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**IN THE SUPREME COURT OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY**

AM 6 of 2016

03/08/16

BETWEEN: POLICE - Appellant

AND: MO'UNGA FINAU - Respondent

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Kefu, Acting Attorney General for the Appellant
The Respondent in person

CROWN APPEAL AGAINST DISMISSAL OF PROCEEDINGS

Judgement

[1] The appellant appeals against the dismissal of criminal defamation proceedings brought against the respondent for a publication on the internet (facebook) to the following effect;

"That was the ugly thing between the father and daughter and mothers you are sisters go and tell your father to talk about this curse that I am telling you, living curse."

[2] The complaint laid under section 2 of the Defamation Act 1988 was that these words referred to Sione Makihele and caused hatred and ridicule against him.

Recd 02/08/16

[3] The publication was made by the defendant in a facebook publication which was cited by a number of persons who gave evidence that they had seen the publication.

[4] The Crown appeal is not directed here at the merits of the dismissal but at what it asserts are material irregularities in the Magistrates' approach to the case. Mr Kefu, in his written memorandum of argument, explained that the police have been advised that it is only the most serious instances that criminal proceedings for defamation should be commenced; otherwise the parties should be left to their civil remedies for defamation.

[5] Mr Kefu raised three concerns here with the Magistrates' approach;

- i. That he failed to give any reasons for his apparent decision that the summons was defective;
- ii. That he failed to assess first if the words were capable of being defamatory of the complainant. Mr Kefu submitted he had failed to assess whether there was evidence of actual defamation of the complainant in the view of the persons who read the published words.
- iii. The Magistrate had assessed whether the allegation made against the Complainant were true and after accepting that the allegations were true, and what he had done to his cousin masturbating in her presence on 4 different occasions) was not "good" because they were related and he said should have respect for one another, he then acquitted the respondent without giving reasons for doing so.

In this regard, Mr Kefu submitted the approach was wrong because under criminal defamation, section 7 provides that the truth of the alleged defamatory words are not a defence, unless it is further proved by the accused that the publication was for the public benefit. Mr Kefu submitted that the Magistrate failed to make inquiry as to whether the publication was for the public benefit.

[6] I have attempted to make sense of the evidence, the submissions of the prosecutor, the defence submissions and the Magistrate's judgement but have had great difficulty in doing so, even allowing for the fact that these have been transcribed from Tongan to English for this Appeal.

[7] Mr Kefu is correct when he submits that the summons was not defective or at least so defective that this should have meant that the proceedings were dismissed on this ground, if indeed that was intended by the Magistrate. Mr Kefu acknowledged that the correct section was section 5 of the Defamation Act and not section 2 (1) of the Act as the summons mentioned which is the definition section. I agree with Mr Kefu, however, that the summons was sufficiently clear as to what the particulars of the defamation were so that the defendant was not prejudiced in her defence.

[8] The second submission was that the Magistrate had not determined that the statement was defamatory. In my view, the Magistrate also failed to direct himself at all as to whether in terms of section 2(1) the writing, printing or otherwise item put into visible form of any matter damaged the reputation of another or exposed another to hatred, contempt or caused him to be shunned. *Gatley on Libel and Slander*, (1981), states at paragraph 51 "any imputation of conduct considered by right thinking persons to be immoral is necessarily defamatory. In this

case, aside from the publication itself, evidence was also led from certain persons known or related to the complainant, to whom the publication was directed or had seen it, that the conduct referred to involved the defendant masturbating in the presence of a third party. This was denied by the complainant. This later basis would constitute what is known as a true innuendo, namely an additional or extrinsic factual basis for what on its face is a statement capable of being regarded as defamatory. *Gatley*, at para 105. It is this later basis that Mr Kefu would appear to be relying on when he submits that the Magistrate failed to assess whether there was evidence of actual defamation of the complainant in the view of persons who read the words. I agree that the Magistrate does not seem to have turned his mind to this issue.

- [9] Instead, he seems to have proceeded to consider whether the allegations of masturbation were true. Although proof of truth on the part of a defendant in a civil action for defamation would be a defence, that is not so in criminal defamation. Section 7 of the Act provides that the truth of the publication is only relevant to a defendant's acquittal if it is also proved that the publication of the matters charged was for the public benefit. Mr Kefu rightly pointed out that, although the Magistrate seems to have preferred the view that masturbation had taken place and that this was the basis for the publication, I consider Mr Kefu is correct that he did not turn his mind to the issue of whether in the circumstances of this case, publication was for the public benefit. I add that the matter is further confused because the witness in front of whom the masturbation was alleged to have taken place was apparently the complainant's cousin and not a sister as the summons alleges. It is unclear to me whether this was in fact the basis upon which the Magistrate ruled the summons was defective and could not be amended or indeed what he made of this.

[10] In the light of the fact that the defendant was acquitted, I considered whether I should attempt to resolve the matter on the evidence as it appeared in the record rather than remit the matter to be retried, but I decline to do this. The transcript is not very satisfactory, and I accept Mr Kefu's submission that the matter should be remitted back to the Magistrate's Court for trial before another Magistrate. I so direct; however, I express the view that because criminal defamation is a rather uncommon and difficult area of law, it would be preferable, if this time, the matter was prosecuted by a Crown prosecutor rather than a police prosecutor.

[11] Accordingly, I allow the appeal. The case is remitted back to the Magistrate's Court. The Crown shall deliver a copy of this judgement to the respondent who is unrepresented and arrange for her to be notified of a date for her next appearance in the Magistrates' Court when a date for the retrial can be fixed.



A handwritten signature in black ink, appearing to read "C. B. Cato", is written over the right side of the seal.

C. B. Cato

JUDGE

DATED: 21 JULY 2016