to charge the appellant and to continue the proceedings until the *nolle prosequi* was filed. The findings on malice were also challenged. In the written submissions, the appellant also submitted that the Court below had erred in the findings relating to the making of a false statement and perjury but counsel did not address the findings on those counts in his oral submissions. The appellant accepted the findings of guilt on the firearm and ammunition charges.

[54] In advancing the appellant's argument in respect of reasonable and probable cause, the main points made by Mr Edwards were:

(a) There was an absence of a link between the appellant, Mr Lee and Satua Tu'akoi;

(b) There was no link with the payments made by Mr Lee and his wife to the passports said to have been approved by the appellant;

(c) There was material on the prosecution case brief indicating that Mr Tony Chen (rather than Mr Lee) was involved with promoting in Hong Kong the issue of unlawful Tongan passports. This was said to be supported by the recognition by the prosecution in the brief of a link between Satua Tu'akoi and Mr Chen;

(d) The recognition by the prosecution of potential deficiencies of the kind we have summarised above[27] showed the prosecutors were aware of problems with the case from an early stage.

(e) The inferences the prosecution sought to draw from the meeting at the Emerald restaurant were not reasonably available and did not implicate the appellant;

(f) There was no temporal linkage between the meeting at the Emerald restaurant and the impugned payments made some time later;

(g) The emails between Satua Tu'akoi and the appellant relied upon by the Crown did not carry any adverse implications for the appellant;

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27 At [12] above.

(h) There was no justification for the prosecution to continue after 3 March 2020 when the Lord Chief Justice first raised concerns at trial about the sufficiency of the prosecution evidence.

Reasonable and probable cause – consideration

[55] We accept Mr Sisifa's submission for the respondents that the Lord Chief Justice did not err in finding there was reasonable and probable cause to charge the appellant with the bribery and money laundering offences and the other counts in the amended indictment.

[56] There was no challenge by the appellant to the finding by the Lord Chief Justice that the inquiry involves both an objective and a subjective aspect: there must be an actual belief on the part of the prosecutor in the existence of reasonable and probable cause and that belief must be reasonable in the circumstances. In *Miazga* the Supreme Court of Canada put it this way:[28]

> In the context of a public prosecution, the third element necessarily turns on an objective assessment of the evidence of sufficient cause. If the Court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go further.

[57] Here, Mr Kefu's unchallenged evidence was that he honestly believed there was reasonable and probable cause to bring the prosecution. We are also satisfied that, viewed objectively, reasonable and probable cause existed to charge the appellant and to commence proceedings. Our reasons for reaching this conclusion may be briefly stated:

(a) The prosecutors had a proper basis to conclude that a jury, properly directed, could reasonably infer that the appellant was involved in a fraudulent scheme to facilitate the issue of unlawful Tongan passports in return for money.

(b) There was also a proper basis for a jury to infer that the scheme involved Satua Tu'akoi and 'Ileana Taulua lodging forged passport applications with the Immigration Division of the Ministry of Foreign Affairs and that payments had

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28 *Miazga v Kvello Estate* (supra).

been made by Mr Lee and his wife to the appellant and members of his family in return for his approving the issue of Tonga passports.

(c) That inference was reasonably capable of being drawn based on the highly unusual events surrounding the dinner at the Emerald restaurant, the subsequent payment of large sums of money to the appellant and members of his family and the existence of certain emails between the appellant and Satua Tu'akoi.

(d) The evidence in relation to the Emerald restaurant was that the appellant had dinner there with Mr Lee, Satua Tu'akoi and others which resulted in the appellant summoning an immigration officer and the issue of passports in the middle of the night. These events alone provided a proper basis for the inferences and links the Crown sought to draw.

(e) The delay thereafter before payments were made was not such as to seriously weaken the inference that the payments were in return for the issue of unlawful passports. There was no dispute the payments came from Mr Lee and his wife and there had been no definitive exculpatory explanation for the payments until the appellant gave evidence at trial that the largest payment was for his winnings from a casino in Macau which he had attended with Mr Lee.

(f) The evidence of an association between Satua Tu'akoi and Tony Chen referred to by Mr Edwards and the latter's involvement in the issue of passports did not preclude reliance on the evidence the Crown advanced to support the inference of links between the appellant, Satua Tu'akoi and Mr Lee. That link was evident from her attendance with the appellant and Mr Lee at the Emerald restaurant

(g) The assessment of the evidence prior to the laying of charges was carried out independently by Mr Kefu and the prosecution team and in accordance with the Prosecution Guidelines.

(h) Significantly, the prosecution's assessment of the sufficiency of the evidence was substantially upheld by judicial officers on three separate occasions before the trial commenced in the context of no case applications by the appellant: first,

by Principal Magistrate Mafi in the committal proceedings; second, by Paulsen LCJ on appeal; and finally by Whitten LCJ prior to the commencement of the criminal trial.

(i) The focus of the no case applications was on the bribery and money laundering counts. The appellant did not appeal his committal on the false statement and perjury charges.

[58] Mr Sisifa accepted that the obligation on the prosecution to be satisfied of the existence of reasonable and probable cause extends beyond the decision to charge and continues during the trial. This brings us to the submission made on behalf of the appellant that the trial ought not to have been continued after the Lord Chief Justice first raised concerns about the sufficiency of the evidence on 3 March 2020.

Reasonable and Probable Cause to Continue

[59] Mr Edwards' forceful submission on this issue was premised on the proposition that the prosecution was continued without reasonable and probable cause even after the Lord Chief Justice raised his concerns on 3 March 2020. Counsel submitted that improper purpose could be inferred from the prosecution proceeding after that point even though Crown counsel knew or must have known that the evidence was insufficient to warrant a continuation of the proceedings.

[60] Mr Edwards was particularly critical of the decision to proceed in the hope by the prosecutors that evidence would emerge from the evidence of the appellant which would support the Crown case. He submitted that Crown counsel should have informed the presiding Judge of the reason for their decision to continue and that it was improper for them not to have done so.

[61] Counsel also submitted that the prosecution had failed to make adequate inquiries during the course of the investigation including, for example, failing to interview the appellant's wife and grandson and to take sufficient steps to locate and interview Mr Lee. It

was submitted this indicated a determination by the prosecutors to proceed without regard to the evidence. We see no basis to interfere with the findings below on this point.[29]

Malice – consideration

[62] The element of malice in this context requires the plaintiff to prove that the sole or dominant purpose to prosecute was one other than the invocation of the criminal law.[30] The following is an accurate case summary of the key aspects of the decision of the Supreme Court of Canada in *Miazga*:[31]

> Malice is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose". The malice element of the test will be made out when a court is satisfied, on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice" … While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry it does not equate with malice and does not dispense with the requirement of proof of an improper purpose. By requiring proof of an improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, honest mistake, negligence or even gross negligence.

[63] It needs to be kept in mind that the sufficiency of evidence in a criminal trial may be affected in a wide variety of ways. An apparently strong Crown case may be significantly weakened by the vagaries of trial. So too, the converse may occur. Where a prosecutor maintains an honest belief in the existence of reasonable and probable cause, proof of an improper purpose is still required before liability will be imposed even if, objectively assessed, reasonable and probable cause is absent. That is so, even if the prosecutor's decision to proceed is found to have occurred through incompetence, inexperience or any of the more serious inadequacies described in *Miazga* even including gross negligence.

[64] We are unable to accept the submissions made on the appellant's behalf for these reasons:

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29 Judgment at [189].

30 *A v State of New South Wales* (supra) at [93].

31 *Miazga v Kvella Estate* (supra) at [78] to [89] per Charron J delivering the judgment of the Court.

(a) Our conclusions on the issue of reasonable and probable cause mean that the Lord Chief Justice was right to dismiss the malicious prosecution claim on this ground alone, without the need to determine the existence or otherwise of malice.

(b) Mr Kefu's evidence that he honestly believed there was reasonable and probable cause to commence the prosecution was never challenged.

(c) In the period after the trial commenced, the Lord Chief Justice was uniquely placed to assess the impacts on the strength of the Crown case of the rulings requiring further particulars and declining a joint trial. We see no basis to interfere with his conclusions in that respect.[32]

(d) Mr Edwards accepted it was never put to the Crown prosecutors who gave evidence that they had acted improperly or in bad faith. If this proposition were to be advanced, it was essential to allow those accused of such matters to respond to serious allegations of this nature.

(e) While it is axiomatic that the Crown carries the onus of proof beyond reasonable doubt throughout a criminal trial, where the defendant chooses to give or call evidence, the Crown is fully entitled to rely on any admission by the defendant or other evidence in the defence case considered to enhance the prosecution case. To proceed in the hope that some support to the Crown case could be gained from the evidence of the appellant was not therefore indicative of an improper purpose. We do not accept Mr Edwards' submission that there was any obligation for the Crown to inform the Judge of the reasons for the decision to proceed. We also observe that the appellant could have renewed his application for a no case ruling at that point but did not do so.

Conclusion

[65] We conclude that no material error in the Lord Chief Justice's decision has been shown and the appeal must be dismissed.

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[32] Judgment at [217], cited at [43] of this judgment

[66] However, we wish to conclude with an observation about the apparent suggestion offered by His Lordship that the decision to continue the prosecution was more likely the result of inexperience, incompetence, honest mistake or negligence, none of which is actionable.[33] The language used in this respect merely echoes the terminology in the cases we have referred to above. We do not view these descriptors as a finding by His Lordship that any of them applied to the prosecutors in this case. Given His Lordship's findings in the following paragraphs[34] we consider the decision to continue the prosecution was more consistent with an honest and proper review of the prospects of securing a conviction in the circumstances that by then had emerged. The decision to enter the *nolle prosequi* promptly followed.

Result

[67] The appeal is dismissed.

[68] While we accept the appellant's understandable desire to attempt to repair his reputation given the seriousness of the allegations made against him, we see no reason not to award costs. Accordingly, the appellant must pay costs to the respondents on the appeal in an amount to be fixed by the Registrar if not agreed.

Blanchard J

Hansen J

Randerson J

[33] Judgment, at [218], cited at [43] of this judgment.

[34] Judgment, at [220] and [221], cited at [43] of this judgment.