

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

Solicitor General

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07/04/15

*Mavis
Prepared by Police
[Signature]*

AM 1 of 2015

[CR 255 of 2010]

BETWEEN: MOSESE MALUPO - Appellant

AND: POLICE - Respondent

BEFORE LORD CHIEF JUSTICE PAULSEN

Heard: 9 March 2015 and 1 April 2015.

**Appearances: Mr. 'A. Kefu SC for the Police
 Mrs F. Vaihu for the appellant**

RULING

[1] The appellant, Mosese Malupo, was charged with common assault contrary to Section 112(a) of the Criminal Offences Act. It was alleged that on 5 March 2010 he joined in a fight between other young men and punched the back of the head of Viliami Kisepi as well as parts of his body.

*rec'd 07/04/15
[Signature]*

- [2] On 19 March 2010 he was convicted of the offence after a defended hearing before Magistrate 'Etika and was sentenced to a period of imprisonment of 6 months, the last 3 months suspended.
- [3] Mr Malupo has not served any of his sentence. He filed an appeal from both conviction and sentence. At that point the case was not progressed by the Magistrates' Court. It appears Mr Malupo believed the appeal had been dealt with. It was only upon Mr Malupo making enquires of the Court this year that the fact that his appeal had not been dealt with came to light. There has then, through no fault of Mr Malupo, a five year delay in the hearing of his appeal.
- [4] The appeal came on for hearing on 9 March 2015. Mrs Vaihu appeared for Mr Malupo and advised that he no longer wished to pursue an appeal against conviction. He did want to proceed with his appeal against sentence. I then heard submissions from Mrs Vaihu and from Mr Kefu SC, for the Police, on the appeal against sentence. In light of a submission that was made on Mr Malupo's behalf that I should grant him a discharge without conviction, I adjourned the case until today to allow further information to be provided to me as to the consequences that a conviction might have upon him.

The Magistrate's decision

- [5] In sentencing Mr Malupo the Magistrate noted that he had no criminal record and was at the time of the offence just 18 years old. Although

the sentencing remarks of the Magistrate could be clearer, it appears he was concerned about the increase in the frequency of inter-school violence and felt that there was a need to deter such behavior. He also noted that in other like cases imprisonment had been imposed but he gave no detail of those cases.

Submissions of Counsel

[6] Mrs Vaihu submitted that at the time of the offending fights between young men from different schools were very common but nonetheless that the sentence of the Magistrate was still extremely harsh. She submitted that Mr Malupo became involved in the fight in an attempt to stop it. Mrs Vaihu produced two references for Mr Malupo. One was from the Principal of Tonga College and one from the Vicar General of the Diocese Cathedral of the Immaculate Conception. Both testify to the good character of Mr Malupo. She emphasised that since the offence occurred Mr Malupo has not been in any trouble with the law and that he had entered teacher training. I understood her to say that he could not continue with that training if he had a conviction for assault. In those circumstances, Mrs Vaihu submitted that it would be appropriate for me to discharge Mr Malupo without conviction under section 204 of the Criminal Offences Act. It was to get further information to support that submission that I adjourned the hearing on 9 March 2015 until today.

[7] For the Police, Mr Kefu accepted immediately that the sentence imposed by the Magistrate was manifestly excessive. He pointed out that the Court's power to grant a discharge without conviction is provided for under section 204 Criminal Offences Act as amended by section 28 of the Criminal Offences (Amendment) Act 2012. Despite that section being enacted well after Mr Malupo was sentenced by the Magistrate, Mr Kefu submitted that the Court had the power to grant a discharge without conviction because it had to proceed as if Mr Malupo was being sentenced for the first time. As to whether it is appropriate to grant a discharge without conviction in this case, Mr Kefu said that the Police took a neutral position but given the prevalence of school boy fights, which continue today, and the concern that the community has about them, such a lenient approach might be 'a step too far'.

My consideration

[8] The maximum penalty for breach of section 112 is a fine of T\$5,000 and 12 months imprisonment or both. But this is of course a maximum penalty and would not be imposed in anything but the most serious of cases.

[9] It has been accepted by Mr Kefu, and I agree, that the sentence imposed by the Magistrate in this case was manifestly excessive and it cannot be allowed to stand.

[10] Mrs Vaihu has submitted that I can and should discharge Mr Malupo without conviction. I understood this was on the basis that a conviction would prevent him from completing teacher training. I was this morning presented with a letter from the Principal of the Tonga Institute of Education which confirmed that Mr Malupo had been enrolled in teacher training but had left to take up a rugby playing contract in France. The letter stated that it is highly undesirable that a teacher trainee have a conviction for inter-college brawling. What it did not say, and I cannot infer, is that the fact of a conviction would prevent Mr Malupo completing his teacher training if that is now his intention.

[11] The principles that the Court should follow in deciding whether to discharge without conviction were set out recently by Cato J in *Rex v Tu'iha'ateiho* [CR 116 of 2013]. He applied what was said by Richardson J in *Fisheries Inspector v Turner* [1978] 2 NZLR 233 that the Court must balance all the relevant public interest considerations as well as all the circumstances of the offender and the offending to determine if the direct and indirect consequences of a conviction are out of all proportion to the gravity of the offence. Only then is it proper to grant a discharge without conviction.

[12] I am not prepared to grant a discharge without conviction in this case. Despite the submissions of Counsel, I am not satisfied that I have the power to grant a discharge without conviction because under section

80 Magistrates' Courts Act I may, on appeal, only exercise a power which the Magistrate might have exercised, which in this case did not include granting a discharge without conviction (see *Lavaki Lolohea v Police* [Cr App. 893/99] per Ward CJ). Even if I am wrong in that, I do not consider that the consequences of a conviction are out of proportion to the gravity of the offence. Inter-college fights remain a problem in Tonga and a matter of community concern. There is no evidence that a conviction will prevent Mr Malupo continuing with his teacher training. Furthermore, this was not in my view a trivial incident. Mr Malupo became involved in a fight that was none of his business and he clearly went further than was necessary to stop the fight and became an active participant in it. He struck blows to the head of Mr Kisepi which although apparently causing him no lasting injury might well have done so. It appears the fight was broken up quickly only because the Police were on the scene. Things had the potential to turn out more badly than they did.

[13] Taking into account Mr Malupo's relative youth at the time of the offence, that he had no criminal convictions of any sort, his obvious good character (apart from this incident) and the fact that the assault did not result in serious injury it would have been appropriate for the Magistrate to have imposed a fine. (*Tu'i'onetoa v Police* [AC 17 of 2014]). I consider that is still appropriate but in deciding upon the amount of the fine I am entitled to take into account Mr Malupo's good

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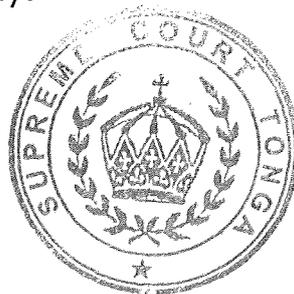
behavior since he was first sentenced. In these circumstances I consider that it would be right to impose only a nominal fine.

[14] Nothing in this decision should be taken to detract from the very real concerns expressed by the Magistrate about inter-college fights nor is it a precedent for how such cases will be handled by the Courts in the future. The delay in hearing the appeal combined with the fact that for that lengthy period Mr Malupo has not offended in any way justify a more lenient approach than might otherwise be the case.

Ruling

[15] The appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence imposed by the Magistrate is quashed and in substitution the appellant will pay a fine of T\$50 and will have 6 weeks to pay.

Nuku'alofa: 1 April 2015




LORD CHIEF JUSTICE

**N. 'Inafo
1/4/2015**