IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY **AM 10 of 2015**

#1

BETWEEN: **RODNEY TU'INUKUAFE**

- Appellant

AND : **POLICE**

- Respondent

Counsel : **Mr. P. Pifeleti for the appellant**
Mr. T. 'Aho for the respondent

Hearing : **15 July 2015**
Decision : **16 July 2015**

RULING

The appeal

[1] The issues that arise in this appeal are:

[1.1] Whether the Court has power to entertain an appeal against sentence imposed by a Magistrate that is filed out of time, and

Recd 16/07/15

[1.2] Whether the Magistrate was wrong to impose cumulative fines in circumstances where there was a close relation between the offences with which the appellant was charged.

[2] The facts are that the Police executed a search warrant at Mr. Tu'inukuafe's home on 16 January 2015 on an unrelated matter and found him to be growing a marijuana plant. He was charged with (1) cultivating an illicit drug (summon No 12/2015) and (2) possession of an illicit drug (summons No 11/2015), contrary to section 4(a) of the Illicit Drugs Control Act. He pleaded guilty to both charges and on 27 January 2015 he was sentenced in the Magistrate's Court. On the first charge he was ordered to pay a fine of T$750 and in default to serve 6 weeks imprisonment. On the second charge he was ordered to pay a fine of T$500 and in default to serve one months imprisonment.

[3] Mr. Tu'inukuafe has appealed against these sentences on the grounds that they are excessive and that the Magistrate could not be satisfied that the plant found in his possession was in fact marijuana. As Mr. Tu'inukuafe pleaded guilty to both offences and his appeal is only against sentence this second ground was not arguable.

[4] In written submissions filed before the hearing the Police argued that the appeal is filed out of time and that the requirement that an appeal be filed within 10 days of the Magistrate's decision in section 75(1) Magistrate's Court Act is a substantive requirement that has not been complied with. The Police submit that Mr. Tu'inukuafe should not be heard on the appeal. By my calculation the appeal had to be filed by 6 February 2015 and was filed on 9 February 2015.[1] The Police also argue that no reasons have been provided by the appellant to explain why the appeal was filed out of time and no application to file an appeal out of time has been made. The Police do fairly and properly concede that the Magistrate made an error in imposing cumulative fines when there was, on the facts of the case, a clear relation between the possession and cultivation charges. Hokafonu v R (CA) [2003] TLR 249.

[5] In the papers before the Court there is a letter dated 6 February 2015 from Mr. Tu'inukuafe's advocate, Mr. Pifeleti, to the Magistrate's Court stating Mr. Tu'inukuafe's intention to appeal. The letter and a notice of appeal (dated 9 February 2015) were not delivered to the

[1] For the computation of time see sections 18 and 19 Interpretation Act.

Magistrate's Court until 9 February 2015. It is common ground that the appeal was not filed until 9 February 2015 in breach of section 75(1).

[6] Having read the Police's submissions before the hearing of the appeal, I issued a minute to Counsel on 14 July 2015 asking them to address me on whether the Court has the power to extend time for the filing of an appeal under section 75(1) Magistrate's Court Act and, if so, the basis of the jurisdiction. At the hearing of the appeal Mr. Pifeleti offered no submissions on those matters. For the Police, Mr. 'Aho had no case law directly on point but he submitted, by reference to the Court of Appeal Act and the Tonga Police Act, that in some cases time limits on rights of appeal may be regarded as directory and not mandatory.

What is the effect of s75(1)

[7] Section 75(1) Magistrate's Court Act provides that an appellant "shall" within 10 days after the decision of the Magistrate give written notice to the Magistrate and the other party of his intention to appeal and the

general grounds of appeal. The provision is expressed in an imperative form and there is no statement of the consequences of a failure to comply with it. The issue is whether the time limit imposed by the provision may be extended or dispensed with.

[8] Where there has been a failure to comply with a statutory time limit the case law has distinguished between what have been classified as mandatory and directory requirements. A failure to comply with a mandatory requirement invalidated the act in question whereas failure to comply with a requirement that was merely directory did not invalidate what followed.

[9] In a Tongan context, Supervisor of Elections and ors v Tupouniua [AC 32 /2014] concerned the refusal of the Supervisor of Elections to accept Mr. Tupouniua's nomination to stand for election to the Legislative Assembly on the ground that his nomination was received outside the time stipulation in section 9(1) of the Electoral Act. In the Supreme Court, Cato J had held that the time requirement in section 9(1) was directory and not mandatory so that the statutory requirement should not be strictly applied. The Court of Appeal quashed the decision. For present purposes what is of interest is the

Court of Appeal's acknowledgement at [24] of the traditional view that a stipulation as to time is to be regarded as obligatory (Petch v Gurney [1994] 3 All ER 731, 738) and its rejection of the mandatory or directory distinction in favour of an approach that asks whether it is the purpose of the legislation that an act done in breach of the provision should be invalid. The Court approved the words of Lord Steyn in R v Soneji [2006] 1 AC 340 where he said:

> "..the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

[10] I note that a rigid interpretation of section 75(1) has the potential to cause significant hardship and injustice. The Magistrate's Court deals with serious criminal offences and can impose a range of penalties including lengthy periods of imprisonment. The period provided for filing appeals from decisions of a Magistrate is very short. Many defendants appearing before the Magistrate's Court on criminal charges are self-represented. It is easy to foresee circumstances where a meritorious appeal is not filed in time due to ignorance of the statutory time limit or because circumstances

beyond a defendant's control prevent that. Even in cases where a defendant is represented by Counsel an appeal may not be filed on time due to Counsel's neglect. The law reports are full of such cases. This supports an interpretation of section 75(1) that a failure to comply with the statutory time limit should not be fatal to an appeal. However there are strong factors indicating a contrary interpretation.

[11] Section 75 appears in Part VII of the Magistrate's Court Act. The purpose of that Part of the Act is to provide for a general right of appeal from decisions of the Magistrate in both civil and criminal matters. Appeals are creatures of statute and this Part of the Act provides procedures for the conduct of appeals as well as conferring the powers of the Supreme Court upon hearing appeals.

[12] It is noticeable that many of the provisions in Part VII are prescriptive as to time. Section 75(1) states that the appellant "shall" give written notice of the appeal within 10 days of the Magistrate's decision. Similarly, section 75(2) provides that the appellant "shall" at the time of giving notice of appeal deposit the appeal fee. Section 76 provides a requirement that an appellant granted bail "shall" be required to

enter into a recognizance within 14 days of the date of the decision appealed from.

[13] The use of the word "shall" in section 75(1) and other provisions in Part VII, is important. In R v Fiu [1999] Tonga LR 189 the Court of Appeal noted that the use of the word "shall" made it clear, beyond argument, that the Legislature intended that the penalty provisions in section 210 of the Customs and Excise Act were mandatory. In Tau'atevalu v Police [2006] Tonga LR 14 the Supreme Court held that compliance with the procedural requirement in section 14 of the Magistrate's Court Act, relating to service of a summons more than 24 hours before the hearing, was mandatory. In that case the proviso to section 14 provided that if the summons was not served on the accused more than 24 hours before the time of the hearing "the case shall not proceed without the express consent of the accused...".

[14] I note also the absence of any statutory discretion appearing in the legislation to extend time. This is an important factor. Mr. 'Aho referred me to the rights of appeal under sections 10 and 20 of the Court of Appeal Act which he said have been interpreted as "procedural" and not "substantive". However, it has generally been

accepted that provisions with respect to time are strict and are obligatory unless a power extending time is given to the Court.[2] Consistent with that, there is a statutory power to extend time for filing civil and criminal appeals to the Court of Appeal (section 20 and Order 4 Rule 1 Court of Appeal Rules). The absence of any procedure to apply to extend time, or any basis upon which such applications are to be considered, in this case strongly suggests that the time limit in section 75(1) is strict. As the Court noted in Petch v Gurney at 738[3]:

> "Unless the Court is given a power to extend the time or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether, and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with."

[15] Mr. 'Aho also referred me to the case of Fifitia v The Police Board AM 16 of 2012 but having read the case I cannot see its relevance. I note however that the right of appeal that exists under section 85(3) of the Tonga Police Act 2010, which is what was in issue in that case,

[2] Barker v Palmer (1881) 8 Q.B.D 9.
[3] As quoted by the Court of Appeal in Supervisor of Elections v Tupouniua at [24].

is expressed in very different terms than section 75(1). Any cases decided under that provision would be of little relevance on the issue that is before me for that reason.

[16] I note again that Part VII contains a number of prescriptive time limits. The relation between section 75(1) and section 76 is, in my view, particularly relevant. As I have said, section 76 provides that a Magistrate who allows an appellant bail shall require him, within 14 days after the date of the decision appealed from, to enter into a recognizance in Form 17. If the requirement to file an appeal within 10 days in section 75(1) can be dispensed with then in cases where an appeal is filed outside the period of 14 days from the date of the decision the Court would have no power to require an appellant to enter into a recognizance under section 76. That cannot in my view have been intended.

[17] In my research I have found the case Police v Kolo [2007] Tonga LR 67 which is on point. In that case the Police filed an appeal against a Magistrate's decision 7½ months out of time. The Court held that section 75(1) was quite clear in its terms and that "There is a mandatory requirement that the appeal be notified within 10 days to

the magistrate and the other party". The appeal was dismissed notwithstanding that Laurenson. J considered the Magistrate's decision was so brief and inadequate that he would otherwise have referred it back to the Magistrate.

[18] Having regard to all of these matters I have come to the clear view that it was the intention of the Legislature that the time requirement in section 75(1) is strict and that the Court has no power to dispense with the requirement of the section. It follows that this appeal must be dismissed and, strictly speaking, I do not need to go on and consider the issue of whether the Magistrate's decision was correct on the merits but I should say a few words about that.

[19] From the perspective of Mr. Tu'inukuafe this is a most unsatisfactory result and I empathise with him. That said I do not know why the appeal was not filed in time and whether Mr. Tu'inukuafe was in any way at fault or if the time limit was simply overlooked. The Police accept that the Learned Magistrate made an error of principle in making the fines imposed upon Mr. Tu'inukuafe cumulative when there was a clear relation between the cultivation and the possession offences. The Police submitted that the appropriate fine should have

been between $500 and $750 and that the total fines imposed by the Magistrate of $1,250 were manifestly excessive. I agree with those submissions and had I been able to do so I would have reduced the fines to no more than $750 in total. In the circumstances however I can do nothing to correct that error on this appeal.

The result

[20] The appeal is out of time and is dismissed. I will hear the parties on costs by memoranda within 7 days.

O.G. Paulsen
LORD CHIEF JUSTICE

DATED: 16 July 2015.