Solicitor General

IN THE SUPREME COURT OF TONGA **AM 6 of 2018**
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

01/06/18
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BETWEEN: **R E X** - **Appellant**

AND: **THERESA VAOMOTOU** - **Respondent**

BEFORE THE HON. JUSTICE CATO

JUDGEMENT

1. The Respondent, Theresa Vaomotou, who was unrepresented at trial and on this appeal, pleaded guilty to one count of procuring her own miscarriage under section 104 of the Criminal Offences Act on the 28th August 2017. She had admitted the offence in her statement dated 7th March, 2017 and record of interview also in March 2017.

2. Principal Magistrate Mafi adjourned the sentence until the 5th March 2018 and ordered a probation report and a doctor's report. No medical report was, however, available on sentence for reasons which do not appear on the record. The Principal Magistrate set aside the guilty plea and because there was no medical report discharged the Respondent. His reasoning was as follows;

> "Therefore I will make a ruling for this case based on my dissatisfaction for a doctor's report not being filed even though the accused pleaded not guilty to the charge. And my ruling is that the accused is discharged."

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The Principal Magistrate, in the Notice of Appeal, was also recorded by the Prosecution as saying;

> "The Respondent's admission in her statement and record of interview taken by the police were not sufficient to prove the offence of a girl procuring her own miscarriage under section 104 of the Criminal Offences Act, because the Prosecution should still prove that the Respondent was pregnant and had unlawfully caused her miscarriage and the Prosecution should not rely on the Respondent's admissions in the record of interview because she is too young and she stated to the Probation officer that she was coerced to make the admissions."

3. The Crown appealed this discharge arguing as a first ground of appeal, that Principal Magistrate Mafi was wrong not to have entered a conviction following her guilty plea, and should have proceeded to sentence her.

4. Alternatively, the Prosecution contended that, if the Magistrate had doubts about the voluntariness of the admissions made to the Police and the guilty plea made to the Respondent on the 28th August, 2017, he should have directed the Respondent to seek legal advice and legal representation on whether she should maintain her guilty plea; or he should have questioned the Respondent about whether she still admitted the offence or wished to maintain her guilty plea before ruling whether to proceed with sentencing or reverse the guilty plea and enter a not guilty plea and then set the matter for trial.

5. The case had taken a rather unusual turn at what the Prosecution had envisaged was to be a sentencing hearing. The Probation officer had, in her report to the Court, recorded from conversations she had with the Respondent that the latter had not willingly pleaded guilty but had been pressurized into doing so by her mother and by the Police in the record of interview. In any event, the Probation officer indicated that she had consulted with a doctor who had opined that penicillin could never cause a miscarriage and had also suggested that there was some doubt

whether she was pregnant. The report went well beyond what is normally contained within a probation report namely a report on the personal circumstances and antecedents of the offender, and amounted in effect to a review of the case. That said, the Respondent was unrepresented and, if indeed the probation officer had learned from her that her record of interview and pleas were involuntary or wrongly advanced the probation officer properly, in my view, conveyed her concerns to the Court.

6. I called for the probation report which did not accompany the file on appeal, and I can well understand, having read it, why Principal Magistrate Mafi was concerned about the plea of guilty and set it aside. I was informed that the Prosecution had resisted the discharge, at that stage.

7. The Prosecution appears to have been taken by surprise. I am informed by Mr Lutui that the Prosecution does not, in Tonga, have access to the probation report. I was surprised by this, because I have stated, on several occasions, that probation reports should be routinely sent to the Crown in advance so that the Prosecution may be forewarned of matters that may be contentious, in order to avoid the problem of it being taken by surprise as appears to have been the case here. No court should act on material that has only been made available to one party. I can well understand why Principal Magistrate Mafi decided that the plea should be set aside rather than proceed to sentence on the material he had before him. To have proceeded with sentence would have invited an appeal particularly where the plea had been entered when the Respondent was unrepresented. I consider the Crown submission rather unrealistic, however, that the Magistrate should have advised her to have sought legal advice on her position concerning the admissibility of her record of interview or whether she should maintain her legal plea before setting the plea aside. The probation report had asserted that she had no means of accessing a lawyer, and indeed that this

was given, in the probation report, as a reason why she had taken the course of pleading guilty. I consider in setting aside the plea the Magistrate acted appropriately and had the matter remained there, no criticism could have been made of his decision. Tonga does not have legal aid and criminal justice does have to be tailored to take this into account. Criminal procedure must be sufficiently flexible so that possible miscarriages of justice are avoided particularly where unrepresented defendants are concerned.

9. However, I agree with the last part of the Crown's submission that, if the plea was to be set aside, then the case should have adjourned, been given a fresh trial date and the Crown given the opportunity of assessing the case in the light of the additional information. The Prosecution, obviously, required time to assess for itself the validity of the issues advanced in the probation report. In the event that they were found by the Crown to be valid, the Crown would then likely have offered no evidence against the Respondent. Indeed, Mr Lutui maintained that this was still the Crown's position. He contended that the Magistrate, by discharging the Respondent, had erred and had denied the Prosecution the opportunity to consider the material and the opportunity to proceed to trial.

10. I agree with Mr Lutui. The Magistrate erred in discharging the Respondent at the stage he did, for the reason that the Prosecution had not produced a medical report, and or for other reasons mentioned by him. The offence is a serious offence in Tonga and the Crown should have been given every opportunity to consider its position in the light of the observations set out in the probation report. In denying the Crown further time to reflect on the accuracy of the matters set out in the report in order to determine its position in relation to further prosecution and possible trial and, in discharging her for the reasons he gave, the Magistrate denied the Crown natural justice.

11. Accordingly, I uphold the appeal and make the following orders;

a. The Respondent is to appear on the 12th June 2018 at 10 am for a hearing date to be fixed for her trial before a Magistrate other than Principal Magistrate Mafi.

b. By that date, the Crown is to consider its position and indicate whether it desires to proceed to trial or whether it will offer no evidence. Should the Crown require further time to consider its position, it can apply then to the Magistrate for more time to be allowed before a trial date is given.

c. In the event that the Crown decides to proceed to trial, the recommendation only of this Court is that the Crown uses its best endeavours to ensure that the Respondent is legally represented. The lack of legal representation has already been suggested as a reason why the Respondent proceeded to enter a guilty plea. It is plain that, the case raises some difficult legal and factual issues and is important. In making this recommendation, it is not meant to convey any general obligation on the Crown to assure a defendant is legally represented, which would require a detailed assessment of legal aid and its future availability in Tonga which is beyond the jurisdiction of this Court, but merely that this case is exceptional in the way it has developed with the consequence that, in my view, a Magistrate would be considerably assisted by the Respondent having legal representation.

SUPREME COURT TONGA

C. B. Cato
JUDGE

DATED: 30 MAY 2018