IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 23 of 2022
(CR 203/2021)

BETWEEN:

ATTORNEY-GENERAL Appellant

AND

SIONE PO'OI Respondent

JUDGMENT OF THE COURT

Court: Whitten P
Randerson J
Harrison J

Counsel: ✓J Lutui for Appellant
No appearance for Respondent

Hearing: 27 March 2023

Judgment: 6 April 2023

Introduction

[1] The respondent Mr Po'oi is charged with engaging in dealings with another person for the transfer of 437.94gms of cocaine in July-August 2021, contrary to s 4(1)(b)(iv) of the *Illicit Drugs Control Act*. After his arrest, Mr Po'oi made a confession to the police which the prosecution seek to rely upon at trial. Mr Po'oi challenged the admissibility of his confession on the grounds that the police had failed to inform him of his rights under ss 148 and 149 of the *Tonga Police Act*.

[2] After a *voir dire* hearing, Cooper J ruled on 26 August 2022 that there had been a failure by the police to comply with s 149 of the *Tonga Police Act* to advise him of his right

to telephone or speak to a relative, friend or law practitioner. This right arises before a police officer begins to question a person who has been charged with an offence. In consequence, Cooper J determined that Mr Po'oi's confession should be excluded from evidence.

[3] It became apparent that Cooper J's decision may have been affected by an error in translation in relation to evidence adduced at the *voir dire*. After the filing of the Attorney-General's initial appeal against Cooper J's ruling, both counsel agreed as to the error and further agreed to raise the matter with the trial Judge to seek a reconsideration of his finding. This was recorded in a minute issued by the Lord Chief Justice on 22 September 2022. After reconsideration, Cooper J issued a second ruling (described as a Corrigendum) dated 13 October 2022 but maintained his initial ruling that Mr Po'oi's confession should be excluded in evidence at trial.

[4] The Attorney-General has since been granted leave to appeal against both the initial and Corrigendum ruling.

The initial ruling

[5] Cooper J recorded the sequence of events relating to Mr Po'oi. On 28 August 2021, Mr Po'oi's residence was searched as a result of information received. The search was commenced at 13:35 hours. A small quantity of ammunition was located but no drugs. Nevertheless, Mr Po'oi was arrested and Cooper J found that at 15:58 hours the same day he was charged with engaging with others for the transportation of illicit drugs. Detective Inspector Tahitu'a denied that Mr Po'oi had been charged at that point and asserted he was only arrested and that reference to the charges was to explain the reason for his arrest. Cooper J found this was contrary to the investigation diary record maintained by the police.

[6] The Judge also found that later the same day at 20:00 hours Mr Po'oi was "brought out of prison to … record a statement …". Prior to the statement being taken he was given the caution required by s 148 of the *Tonga Police Act* and he then provided the police with an account of how he and another person had arranged for cocaine to be supplied to him in Tongatapu from Vava'u. Mr Po'oi signed the statement including an acknowledgement that he had received the caution required by s 148. Before us, it is not in dispute that s 148 was

complied with immediately prior to the confession and on several occasions earlier that day. Rather, the focus was on s 149.

[7] Cooper J found that, when Mr Po'oi was questioned by the police, he was not informed of his rights under s 149. Applying the approach adopted by Chief Justice Paulsen in *R v Filo,*[1] the Judge found this was not a technical breach, rather it was the breach of a fundamental right. Whether or not a breach was deliberate it was "very wrong" or "egregious" meaning "a very bad error". Accordingly, the Judge exercised his discretion under the proviso to s 22 of the Evidence Act to refuse to admit evidence of Mr Po'oi's confession. The discretion under the proviso arises where a confession is alleged to have made to a police officer by the accused person "while in custody and in answer to questions put by such police officer …".

The Corrigendum ruling

[8] The Judge below noted that Mr Po'oi's case was sent to the Court of Appeal on the discrete point as to whether the Court had correctly identified that Mr Po'oi had been charged at the time he gave the police his confession. The point arose because the outcome depended on whether Mr Po'oi had been charged at the time he gave the police his statement with the consequence that s 149 of the Tonga Police Act was triggered.

[9] In his Corrigendum judgment, Cooper J found that Mr Po'oi had been informed on several occasions on the afternoon of 28 August that he "would be charged" first with the offence of possession of unlicensed ammunition and later that he "would be charged" with engaging with others for the transportation of illicit drugs. This occurred on the last occasion at 15:58 hours (entry 45 in the Police investigation diary). At that point, he was given the caution required by s 148 but was not advised of his rights under s 149.

[10] The Judge also referred to oral evidence of Detective Inspector Tahitu'a as supplementing the record contained in the investigation diary. He summarised the Detective Inspector's evidence as being that the entries in the investigation diary reflected a process adopted by the Tongan Police that the defendant was not actually charged with the offence at that stage but was being informed that he would be charged and that the charging process was

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1 *R v Filo* 7/2018.

to follow. He would only actually be charged with the issue of the criminal summons which did not occur until Monday 30 August. At that point, he was cautioned.

[11] Cooper J referred to s 116 of the Tonga Police Act which requires a person arrested under s 115 to be brought before a Magistrate, or if there is no Magistrate in the district, before the officer in charge of the police station, to be charged as soon as practicable after being arrested and no later than 24 hours after arrest. The Judge found it "very hard to accept" that Mr Po'oi was not entitled to the safeguard under s 149 because, despite the words used by the police officer, Mr Po'oi was not being actually charged with an offence. Explaining his reasons, the Judge below said:

> 20. A member of the public is not going to know the mechanism for being charged as set out in section 116 (1) Tonga Police Act.
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> 21. I come to the conclusion that if a Police Officer during an operation to bring in suspects for a series of drug offences, as was happening here, tells a detainee he is going to be charged with an offence, that person will, naturally enough, believe they have been charged.
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> 22. If that officer then says three times, in the space of 32 minutes, that the detainee, Mr. Po'oi, was to be charged with an offence, each time after saying it he cautions that detainee, then this has been reinforced in extenso.
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> 23. Given that the officer had not gone through the proper procedure under s.116 for charging Mr. Po'oi, then he was not in a position to charge Mr. Po'oi.
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> 24. But, if one follows the sequence of sections from 116 to 147 through to 149, it appears to me that after arrest a person must be charged within 24 hours or released, unless s.116 (3) Bail Act exception applies.

[12] Addressing the circumstances in which Mr Po'oi made his confession, the Judge said:

> 25. Mr. Po'oi was taken to the police station, placed in a cell on 28th August 2021. At 2000 hrs that day he was brought out of prison to the Drug Enforcement Taskforce so police could "talk with him to record a statement. ...".
>
> 26. The first point about that procedure is that it was not voluntary, Mr. Po'oi had not told the police he wanted to speak to them, but was brought from his cell to be spoken to and have his answers recorded.

27. It therefore follows that he was being asked about knowledge, involvement or participation in an offence and his answer/answers were being recorded.

28. I conclude from that it amounted to an interview, whatever name was attached to that process and whatever document it was recorded into.

29. Thus, having found that he was effectively told he was being charged and has effectively been interviewed, the question is, were the police entitled to so interview him, when they took his statement, without telling him of his rights under section 149, to communicate with lawyer, friend or relative?

[13] The Judge went on to note that Mr Po'oi did not appear ever to have been arrested and expressed his final reasoning in these terms:

32. I conclude that looking from the position of the lay man, and what he could reasonably expect to be his status at that time, and that he must surely have believed he had been charged with an offence when he was taken from prison to provide a statement, he should have been given the s.149 caution as to his right to communicate.

33. To do otherwise is to excuse the police of fundamental errors in the due process of informing a detainee of key stages of their detention and in turn their rights. These are the basic steps to how a free person becomes otherwise engaged with the legal process and that interference of their liberty.

34. It must be engaged with correctly and precisely when its effects are thus.

35. I therefore conclude by excluding the statement Mr. Po'oi gave at 2000 hrs, 28th August 2021 for the reasons I have just set out, maintaining my position in my initial ruling.

Grounds of appeal

[14] The Attorney-General's Amended Notice of Appeal advances three grounds of appeal:

(a) The Judge had wrongly determined on the evidence that Mr Po'oi had been charged prior to the time he made the alleged admission.

(b) A person who is arrested is not "charged" for the purposes of s 149 of the *Tonga Police Act* until the issue of a criminal summons pursuant to the *Magistrates Court Act*.

(c) The right under s 149 was not triggered because Mr Po'oi was not at the time being questioned by a police officer; rather he was making a voluntary statement to the Police at his own request.

[15] For the Attorney-General, Mr Lutui submitted that the correct translation for the entries made in the investigation diary should have been "D/IP Tahitu'a informs Sione that he is arrested for engaging with others for the transportation of illicit drugs ...". This was based on a clarification given by the Detective Inspector during his evidence when it was realised that the English translation of the relevant entries in the investigation diary was incorrect. Mr Lutui submitted that, despite this clarification, the Judge had continued in his Corrigendum ruling to describe Mr Po'oi having been informed he was going to be charged rather than using the correct term "arrested". Despite Cooper J's finding that there did not appear to have been an arrest, this was contrary to the Detective Inspector's evidence. Citing s 116 of the *Tonga Police Act*, Mr Lutui submitted that Mr Po'oi had not been charged at the time he made his confession. That did not occur until two days later when a summons was issued.

[16] It followed, in Mr Lutui's submission, that the obligation to inform Mr Po'oi of his rights under s 149 did not arise. However, addressing the third ground of appeal, Mr Lutui submitted that Mr Po'oi's confession had been made voluntarily at his own instigation. It did not result from questioning by the Detective Inspector in terms of s 149. The obligation under s 149 only arises after a person has been charged and before an officer intends to question that person for the purposes of eliciting an answer or information from him.

Discussion

[17] The relevant part of s 149 provides:[2]

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[2] Section 149(2) provides a discretion for a police officer in certain circumstances to refuse to allow a person charged to speak with others. This provision is not material in the present case.

Section 149 Right to communicate with relative, friend or law practitioner

(1) Unless subsection (2) applies, before a police officer starts to question a person who has been charged with an offence, the police officer shall inform that person that he may telephone or speak to a relative, friend or law practitioner.

[18] Our review of the evidence demonstrates a degree of confusion in the translation of the investigation diary and in the translation of the critical evidence given by Detective Inspector Tahitu'a. In his evidence in chief, the officer confirmed that Mr Po'oi had been arrested and taken to the police station and kept in custody. According to the English translation in the notes of evidence, when asked what offence he had "charged him with" the officer answered "working together with others regarding the supply of drugs". Mr Lutui submitted that the English translation recorded was wrong and should have been translated as "arrested" rather than "charged". However, in cross-examination, the officer maintained that Mr Po'oi had not been charged at the time of the diary entries at 15:25, 15:50 hours and 15.58 hours. Rather, he had informed Mr Po'oi of what he was arrested for. In re-examination, the officer expressed the view that Mr Po'oi was not "charged" until the issue of a criminal summons at a later stage in the process.

[19] Whatever the position may have been on this issue, the Detective Inspector's evidence on the circumstances in which the confession was made was largely undisputed. The only issue raised in cross-examination was whether it was recorded in the investigation diary that it was Mr Po'oi who had asked to record the statement. There was no dispute that between 7.00 and 8.00pm on the day Mr Po'oi was arrested, the Detective Inspector was contacted by one of the officers in charge of the prison cells and advised that Mr Po'oi wanted to talk to him. The officer went to Mr Po'oi's cell. He asked him if he (the Detective) was available so Mr Po'oi could talk to him. They went to the police station and the officer said he then talked with Mr Po'oi who explained the nature of what happened and agreed to make a statement which was then signed.

[20] In these circumstances, we accept that the confession was voluntarily made and that on this occasion, the Detective Inspector had not begun to question Mr Po'oi within the meaning of s 149 of the *Tonga Police Act*. We accept there had been some preliminary discussion between them before the statement was made but in the circumstances described

by the officer the discussion was initiated by Mr Po'oi and did not amount to questioning by the police in terms of s 149.

[22] Although it is not necessary to decide the issue, we consider that a person is not charged for the purposes of s 149 of the *Tonga Police Act* until a summons is issued under s 116 of the Act and the accused is brought before the Magistrates Court. This might be some time after a suspect is arrested and the protection of the right afforded by s 149 may be of little efficacy. It might be thought that the opportunity for a suspect to contact a lawyer, relative or friend before being questioned by police ought not to be delayed. Given the importance of the right under s 149 of the *Tonga Police Act* and the potential for confusion by an arrested person, legislation clarifying when the right under s 149 should arise would be desirable.

Result

[23] It follows that the Judge below erred in finding that the right to the advice required by s 149 of the *Tonga Police Act* had been triggered. Accordingly, the rulings given in the Court below are set aside and the confession made by the respondent may be admitted at his trial.

Whitten P

Randerson J

Harrison J

COURT OF APPEAL TONGA