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

AM 20 of 2014
[MC, CR199/2014]

BETWEEN: POLICE

- Appellant

AND : SAMIUELA FINAU
& 22 OTHERS

- Respondents

S. F. Sisifa (Acting Solicitor General) for the Appellant
Mrs. P. Tupou and S. T. Fakahua for the Respondents

JUDGMENT

[1] On 2 February 2014 the Respondent and 23 others named in the Amended Notice of Appeal filed on 10 October 2013 were issued with Summonses to appear at the Fasi Magistrates Court. The complaint read as follows:

> "Complaint has been made to me that on the 18th of July 2013 at Tofoa you committed RIOTERS UNLAWFULLY DAMAGING BUILDING contrary to section 77 (2)(b) of the Criminal Offences Act Cap 18 of 1988 volume 1 in which you together with others riotously assembled together and you unlawfully caused damage to a building belonging to Kepu 'Ioane".

[2] Although the English translation of the Tongan original is rather ungrammatical it is accepted that it is an accurate translation. Furthermore it closely mirrors section 77 (1) and (2) of the Criminal Offences Act, Cap 18, which read as follows:

> "Rioters demolishing buildings etc
>
> (1)All persons who being riotously assembled together unlawfully pull down or destroy or begin to pull down or destroy any building, machinery or structure commit an offence and are liable to imprisonment for a period not exceeding 15 years;
>
> (2)All persons who being riotously assembled together unlawfully damage any of the things mentioned in subsection (1) commit an offence and are liable to imprisonment for a period not exceeding 7 years".

[3] Since the offence with which the Respondents had been charged carried a maximum penalty of 7 years imprisonment only a Magistrate with enhanced jurisdiction (section 11 (4) of the Magistrates' Court Act) or the Supreme Court had jurisdiction to try the charges.

[4] I was not told what considerations led to the decision to proceed by way of committal to the Supreme Court. It appears from the Summonses that the Respondents were all young men aged between 17 and 22. Mr. Sisifa advised me that they were all first offenders. In these circumstances it is not easy to understand why the matters were not dealt with summarily by a Magistrate with enhanced jurisdiction or under the provisions of section 35 of the Magistrates' Court Act. Where offences can suitably be dealt with in the

Magistrate's Court they should be committed to the Supreme Court. Another alternative was to charge the Respondents with wilful damage to buildings contrary to section 178 of the Criminal Offences Act. This offence as amended by the Criminal Offences (Amendment) Act 2012 makes provision for serious or simple wilful damage depending on the circumstances. The latter is triable in any Magistrate's Court.

[5] The committal proceedings commenced on 19 May 2014. Although there is no record to this effect it appears that section 32 (3) disclosure had already taken place. According to the transcript Mr. Fakahua objected to the Summons against his client, Respondent number 2 Tu'ifua Ngaluafe, on the ground that it referred to section "771 25/90". He submitted that no such section existed and asked for the summons to be dismissed. According to the copy summons supplied for the hearing of this appeal there is no reference to any section "771 25/90". The Prosecutor objected to Mr. Fakahua's application. The Magistrate adjourned the committal proceedings "so you can both have a look at the legislation...and as the prosecution has sought to allow Crown Law to look at the cases and the documents and for any further submissions to be made by both parties".

[6] On 10 June when the hearing resumed Mr. Fakahua again raised the matter of the Summons against his client. According to the transcript, on this occasion he submitted that the Summons was defective as it charged contravention of "section 771(2)(b), there is no such section". The Magistrate again adjourned the matter to allow the Prosecutor to respond.

[7] On 15 July the hearing was again adjourned. It was also adjourned on 21 July. On 4 August Mr. Fakahua asked for the Summonses to be struck out on the ground that the Respondents had been charged with contravening section 77(2)(b) when no such section existed. The prosecutor asked leave to amend. The application was refused. The Magistrate pointed out that he had asked for submissions on the law however none had been received. In his view the Summonses were clearly defective in that they referred to a non-existent section section 77(2)(b). To allow the prosecution to amend would open "the floodgates"; it "would set a precedent for the prosecution to continuously apply for amendments in P.I stage in further cases". He ordered the Summonses alleging breaches of section 77(2)(b) to be "struck off".

[8] Section 32(4)(d) provides that where the Magistrate "considers that the documents do not disclose that a sufficient case has been made out to put the accused upon his trial before the supreme Court [he] shall discharge him". The orders striking out the Summonses were presumably intended to have the result that all the Respondents were discharged. It is important to remember that a discharge at committal proceedings is not the same as an acquittal (*Manchester City Stipendiary Magistrate ex Parte Shelson* [1977] 1WLR 911. Following a discharge there is no legal objection to an accused being charged for a second time in respect of the same matters.

[9] At the hearing of this appeal against the Magistrate's discharge of the accused following his refusal to allow the Summonses to be amended, Mr. Sisifa handed up an affidavit by Rose Lesley Kautoke,

Assistant Crown Counsel in which she deposed that on 1 August 2014, that is three days before the Respondents were discharged, she had sent a savingram to the Registrar of the Magistrates Court in answer to the Magistrate's request for authorities to be referred to him. Mrs. Tupou told me that neither she, nor Mr. Fakahua had seen a copy of this savingram before and that none had been served upon them. It is clear from the Magistrate's ruling that he had also not received the submission.

[10] In her submission Ms. Kautoke referred to:
Police v Liava'a AM 13/3
Police v Ramsay Dalgety AC25/2010
R v Saafi [2004] Tonga L. R. 242

[11] In *Police v Liava'a* paragraphs 10, 11 and 12 I explained that where there is an error in the charge which is merely technical and the facts of the charge as laid clearly reveal the nature of the conduct complained of then the charge is not bad, that an opportunity must be given to the prosecution to amend but than an accused should be given an opportunity further to consider his position if the amendment causes any difficulty: "the overall aim must be justice both to the prosecution and the defence".

[12] *Police v Liava'a* is entirely consistent with *Saafi* in which a similar argument relating to an indictment was rejected on the ground that "there can be no suggestion that the accused has not understood the charge or that any prejudice has been suffered by the alleged defect".

[13] *Saafi* is itself consistent with the leading case *Johal* (1972) 56 Cr. App R in which the Court of Criminal Appeal emphasized that when amendment of an indictment is sought the essential question to consider is whether the accused will be prejudiced thereby. A further detailed examination of relevant considerations when it is suggested that an information or summons is defective may be found in Stone's Justices' Manual 1993 at paragraphs 1-424 and 425.

[14] In the present case, as conceded by Mrs. Tupou and Mr. Fakahua there was no doubt that the meaning of the Summonses were perfectly clear. The only thing wrong with the Summonses was that the letter (b) had been inserted after the numbers 77(2). The summonses could have been perfected by simply crossing out the letter (b) with a red pen.

[15] It is a pity that neither the Magistrate, nor either the prosecutor nor defence counsel apparently spotted this trivial drafting error until the committal proceedings were well under way. Given the authority of *Liava'a* (circulated to all Magistrates and the Tonga Law Society) the prosecution's application to correct the summons should have been agreed to without any further fuss and wasteful adjournments. The failure by the Magistrate's Court to draw the Magistrate's attention to Ms. Kautoke's submission does not reflect well on the administration of that Registry.

[16] Mr. Fakahua's final submission was that Clause 13 of the Constitution which is entitled "Charge cannot be altered" had the effect that charges, once laid, could not be amended. I disagree. The Clause itself states:

"No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial".

This does not mean that the indictment, summons or warrant cannot, in any circumstances, including typographical or other minor errors be amended by corrections. In my opinion the Clause aims to prevent the type of situation that arose in *R v Jennings* 33 Cr. App R 143 where, there being no evidence to support a particular count in an indictment that count was amended to charge an entirely different offence.

[17] In *Pohiva & Ors v R* [2008] To LR 266, the Court of Appeal considered at length the considerations which should be borne in mind when an application to amend an indictment is made. There was no suggestion by the Court that amendment is prohibited by Clause 13; the issue is, once again, fairness in all the circumstances.

[18] The appeal is allowed. Leave is granted to amend the summons by deletion of the letter (b). The discharges of the Respondents are quashed. The matters are all remitted to the Magistrates Court for completion. All concerned may wish to reconsider whether the charges can suitably be dealt with under Section 35.

DATED: 17 October 2014.

CHIEFJUSTICE

E. Takataka
16/10/2014.