

**IN THE SUPREME COURT OF TONGA  
CRIMINAL APPEAL  
NUKU'ALOFA REGISTRY**

**AM 15 of 2017**

*Sen, file + Uploned*

*11/07/18*

**BETWEEN: POLICE - Appellant**

**AND: FATAFEHI VUNA - Respondent**

**BEFORE THE HON. JUSTICE CATO**

**JUDGEMENT ON APPEAL:**

**Mr. Aho for the Appellant**

**Mrs. Tupou for the Respondent**

1. The Appellant appeals the decision of Principal Magistrate Mafi to dismiss charges relating to forgery under section 170(1), 2(b) and 171 of the Criminal Offences Act, and a charge of making a false declaration in order to deceive an Immigration officer contrary to section 33(1)(a) of the Immigration Act.
2. On the 15<sup>th</sup> August 2017, the judgement of the Principal Magistrate was to the following effect;
  - i. "Section 30 of the Interpretation Act does not allow a person to be charged with two separate offences from two separate Acts where they arise from the same set of facts.
  - ii. The accused was charged with Forgery under section 170(1),2(b) and 171 of the Criminal Offences Act as well as making a false declaration in order to deceive an immigration officer contrary to section contrary to section 33 (1)(a) of the Immigration Act.

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- iii. The police did not in its written submission state that should this Court rule against the police, that this Court should cancel one of the Criminal summons and proceed with the other. I therefore consider the matter closed and rule that both criminal summonses are defective as they are contrary to section 30 of the Interpretation Act. The accused is discharged."
3. The material facts are that, on the 16<sup>th</sup> November 2016, the Respondent made a police statement under caution, in which he said that in 2011, he was approached by his nephew who asked him to fill up the certification of identity section form for a friend. The Respondent also, in this statement, had admitted that he did not know anybody by the name of the person for whom a passport had been sought. Despite this, the Crown alleges that the Respondent signed the confirmation of identity declaration for the Applicant. The Application form and supporting documents were then filed with the Immigration Division of Foreign Affairs, on 4<sup>th</sup> August, 2011.
4. Mr Aho, when questioned by me as to why this had taken so long to come before the Court since 2011, said that it was not until 2016 that Immigration had located the passport which had not been claimed in a desk and suspicion was attracted to the fact that the photograph was of a European, yet the name was of a Tongan. Further inquiries were made and the matter was handed over to the police. This had resulted in the Respondent being interviewed and prosecution commenced last year.
5. Further discussion with Mr Aho revealed also that the alleged deception related to the fact that the Respondent had declared in an immigration identification form that he had known the Applicant for "tick" years. A tick had been placed in the box reserved for years. Mrs Tupou produced the original immigration form. I examined it and was concerned as to whether the Respondent could have been said to have committed a forgery, that is made a false document with intent to defraud under section 170(1(a) of the Criminal Offences Act or a false declaration under section 33(1)(a) which also requires an

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- intention to deceive be proven by the Prosecution, where the box had obviously not been completed regularly. Mr Aho agreed that placing a tick in the appropriate box could not be said to communicate knowledge of the Applicant for any period of time, and hence there could not, in my view, be said to be a false statement. I do not see how any reasonably careful immigration officer could have been deceived by the defendant, in any event. The officer should have been alert immediately to the fact that the document was materially deficient in not citing a period of years and should have either requested the form to be properly filled out or have declined to have processed the application. As events have turned out, the passport was never collected so no harm was done to the security of the Tongan passport system.
6. I indicated to Mr Aho for these reasons that I considered any prosecution either under the Criminal Offences Act or under the Immigration Act was bound to fail. For this reason, I indicated that even were I to have acceded to Mr Aho's argument that the Learned Magistrate should not have dismissed the charges, I would have decline to refer the case back to Principal Magistrate Mafi for further action. In my view, the prosecution could not succeed because the evidence was insufficient to commit the Respondent to this Court for trial.
  7. The appeal, however, raised an interesting point as to whether the Prosecution was able to proceed with charges under separate acts in the one proceeding, as Mr Aho contended, although he admitted that under section 30 of the Interpretation Act there could not be any duplication of penalty. I inquired of him what could be the purpose of wishing to proceed on what was essentially the same allegation by bringing charges under both Acts, in these proceedings. It should be noted that forgery carries a maximum sentence of 7 years, whereas, under the Immigration Act provisions, section 33(1) carried a maximum sentence of two years imprisonment or a fine not exceeding \$100.00 or to both. Mr Aho could not give me any reason other than his instructions were to proceed in this way and also that had not elected which charge the prosecution elected to proceed

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on, as the Principal Magistrate had requested, before he had dismissed the charges, for this reason also.

8. Section 30 of the Interpretation Act provides;

“Where an act or omission constitutes an offence under two or more Acts that offender shall unless the contrary intention appears, be liable to be prosecuted under either of those Acts but shall not be liable to be punished twice for the same offence.”

Mrs Tupou contended that the prosecution could not charge under two different Acts in the same proceedings for what was the same allegation of criminal offending namely falsely stating or declaring knowledge of the Applicant for a passport application. She contended that was double jeopardy. I do not see that to do so raises double jeopardy which more commonly arises in a case where there has been a previous adjudication and an acquittal, so that further proceedings may be regarded as exposing a defendant to a further risk of penalty, and an abuse of process. In this regard, compare section 12 of the Constitution which is plainly directed at preventing double jeopardy.

9. In the present case, the alternatives of forgery and false declaration to an Immigration officer involve the exercise of prosecutorial discretion as to whether the circumstances justify prosecution on indictment for forgery for which the defendant will be exposed to a greater penalty than would be the case for a prosecution under the Immigration Act. Rather exceptionally, I note that section 35 allows offences under the Immigration Act to be tried in either the Magistrate's or the Supreme Court but I do not think that this justifies both Immigration and Forgery charges being combined in the same proceedings, where they relate to same allegation of offending, or criminal act.

10. In my view, section 30 allows the prosecution to elect to commence proceedings under either Act but I agree with Mrs Tupou that it would seem contrary to the intention and spirit of section 30 to allow joinder of charges relating to the same offending albeit under different legislation where conviction would expose the defendant to dual punishment. To combine

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both charges in the same proceedings I would also add seems senseless. For this reason, I consider the Principal Magistrate was correct to have required the Prosecution to have elected under which Act it wished to prosecute the defendant. When the Prosecution did not accede to his request to elect, then I consider he was correct to have dismissed the charges because it was inappropriate, for both charges in these circumstances to be joined in the same proceedings, and an election was required by the prosecution to keep the proceedings alive.

11. For the reasons I have given namely the offending lacked sufficiency and the proceedings were, in any event, irregular, I dismiss the appeal.



A handwritten signature in black ink, appearing to read "Cato", with a long, sweeping flourish extending to the right.

C. B. Cato

**J U D G E**

**· DATED: 28 NOVEMBER 2017**