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IN THE SUPREME COURT OF TONGA

APPELLATE JURISDICTION

NUKU'ALOFA REGISTRY AM 18 of 2014

BETWEEN: LATANOA PIKULA - Appellant

AND: VILIAMI FUKOFUKA - Respondent

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Mr. D. F. Corbett for the appellant

Mr. S.T. Fakahua for the respondent

JUDGMENT

This is an appeal from a decision of a Police Magistrate of 18 July 2014 refusing an application by the appellant to dismiss a complaint.

The facts giving rise to the appeal are not in dispute.

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The facts

On 7 March 2014 the respondent commenced a private prosecution against the appellant under Section 162(b)(c) of the Criminal Offences Act (Cap 18). It is alleged that between the months of November 2013 and January 2014 while on a tour of Australia with the Tonga High School Ex Students Hahake Chapter the appellant 'embezzled' funds collected by the group amounting to $33,578.

On the same day the Magistrate's Court made an order on the application of the respondent requiring the appellant to surrender up his passport to the Court on the grounds that the appellant was likely to abscond.

There followed a number of appearances by the appellant before the Court which, I am told, resulted in adjournments while the parties explored the possibility of settlement but when this proved unsuccessful the parties agreed to a trial date of 29 May 2014.

On 29 May 2014 the appellant, his Counsel and witnesses attended Court for the trial but without any notice or explanation neither the respondent nor his Counsel did so.

I pause to note that the respondent's Counsel was not Mr. Fakahua who appeared before me as he has only recently been instructed.

The appellant's party waited for about 30 minutes at Court and then the appellant made an application that the complaint be dismissed. The Magistrate did not dismiss the complaint. He directed the appellant to file and serve a written application.

I am not clear why the Magistrate considered this was necessary and would have thought that the application could have been dealt with on an oral application (after hearing from the respondent's Counsel) but as I was not addressed on the matter I say no more about it.

On 14 June 2014 the appellant duly filed the application supported by an affidavit in which he sought *"The case PR14 of 2014 is struck out for non-appearance of the plaintiff* or *his legal counsel ..."* along with costs and the return of his passport.

The application relied on Section 22 of the Magistrate's Court Act which provides as follows:

> *'If when the case is called the defendant appears or is brought before the Court under a warrant of arrest and the complainant having had due notice of the time and place of hearing (which shall be proved to the satisfaction of the magistrate) does not appear the magistrate may dismiss the complaint or if he thinks fit adjourn the hearing to some future day.'*

It took the respondent until 1 July 2014 to file his opposition to the application and there was a further hearing before the Court on 3 July

2014 where a timetable was made for the exchange of submissions. I understand the submissions were received by the Court on 10 July 2014 and 15 July 2014.

In his submissions the respondent sought the Court's forgiveness. He had apparently gone overseas on an urgent matter without letting his Counsel know of his plans. As far as I can see no explanation has ever been proffered for his Counsel's failure to appear and ask for an adjournment.

The respondent argued that the Magistrate should exercise his discretion under Section 22 to adjourn the trial as the crime alleged was serious and the sum said to have been taken was substantial.

The Magistrate issued his ruling on 18 July 2014. He refused to dismiss the complaint but awarded the appellant $600 for costs thrown away. The Magistrate noted that a new trial date would be set *"unless one party seeks Supreme Court decision which is allowed..."*

The appellant filed this appeal from the decision of the Magistrate on 28 July 2014.

The Magistrate's discretion

In refusing to dismiss the complaint the Magistrate exercised a discretionary power under Section 22 of the Act. The dismissal of a complaint under Section 22 is an extreme step. In deciding whether

to dismiss the complaint or adjourn the trial the Magistrate must do justice between the parties. In my view it will rarely be appropriate to dismiss a complaint unless the failure to do so will deprive the defendant of some recognised right (such as the right to a fair trial) or the defendant will suffer some serious prejudice or the complainant is guilty of an abuse of process. Even then the power to dismiss must be exercised sparingly and only in the most obvious of cases. *Tu'ivai v Lokotui* [2005] Tonga LR 178.

This Court is required to determine appeals from the Magistrate's Court on their merits but it will rarely interfere with the exercise of discretion by a Magistrate granting an adjournment of a trial.

For the appellant to succeed in a case like this he must demonstrate that the Magistrate clearly fell into error. This might occur if for instance the Magistrate acted on wrong principles, had some fundamental misapprehension of the facts or took into account irrelevant considerations or failed to take into account relevant ones.

The merits of the appeal

For the appellant Mr. Corbett did not suggest that the Magistrate proceeded on a wrong principle except perhaps in one respect. He argued that once it was proved to the satisfaction of the Magistrate that the complainant had due notice of the time and place of hearing (which in this case was never in doubt) the Magistrate was obliged to dismiss. That is not correct in my view. Proof of the fact that the

complainant had notice of the hearing is required before the Magistrate can dismiss under Section 22 but it does not follow that he should dismiss.

The balance of Mr. Corbett's submissions largely focused on the conduct of the respondent and his Counsel. He said that it was at the respondent's insistence that the case was set down when his client was prepared to continue negotiations. He stressed that no notice was given of the respondent's unavailability for the hearing or of his intention not to appear. He pointed out also that the respondent's Counsel had associates who he could have sent along to Court. There is much force in Mr. Corbett's submissions but these are all matters that the Magistrate was aware of and clearly weighed up carefully before dismissing the appellant's application.

Another matter raised by Mr. Corbett is that the appellant has been prejudiced because he cannot travel overseas pending trial. The Magistrate considered that too. But in any event I note that the appellant has had his passport returned on one occasion to allow him to travel and there is no reason to believe this would not happen again in appropriate circumstances.

Mr. Corbett also argued that there has been unacceptable delay as a result of the respondent's actions. The Magistrate referred to this in his decision also and to the obligation of the respondent to prosecute the case diligently and the appellant's right to be tried '*as soon as possible*'. It is true that the appellant's trial has now been delayed 8

months but the delay has largely been the product of this appeal. While the appellant had every right to appeal the consequential delay is not the responsibility of the respondent.

In coming to his decision the Magistrate referred to a number of cases. All the cases cited are civil cases involving applications to strike out claims and for that reason were not directly applicable to the matter the Magistrate had to decide. It appears that whilst it is not cited the Magistrate also quoted from a decision of Hampton CJ in *R v Filimoehala* [1997] Tonga LR 140 which is authority for the proposition that it is in the interests of everyone in the criminal justice system that cases proceed as soon as possible.

When one stands back and reads the decision of the Magistrate as a whole it is very clear that notwithstanding his citation of civil cases he considered and weighed in the balance carefully all of the matters that he was required to.

Specifically he understood that his obligation was to do justice between the parties and he addressed the right of the appellant to have his case heard quickly, the prejudice that was caused to the appellant by adjourning the case and the steps that could be taken to respond to that prejudice (in this case an award of costs and an early hearing '*to clear the defendant from this alleged accusation*'). He was alive to the possibility of abuse of the Court's processes but believed the respondent's apology was genuine.

Overall I am of the view that the Magistrate did not commit any error of approach that would justify this Court's intervention.

In any event even had I decided that the Magistrate was wrong in his approach I would not allow this appeal. As we are dealing with the failure of the respondent to appear on the first trial date, there was some explanation for the respondent's non-appearance, an expression of contrition and a lack of any real prejudice to the appellant it was inevitable in my view that the Magistrate would adjourn the trial under Section 22 and I consider that he was right to do so.

The costs claimed

The respondent also challenged the decision of the Magistrate to award only $600 costs. In the notice of appeal the respondent seeks $1,344 which I understand are wasted costs the appellant says were incurred as a result of the aborted hearing on 29 May 2014. In addition the notice of appeal seeks a further $1,200 which is described as *'thrown away costs ...for non appearance of the plaintiff/complaint or his counsel on the trial date'*.

It appears to me that the appellant is claiming the same costs twice. I can find nothing in the papers to justify the amounts claimed and consider the Magistrate's award of $600 entirely appropriate in the circumstances.

Additional issues

The relief sought by the appellant in the notice of appeal included an order that "*The passport of the defendant is returned forthwith from the Magistrate's Court to the defendant*". When pressed neither Mr. Corbett nor Mr. Fakahua could tell me upon what authority the Magistrate made such an order. My own research has not thrown any light on the matter. In the absence of submissions from Counsel directed to the Magistrate's jurisdiction I am not prepared to interfere with the order.

I raised with Mr. Corbett and Mr. Fakahua whether the Magistrate's Court has jurisdiction to adjudicate in respect of acts that were performed entirely outside the territorial limits of the Kingdom of Tonga. Neither Counsel was in a position to address me on that matter. Mr. Fakahua correctly pointed out that this issue does not form part of the grounds of appeal.

Accordingly I do no more than note the point for Counsel's consideration. I also note the comments of the then Chief Justice in *Pohiva v Tu'ivakano* [2014] TSC 1 at [31] to [36] as to the role of the Attorney-General in private prosecutions which may be pertinent in this case.

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For the reasons set out above I make the following orders:

a. The appeal is dismissed. The case must go back to the Magistrate's Court for a trial date to be set. The case should be accorded priority.

b. I reserve costs on this appeal. The parties are encouraged to agree on costs but if they cannot do so any party wishing to seek costs may file a memorandum setting out the basis for the claim and an itemised bill of costs within 28 days.

ited: **4 February 2015.**

CHIEF JUSTICE