

IN THE SUPREME COURT OF TONGA
CRIMINAL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY

CrApp 1252.98

BETWEEN : 'OFA COCKER - Appellant;
(Vaini)

AND : POLICE DEPARTMENT - Respondent.
(Nuku'alofa)

Counsel : Mrs Vaihu for Appellant, Mr Kefu for Respondent
Date of hearing : 29th October, 1998
Date of judgment : 30th October, 1998

JUDGMENT OF FINNIGAN J

The appellant has appealed against a sentence of 3 years imprisonment for arson which was imposed on him by a Magistrate. On 29 October 1998 I allowed the appeal and reserved my reasoning for this written judgment.

The crime of arson is created and its penalty established in s 177 of the Criminal Offences Act cap 18:

177. (1) Arson is the offence of wilfully and without lawful justification setting fire to any building of any kind belonging to another person or (not relevant).....
- (2) Every person who commits the offence of arson shall be liable to imprisonment for any period not exceeding 5 years.
- (3) (Not relevant)....

The Magistrate's jurisdiction to deal with charges of criminal offending is created and limited by Part II and Part III of the Magistrates' Courts Act cap 11. Part II sets out the summary jurisdiction. This is the jurisdiction to state to an accused person the substance of what is charged against him and ask whether he pleads guilty or not guilty, thereafter to record a plea of guilty or to hear evidence and to enter a conviction or to dismiss the charge. It includes the power to impose any sentence up to the statutory maximum penalty for the offence charged. This jurisdiction is created and limited by the first section in Part II, s 11.

As amended by Act no. 24/1990, s 11 provides that, subject to s 35 (about which more later), every magistrate shall have jurisdiction to hear and determine all criminal cases in which the punishment provided by law does not exceed \$1000 or 3 years imprisonment, "and also all criminal cases....which the magistrate is by any law expressly empowered to hear and determine". The following sections in Part II then set out the procedures by which the summary jurisdiction is to be exercised.

The first section in Part III, s 32, then creates and limits the jurisdiction for preliminary inquiries. A magistrate may issue a summons or warrant to compel the appearance before him of an accused person for the purposes of a preliminary inquiry where a person is accused of an offence triable before the Supreme court or the Chief Police Magistrate. The following sections then set out the procedures, ie how that jurisdiction is to be exercised.

At s 35 there is provision for a Magistrate, in certain circumstances, to deal summarily with a person who is charged with an offence triable before the Supreme Court. This provision is that, if it appears to the Magistrate at any time during a preliminary inquiry, (after taking certain representations and other factors into account), that the punishment the Magistrate has power to inflict would be adequate, then the Magistrate may proceed to deal with the case summarily. The steps for him to take are set out there, and the procedure to be adopted in dealing with the case summarily is the s 24 procedure, where both parties appear, in Part II. There is power, in s 35(3), for the magistrate if he convicts the accused after a summary trial, then learns more about the character and antecedents of the accused, to commit the accused to the Supreme Court for sentence.

There is no power in Parts II and III, or elsewhere in the Act, for an accused person to choose in the Magistrates' Court that he will be dealt with summarily on an indictable offence. There is no power either for a Magistrate to deal summarily with indictable offences, other than the power given to the Magistrate in s 35.

In the case before me, the appellant was brought before the court charged with an indictable offence, ie an offence triable in the Supreme Court. The learned Magistrate told the appellant that, and the transcript shows that he made strong efforts to impress upon the appellant the seriousness of what he faced. He tried hard to persuade the appellant to take legal advice. The appellant however insisted upon the Magistrate dealing with him, and insisted upon declining the opportunity of legal advice. Even the police prosecutor had advised him that he could have access to a lawyer because his case was very serious, and he had declined that advice too. He told the Magistrate that he would consent to any order or punishment that the Magistrate would impose. The learned Magistrate thereupon embarked on a full consideration of the matter. Then he imposed sentence, and against that sentence the appellant lodged this appeal.

I have not considered the merits of the sentence, though I have heard submissions from both parties on the merits. In my opinion the learned Magistrate was without jurisdiction to deal with the accused because the penalty for the charge of arson placed the charge

outside the Magistrate's summary jurisdiction. The Magistrate had power only to hold a preliminary inquiry, and he had jurisdiction during that inquiry (in certain circumstances) to proceed to deal with the case summarily, but that jurisdiction was not being exercised. Mr Kefu on behalf of the respondent made a strong submission that it was, but I have been unable to agree, for the following reasons. First, the Magistrate was not acting "during a preliminary inquiry into the offence" as he was required to be for exercise of that jurisdiction. He was not following the procedure set out for preliminary inquiries in s 34. Second, the Magistrate did not act for the reasons that are set out in s 35(1) as necessary conditions precedent to the exercise of the jurisdiction. Third, the Magistrate did not give the accused the option that he was bound by s 35(2) to offer him, nor seek his consent, nor explain to him what is meant by being tried summarily.

Thus, the magistrate in my opinion was without jurisdiction to impose the sentence which he imposed, and that sentence is a nullity.

For these reasons, which I stated briefly at the time and which I now state more fully, I allowed the appeal. I released the appellant on a bail bond to be executed in this court. He will appear again in this court next Tuesday 3 November 1998 at 9.30am, by which time the Solicitor General will have acted ex officio to prepare and serve on the appellant an indictment charging arson. The appellant will be arraigned and his election and plea will be heard then.

NUKU'ALOFA, 30 October, 1998



Dinnigan ACJ
ACTING CHIEF JUSTICE