

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

AM 16 of 2016

Solicitor General
20/04/17
sent email
& file.

BETWEEN: P O L I C E - Appellant

AND: VAIKONA TAKAPU - Respondent

BEFORE THE HON. JUSTICE CATO

J U D G E M E N T

[1] The Crown appeals against a sentence imposed by Principal Magistrate Mafi on 8th March 2016 in the enhanced jurisdiction whereby the Respondent was found guilty and convicted of possession of ammunition without a licence contrary to section 4(1)(2)(a)(b) of the Arms and Ammunition Act, 2012.

[2] The Respondent was sentenced subsequently to a fine of \$200.00 to be paid within a month in default the Respondent be imprisoned for 2 weeks. Further, if the Respondent managed to pay the fine within one month then no criminal conviction would be entered into his record.

[3] The Crown appeals against this sentence; first on the basis that the Magistrate erred in law by ordering that if the Respondent paid his fine then his conviction would be discharged, because there was no provision under Part IV of the Criminal Offences Act which permits a Magistrate to make such an order; secondly that he should have approached sentencing under section 204 of the Criminal Offences Act for a discharge without conviction, if he

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believed that was an appropriate sentence; and thirdly, that he erred in law by not giving the Crown an opportunity to be heard in consideration of a discharge of conviction under section 204 of the Criminal Offences Act.

[4] The accused, after a trial, had been acquitted of unrelated charges. He made a submission on the possession of ammunition without a licence charge for which he had been found guilty after, at the conclusion of the Crown evidence, admitting this. He said he used this for fishing. He asked for a lenient sentence and one that did not ruin his record due to the responsibilities he said he carried out for King and country or hinder his travels abroad. The police found seven, 5.5 mm air gun bullets at the accused's home.

[5] The judgment of the Magistrate following his acquittal on the unrelated charges was to this effect;

"I find the accused guilty for the possession of ammunition without a licence which I sentence him to pay a fine of \$200.00 within a month, failure to do so would result in two weeks imprisonment. If fine is paid, the accused shall not bear a criminal record. "

[6] I add that it is does not appear that the Prosecution was given any opportunity to make a submission on sentence.

[7] In my view, the Crown is correct in relation to all its submissions. First, the Magistrate had no jurisdiction to make the kind of order, he did. Had he sought to discharge the accused without conviction, he should have proceeded under section 204 of the Criminal Offences Amendment Act as the Crown submitted. Such a sentence is justified where the conditions of section 204(1) are met involving situations of lesser criminality having regard to the circumstances, including the nature of the offence and character of the offender, that renders it inexpedient to inflict punishment.

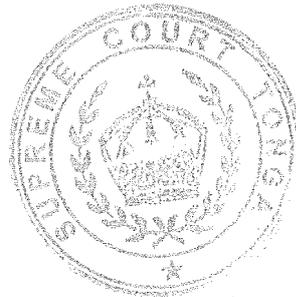
Such a discharge operates as an acquittal under section 204(2) of the Act. A Court may in addition to a discharge make an order for payment of costs or the restitution of any property and in appropriate circumstances compensation, under section 204(3) of the Act. What the Magistrate does not have is the jurisdiction to impose an order of the kind he did following a conviction and imposition of a fine. The discharge without conviction is an exceptional sentence and should not be lightly granted. The Crown should be given an opportunity to make such representations as it thinks appropriate before a discharge is granted because the discharge operates as an acquittal. It was this last aspect that Mr Lutui rightly, in my view, emphasised in his submissions.

[8] I am informed that the Respondent has paid the fine. I considered whether in the light of the fact sentence was imposed in March 2016, (the record not arriving in this Court until early October, 2016) I should quash the sentence and consider an alternative sentence in this Court including a possible discharge without conviction. However, I consider it better that the Respondent be resentenced before Principal Magistrate Mafi. Magistrate Mafi plainly had a discharge without conviction in mind when he sentenced the Respondent though irregularly in March 2016, and may proceed to regularly dispose of the matter under section 204 after further consideration, and considering possible Crown submissions, should he consider this appropriate perhaps ordering that \$200 or such sum as he thinks appropriate is paid towards the cost of prosecution, as is not uncommon elsewhere in these kinds of case. I was informed the Respondent has no previous convictions and the amount of ammunition was not large; nevertheless, offences under the Arms Act carry heavy penalties and are serious. This was, however, plainly at the lower end of offending of this kind. I consider the matter should be fully ventilated before the Magistrate and the Crown given an adequate opportunity to advance any objection it may have to

this course of action taking into account the nature of the offence and the public interest.

- [9] I quash the existing sentence and remit the matter to Principal Magistrate Mafi for resentencing to take place. The Respondent is to next appear in the enhanced jurisdiction of the Magistrates' Court on the 7th February 2017 at 10am in Court room 3 before Magistrate Mafi for sentence then or on a date suitable for the Magistrate. His bail is extended until then. A bailiff of this Court is to serve a copy of this judgment on him and bring to his notice the time of his next appearance before Principal Magistrate Mafi.

DATED: 13 JANUARY 2017



A handwritten signature in black ink, appearing to read "Cato", is written over the printed name.

C. B. Cato

JUDGE