



2015 and was adjourned part heard. It recommenced and the evidence was concluded on the 10th February 2016, the Principal Magistrate dismissing the charges that day.

[3] An appeal was filed by the Crown on the 1<sup>st</sup> March 2016 and on the 4<sup>th</sup> October, 2016 the Notice of Appeal was received in this Court, that is about 7 months after the appeal had been filed. This delay is contrary to the provisions of section 77 of the Magistrates' Court Act which requires the appellant's notice of appeal, recognizance of the appellant, and a correct transcript of all proceedings of the case in the Magistrates' court to be forwarded to the Registrar of the Supreme Court as soon as the provisions of section 75 have been complied with that is the notice of appeal and fee deposit, where appropriate, paid. I see no reason why the need for similar compliance should not arise where it is a Crown appeal. On the 25<sup>th</sup> October, 2016, a direction was given by the Registrar of this Court for the folio or record of proceedings to be translated. This task was not apparently completed until after the 3<sup>rd</sup> April 2017 when a further direction was made by me for a transcript to be prepared. On the 22<sup>nd</sup> May 2017 after a transcript was received, the matter was set down for hearing on the 24<sup>th</sup> May 2017. I would add that Mr Aho for the prosecution had filed a memorandum of argument on the 23<sup>rd</sup> February 2017.

[4] Plainly, delays of this kind do not assist the orderly passage of justice. The matter arose out of an incident in September 2014. It is now two and half years later that the appeal is heard. There was an unacceptable delay in the matter being transferred to this Court, and an unacceptable delay also in the processing of the appeal and the provision of a transcript in this Court. These are systemic delays which can in exceptional circumstances lead to remedial measures being taken by this Court, to ameliorate injustice. Very exceptionally, that may mean a stay of proceedings is appropriate if injustice cannot otherwise be

meaningfully remedied by some other measure such as a reduced sentence on conviction. See R v Williams [2009] 2 NZLR 750( SC)

- [5] This case was straightforward and only four witnesses were called by the prosecution. The nature of the evidence was recorded by Mr Aho in his memorandum and is more comprehensive than the transcript. I rely on Mr Aho's summary, in these circumstances, as being accurate. Evidence was given by the Complainant, a Mr Palu, that a person named Villiami Fonua came to his house and informed him that the Respondent had killed his pig. The Complainant went to the Respondent's home and located the pig which he identified as his. He noticed a puncture hole on the pig's side which he suspected was caused by a gunshot. He said it was the size of a 6 inch nail. However, he did not dissect the pig and did not locate any bullet. He is recorded in the transcript as saying he had heard a gunshot whilst at home and had gone to the area after he had been told what had happened by Mr Fanua. The pig was worth \$200.00.
- [6] Mr Fonua gave evidence that he was in a paddock in Vaini when he was distracted by dogs barking and he saw the Respondent carrying what was a firearm in one hand and dragging a pig with his other. He said that the pig belonged to the Complainant. Mr Fonua went to the Complainant's house and told him what had happened. Mr Fonua is the owner of a licensed .22 firearm and had owned one since 2000. He considered that the Respondent had a .22 rifle.
- [7] Also called as a witness was a police armourer who gave evidence that the Respondent did not have a firearm's licence. He also gave evidence under cross-examination that a .22 bullet could pass through a one year old pig. The suggestion was that there would be an entry and exit hole but he said this was not always the case. Due to a small amount of powder in the round,

the round may have remained in the pig's body. A Constable Lolohea said that he had searched the Respondent's residence and no weapon had been found.

[8] At the conclusion of the evidence, Mr Tu'utafaiva submitted in his closing submissions inter alia that the prosecution could not succeed because it had had not adduced evidence that the rifle met with the definition of arm in the Arms Act, section 2 which reads;

" (1) a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile; or

(2) A weapon of any description designed or adapted for the discharge of any noxious liquid, gas, or other things dangerous to persons and includes any component part of any such weapon."

[9] He declined to call evidence and closed his case after the prosecution evidence. He submitted in closing that the firearm had not been produced and that there was no satisfactory evidence, in any event, that the gun was capable of discharging a shot, bullet or other missile. He pointed out that it was only the belief of Mr Fanua that it was a .22 rifle. No one had seen the actual shooting. There was no evidence of any round being located inside the pig. Mr Aho's submission was that circumstantially there was sufficient evidence to convict based on the fact that Mr Finau, with familiarity gained through owning a .22 rifle for some years, had said that the Respondent was carrying one, and the Complainant had observed what he suspected to be a bullet hole in the pig. The Respondent was seen by Mr Fonua to be holding a firearm and dragging the pig, at the same time.

[10] In this Court, Mr Aho submitted that it would be sufficient for conviction for the Prosecution only to show that the Arms act

definition was satisfied if there were an "adaption" in terms of section 2 (1) or a "component" in section 2(2) of the legislation. I consider, however, that the prosecution whether it be a double barrelled weapon, or an adaption of it such as perhaps a sawn off shotgun, has to establish that, at the material time, a defendant was in possession of the barrelled weapon and that it was in an operative condition namely a shot, bullet, or other missile could be discharged from it. Mr Aho conceded he was entirely dependent on circumstantial evidence for the Court to be able to draw this inference. Pausing there, I do not think that his argument that all the Prosecution had to show was that the Respondent had a component of a weapon under section 2(2) of the definition, which he had not sought to argue before the Magistrate or in his written submission in this Court, has relevance, here. That appears to be directed at other weapon defined in section 2(2) defined as designed or adapted for the discharge of any noxious liquid, gas, or other dangerous things.

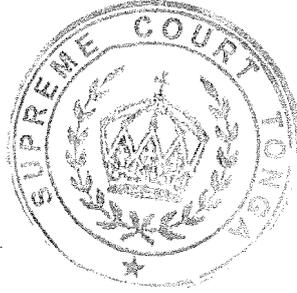
[11] The Principal Magistrate's reasoning as translated for me is rather difficult to comprehend, but I gain the sense that he was not prepared on the evidence to convict the Respondent because it had not been proven to his satisfaction beyond reasonable doubt that the weapon the Respondent was said to be carrying was operative in the sense required. It had not been produced or located and accordingly there was no forensic evidence to say that it was in working order. Nor, in his opinion, was the circumstantial evidence sufficiently persuasive for him, as the trier of fact, to infer beyond reasonable doubt that the Respondent had used the firearm to shoot the animal. This view of the Magistrate's judgment is born out in his assertion that he would have convicted if it had been shown that witnesses actually saw the shooting.

[12] In the circumstances, whilst the evidence circumstantially discloses to my mind a high probability or likelihood that the

Respondent had shot the pig said to be worth \$200.00, I am not able to say that the Magistrate was wrong in his finding that the evidence did not meet the standard required to establish guilt of the charges beyond a reasonable doubt, as undoubtedly it would have, in his opinion, if there had been eye witness testimony evidencing the pig being shot by the Respondent.

[13] For these reasons, I dismiss the appeal.

**DATED: 25 MAY 2017**



*Cato*  
C. B. Cato  
**JUDGE**