

IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NEIAFU REGISTRY

AM 6 of 2017

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BETWEEN: PENI TAUHELUHELU

Appellant

AND: TUIFIO 'ALOUA

Respondent

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. S. T Taufaeteau for the appellant
Mr . S 'Ika for the respondent**

Hearing: 30 November 2017

Date of Ruling: 5 December 2017

RULING

The issue

[1] This is a civil appeal from a decision of the Magistrate at Vava'u. The Magistrate awarded the respondent damages against the appellant of \$1,500 (along with legal and court fees) as a result of the destruction of a bull on the instructions of the appellant. The principal issue in dispute between the parties was whether the bull was owned by the respondent (who was the plaintiff in the action) or the appellant (who was the defendant). The Magistrate found that

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respondent had satisfied the onus upon him to establish on the balance of probabilities that he was the owner of the bull. It is from that finding that the appellant now appeals.

The approach on appeal

- [2] There is a general right of appeal from a judgment of the Magistrate's Court in both civil and criminal matters under section 74(1) Magistrates Courts Act.
- [3] The appellant challenges the Magistrate's finding of fact as to the respondent's ownership of the bull. I caution myself that an appellate Court should be slow to differ from a finding of fact which was made by the judge at first instance who had the opportunity to see and hear the witnesses. This is particularly so when the finding of fact turned solely on the credibility of the witnesses. However, when there is no real question of the credibility or reliability of the witnesses or in cases where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position as the judge of first instance to evaluate the evidence.
- [4] In *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, 327 Viscount Simonds cited with approval what Viscount Cave L.C. had said in *Mersey Docks & Harbour Board v Procter* [1923] A.C. 253, 258:

The procedure on appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into

question but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.

[5] In *Riekmann v Thierry* (1896) 14 R.P.C. 105 Lord Halsbury L.C. said at 116:

Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision.

The dispute

[6] The events that gave rise to the action before the Magistrate can be stated briefly. Both the appellant and the respondent own herds of cattle (including bulls). The herds are kept on properties that are close to each other. In around October 2016 the appellant asked one Nani Falekakala to shoot some cattle including the bull. The bull was required for a funeral. The bull was with the appellant's herd on land belonging to a man called Siamu which is where he took them. After being destroyed the bull was removed. The respondent was overseas at the time but his son, who did not give evidence, contacted him and told him that the appellant had shot his bull. The respondent returned to Tonga and made a complaint to the Police and brought this claim for \$1,500 which was said to be the value of the bull.

The Magistrates ruling

- [7] The Magistrates ruling is in three parts. In the first part he summarises the evidence. In the second part he states his findings. In the third part he gives his ruling.
- [8] When I consider the Magistrate's summary of the evidence (part 1 of the judgment) I am struck by three matters. First, the Magistrate has failed to mention a good deal of the evidence; particularly evidence given by the appellant and his witness. The appellant's evidence has been summarised in two brief lines which does not do it justice. The evidence of the appellant's son fares little better and is treated perfunctorily. Secondly, there is no analysis of the evidence with regard to the weight or value that the Magistrate intended to place upon it. To illustrate the point, a good deal of the respondent's case was based on hearsay evidence but there is no acknowledgment of this or that it might have a bearing upon the weight to be attached to the evidence. Thirdly, the Magistrate has not mentioned a number of important matters which bear directly upon the question of the disputed ownership of the bull (of which I will say more).
- [9] Turning to the Magistrates findings (part 2), he appears to have correctly directed himself that the onus of proof was upon the respondent to establish his ownership of the bull to the civil standard of on the balance of probabilities. He then goes on to find that the respondent had satisfied that onus because he had called four witnesses who stated that the bull belonged to him whereas 'it is only the defendant and his son who states that the bull is theirs'. In this the Magistrate fell into error.
- [10] The probative value of evidence does not necessarily turn upon the number of witnesses that a party is able to call. A fact in issue is not

proven because a plaintiff calls four witnesses to assert it and the defense only two witnesses to deny it. Certainly a judge is entitled to take into account the fact that a number of witnesses all testify to the existence of some fact in issue but that is only if he has reviewed the evidence, evaluated it and determined that the evidence of those witnesses is reliable. In this instance the Magistrate clearly reached a decision based on the weight of numbers. That is not a proper approach.

- [11] Having concluded that the bull belonged to the respondent, in part 3 of his judgment the Magistrate entered judgment for the respondent for the value of the bull (which value does not appear to have been disputed).
- [12] It is clear that the Magistrate took a wrong approach for the reason I have stated above. That does not necessarily mean of course that he reached the wrong result. If I had been of the view that on the weight of the evidence the matter was finely balanced I might not have been inclined to interfere but I am not of that view. On my review of the evidence I am satisfied that the Magistrate could only have ever reasonably concluded that the respondent had failed to prove on the balance of probabilities that the bull was owned by him. My reasons are the following.
- [13] First, when one analyses the evidence of the respondent's four witnesses there is little (and indeed insufficient) probative evidence of the respondent's ownership of the bull. The respondent's evidence could not take matters very far as he was not present when the bull was shot. The shooting was reported to him by his son and he could not know which animal was destroyed. There was a dispute as to which bull was shot with the respondent (and some

of his witnesses) saying the bull had small horns and the appellant saying it did not. The respondent did say that his bull had gone missing but he also noted that the bull in question had been shot in the area where the appellant kept his bulls and that a lot of bulls had gone missing.

[14] The second witness was the respondent's nephew, Pesa Latu. He had moved the respondent's bulls and said that the bull had been born in 2013 and that he saw it shot and that it was the respondent's bull. This was really the high watermark the respondent's case but the weight that one can attach to Pesa Latu's evidence is much reduced because he also said that the bull was with the appellant's bulls and he did not object to the shooting of the bull. Pesa Latu said he did not say anything because Nani Falekakala and the appellant had moved to a different area to shoot the bull but this is not an adequate explanation because he did not tell them that the bull belonged to the respondent after it was shot either. Importantly, Pesa Latu accepted in cross-examination that the bull in fact belonged to the appellant.

[15] The third witness was Nani Falekakala who shot the bull and said that he had been told by the respondent that he had a black bull that he was saving for a 21st birthday but he was not shown the bull. The fact that Nani Falekakala shot the bull without raising any concern would suggest to me that he believed that the bull belonged to the appellant. He did say that 'the closest I can get is that bull that I shot belonged to [the respondent]' which I am told by Counsel means (in the Tongan language) that he was guessing that that respondent owned the bull.

- [16] Finally, Tevite Filipe recounted an event when the appellant, the respondent and he were present and the bull in question fed off its mother and the respondent had said that it was his bull. This evidence is hearsay. Importantly, Tevite did not say that the appellant had acknowledged the respondent's ownership of the bull. The appellant said that Tevite was lying.
- [17] Against that, the appellant and his son both appear to have given cogent and detailed evidence which covered such matters as that the bull belonged to the appellant, that it was in their herd, that they had taken care of it and that no one objected when it was shot. There is nothing in the Magistrate's ruling which suggests that any reasons exist to believe that their evidence was unreliable and should not be accepted.
- [18] Going beyond the parties' assertions of ownership, importantly in my assessment are the following factors of which the Magistrate failed to make any mention in his ruling. They all to my mind bear on the issue he had to decide. First, there does not appear to have been any evidence that that the bull had markings of ownership. What is not disputed is that the bull was within in the appellant's herd and in his possession. That is evidence of the appellant's ownership of the bull. Secondly, no one present when the bull was shot raised any objection or questioned whether the bull belonged to the respondent as one would expect had they thought that was the case. The failure of Pesa Latu to do so is particularly surprising given his familiarity with the respondent's herd and his familial relationship with the respondent. Thirdly, there was disagreement between the parties as to the identity of the bull and whether it was a bull with horns or without horns. Related to this, more than one witness

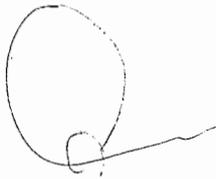
acknowledged that many animals had gone missing in the area raising the possibility that the respondent's bull was lost by other means.

[19] I have arrived at the clear view that the respondent failed to discharge his onus to prove that the bull that was destroyed on the instructions of the appellant was his bull. In those circumstances the Magistrate was wrong to find that his claim was proved and he should have dismissed the respondent's claim and entered judgment for the appellant.

Result

[20] The appeal is allowed. The decision of the Magistrate is quashed and judgment is entered for the appellant who is entitled to costs in this Court and the Magistrates Court.

NUKU'ALOFA: 5 December 2017


O.G. Paulsen
LORD CHIEF JUSTICE

The seal of the Supreme Court of Tonga is circular. It features a central crown emblem surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal, with a small star at the bottom.