

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

AM 13 of 2014
[MC CR 170/2014]

BETWEEN: POLICE

- Appellant

AND : TAVITE TANGIFUA

- Respondent

A.Kefu SC (Ag. Attorney General) for the Appellant

Ms. M. Manavahetau for the Respondent

JUDGMENT

1. On 14 April 2014 an incident occurred at Talafo'ou in which Malakai Lolohea sustained serious injuries. The Respondent was charged:

"You did grievous bodily harm contrary to section 107(1)(2)(3)(5) AB Chapter 18 Laws of Tonga 1988 Volume 1. Whereby you maliciously and without legal right used a wooden coconut scraper to hit Malakai Lolohea causing grievous bodily harm".

2. On 30 April 2014 when the Respondent appeared in Court to answer the summons, defence counsel pointed out that section 107 of the Criminal Offences Act related to Bodily Harm, not grievous Bodily

Harm, a more serious offence, dealt with in Section 106. Counsel also pointed out that section 107 which was amended in 2012 now contains two limbs viz. "Serious" and "Simple". Serious bodily harm is referred to in subsection (4) and carries a maximum of 5 years imprisonment. Simple bodily harm is covered in section (5) and carries a maximum of 3 years imprisonment.

3. Given the wording of the summons, it was not at all clear what the Respondent had been charged with and defence counsel was quite right to raise the matter. The prosecutor was wrong to state that the charge, as is stood, was adequate.
4. When the defect in the charges was brought to the Magistrate's attention, he refused leave to amend the charge and either discharged or acquitted the Respondent. It is these decisions of the Magistrate which are appealed.
5. In *Police v Latu Pilimilose Liava'a* (AM 13 of 2013) I explained that where a charge is technically defective, the prosecution should be given an opportunity to put matters right by amending the charge and that the accused should be given an opportunity to consider his position if placed in any difficulty by leave to amend being granted. Accused persons should not be acquitted merely because a charge is technically defective. The situation is of course different if the defect cannot be rectified eg if the offence charged no longer exists.
6. As also explained in *Liava'a* case it is very important that the prosecution take care to charge correctly. In the present case the wording of the charge "grievous" not only did not refer to section 107

but also was in conflict with s107(5) which refers to "simple" bodily harm. Apart from the inconvenience which flows from careless charging important consequences flow from the choice of charge laid. Section 106 is beyond the jurisdiction of the Magistrate's Court as the maximum sentence is 10 years imprisonment. Section 107(4) is also beyond the jurisdiction of all magistrates whose jurisdiction has not been enhanced as it carries a maximum of 5 years imprisonment. Only section 107(5) is within the general jurisdiction of the Magistrate's Court. The prosecution must carefully consider all the facts before deciding how to charge. During discussion Mr. Kefu advised the Court that it was now intended to proceed against the Respondent under section 106.

7. Ms. Manavahetau generously conceded that the appeal could not be resisted. The appeal is allowed and the matter remitted to the Magistrate's Court for the amended charge to be put to the Respondent.

DATED: 3 October 2014.


CHIEF JUSTICE