CROWN

IN THE SUPREME COURT OF TONGA **AM 8 of 2017**
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

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BETWEEN: **P O L I C E** - **Appellant**

AND: **MOSESE FAKA'OSI** - **Respondent**

BEFORE THE HON. JUSTICE CATO

JUDGMENT

[1] This is an appeal brought out of time by the Applicant against the decision by Magistrate Ma'u on 10th August 2016 discharging the Respondent after a contested trial of the offence of reckless driving contrary to section 25(1) of the Traffic Act.

[2] That section provides that;

> "Every person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for the persons using the road is guilty of an offence against this Act."

[3] More serious offences involving reckless driving, or driving at a speed and in a manner dangerous to the public; or driving under the influence of drink or a drug to such an extent as to be incapable of having control of the vehicle commit offences under section 25(2)(a) and (b), respectively.

[4] The Crown's complaint was first that the Magistrate had misdirected himself on the standard of proof when he said;

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"It is the role of the Prosecution to prove all the elements of the offence that the Accused is alleged to have committed beyond any doubt to the thinking of this Court, that is that the Accused did commit the offence of reckless driving".

[5] A second ground that, in my view, is more persuasive is the Learned Magistrate had seriously misdirected himself when he said of a material prosecution witness that he did not give evidence in relation to recklessness or in a manner that might be dangerous to the public.

[6] In this case, Mr Aho advised that there was evidence that the respondent had driven a vehicle through a stop sign onto the Vuna Road in a northerly direction turning west and had collided with a vehicle coming towards him in a westerly direction. There was evidence implicating the respondent as the driver.

[7] Mr Aho's complaint, which I find has substance, is that the Magistrate did not apply the correct standard under section 25(1) but the higher standard of recklessness and dangerous driving required for conviction under section 25(2). Equally plainly, it seems to me, as Mr Aho submitted, the Magistrate would seem to have come to a plainly wrong conclusion on the evidence under section 25(1) that the Respondent had not driven without due care and attention or without reasonable consideration for the persons using the road when he failed to give way and proceeded to collide with the vehicle travelling towards him in a westerly direction along the Vuna Road.

[8] In this case, however, the Crown had failed to file a notice of appeal within the 28 days allowed under section 75(1) of the Magistrate's Court Act. This was more seriously compounded by a delay caused by the file being overlooked and not being the subject of an appeal until the 27th February 2017. Ordinarily, I

subject of an appeal until the 27th February 2017. Ordinarily, I would have exercised my discretion against extending time under section 75 for such a lengthy delay because of the principle expounded in several leading cases cited to me by Mr Aho of the importance for the public interest of finality in litigation (*R v Unger* [1977] 2 NSWLR 990, at 995; *R v Knight* [1998] 1 NZLR 583, *Kentwell v The Queen* [2014] HCA 37 at para 33 , but, in my view, the error here is so plain and obvious and the Magistrate was so clearly in error that "the interests of justice require leave to be granted". (Richardson P in Knight at p585), and the matter remitted for trial before a different Magistrate.

[9] Mr Aho pointed out to me that in R v Fifita AM 22 of 2014, the Magistrate appears to have fallen into similar error in referring to the standard of recklessness in a prosecution falling within section 25(1) and not 25(2) (a) of the Traffic Act. Perhaps the title to the section referring to reckless and drunken driving has contributed to this misunderstanding. Section 25(1), however, is concerned with carelessness, a lower threshold than recklessness or driving in a manner dangerous, and hence the lower penalty.

[10] In my view, the Crown was correct in its submission that leave should be granted to appeal out of time in this case. I add that I would have been less likely to have granted leave on the first ground nominated by Mr Aho that is the standard of proof since I doubt that this was more than a slip in language than one of principle and would not justify leave being granted in my view, at least so far out of time.

C. B. Cato

DATED: 17 AUGUST 2017 **J U D G E**