

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

Criminal Appeal AM20 of 2013

BETWEEN : SAMUELA 'AKILISI POHIVA

- Appellant

AND :

1. LORD TU'IVAKANO
2. WILLIAM CLIVE EDWARDS
3. FRIENDLY ISLANDS SATELLITE  
COMMUNICATIONS LIMITED
4. HRH PRINCESS SALOTE PILOLEVU TUITA

- Respondents

Appellant in Person

S. J. Stanton SC with W. C. Edwards for the Respondents

**DECISION**

- [1] Reference is respectfully made to the Judgment herein dated 17 January 2014
- [2] The Appellant commenced private criminal prosecutions against the Respondents in the Fasi Magistrates Court on 12 February 2013. The

Respondents were charged with one or more of several offences including theft, conspiracy, aiding and abetting and receiving the sum of TOP\$18.45 million in May 2011.

- [3] In view of the seriousness of the charges which were beyond the jurisdiction of the Magistrate's Court, committal proceedings were held. These proceedings resulted in the discharge of all four Respondents.
- [4] The Appellant appealed; the appeal was dismissed on 17 January 2014.
- [5] After the delivery of the judgment Mr Stanton asked for the Respondents' costs. I referred to the general rule that costs are not awarded against the Crown in criminal cases save in exceptional circumstances (see Lord Chief Justice's Statement 36 Cr. App R 13). In view, however, of the fact that this was an appeal from a *private* criminal prosecution I asked for written submissions on the issue.
- [6] Extensive written submissions, with attached authorities, were filed by Mr Stanton on 19 May 2014. These were followed by written submissions signed and filed on 28 August by the Appellant but the author of which, it transpired at the hearing, was in fact Mr Harrison, who did not appear. Submissions in reply were filed by Mr Stanton on 14 November.
- [7] Mr Harrison submitted that the only statutory power to award costs of an appeal to the Supreme Court is to be found in section 80(1) of the Magistrate's Court Act and I agree. He then however submitted that

section 80 had not been enlivened since section 74 of the Act did not make provision for an appeal against an order for discharge following committal proceedings. Unfortunately, Mr Harrison overlooked the fact that the section was amended in 2012 (Act 23/12, section 19) and now provides a right of appeal from “the judgment, sentence or order of a Magistrate.

[8] Although Tonga does not have legislation exactly corresponding to, for example, the Magistrates (Summary Proceedings) Act 1975 (Vict) or the English Costs in Criminal Cases Act 1952 which expressly confer a discretion to award costs to the defendant following unsuccessful prosecution, I regard section 80(1) as sufficient to confer jurisdiction. Whether such jurisdiction must be conferred by statute or may also arise in the inherent jurisdiction of the Court is not, in this application, necessary to decide.

[9] In *Latoudis v Casey* [1990] 170 C.L.R. 534 the High Court of Australia examined the principles governing the exercise of the discretion. At page 542 the Chief Justice stated:

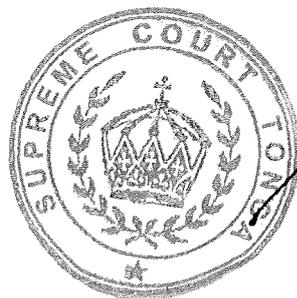
“... there is no sound basis for drawing a distinction in relation to the award of costs against an unsuccessful informant between summary proceedings instituted by police or other public officer and those instituted by a private citizen. In the case of proceedings commenced by a private prosecutor which terminate in favour of the defendant, the private prosecutor should in ordinary circumstances be ordered to pay the costs, even if he or she initiates the proceedings for a public rather than a private purpose”.

“In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs”.

[10] I see no reason not to apply this approach to an unsuccessful appeal by this private prosecutor. I have already expressed my view of the strength of the prosecution case in the Magistrates Court and the merits of the appeal to this court and have nothing to add on that score. I can find no reason not to award the Respondents their costs of this appeal and this application, to be taxed if not agreed.

Result: The Respondents are awarded their costs of the appeal and this application, to be taxed if not agreed.

**DATED: 6 March 2015.**



  
M.D. Scott  
**JUDGE**

M. Taufa  
3/3/2015