

inadequate, and that a custodial sentence was warranted by the damage caused by the offence to the environment.

3. The appeal was heard before me this morning and Mr. Kefu informed me that the appeal was based on the seriousness of the offending and that there was a report of the finding of the investigation carried out in respect of the damage caused by the offending of the respondent, but that report was not made available to the respondent at the time of the sentencing. He asked that the hearing be adjourned and that a copy be provided to Mr. Edwards to study and consult with the respondent before the hearing resumed.
4. Mr. Edwards strongly opposed, not so much the adjournment, but rather the introduction of the report in this Court as a basis to find that the lower court was wrong in the sentence it imposed for having failed to consider the finding of a report that was not before it. He said that the respondent was never given a copy of such report or a chance to be heard in response to such report. He said that the report was not before the Magistrate at all and it was unfair, and improper, that this Court, sitting as the appellate court, is given such a document to find that the lower court was in error in failing to have considered it.
5. I have looked in the file and found a copy of the report in it and a copy of a statement by one, Amelia Sili, who stated that she was the writer of the report, but the letter from the Magistrate forwarding the documents in respect of this appeal does not list what documents were forwarded, but it would appear that the report and the statement were amongst the documents forwarded by him.
6. In a chamber direction on 12 October 2018, Lord Chief Justice Paulsen allowed the appellant to file and serve any further documents related to this appeal by 19 October 2018. Those further documents were filed by the appellant on 25 October 2018, amongst which is a copy of the report and of the statement by the writer, Amelia Sili. By including the report and the statement in the "further" documents, the appellant thereby indicated that the report and the statement were not already before the Magistrate, otherwise they would not have been filed as further documents.

7. Furthermore, during the hearing, I read out the transcript, in Tongan, of the submission of the prosecution to the Magistrate. No reference or mention was made by him to any report or to the statement. The transcript of the whole proceeding does not have any mention of a report or that the report was produced or exhibited.
8. Mr. Kefu accepted that the report was not produced before the Magistrate and he said that that was an oversight on the part of the prosecutor, and left the matter for me to decide as I saw fit.

The report

9. Sea water samples were taken from 6 sites – no. 1 by the mangroves next to the village of Pangaimotu, nos.2 & 3 by the mangroves on the south bank of the channel between Pangaimotu Island and mainland Vava'u, one on each side of the course – way between them, and nos. 4, 5 and 6 by the mangroves on the northern side of the channel with no. 6 on the west side of the course – way and nos. 4 and 5 on the other side. The samples were tested for various characteristics and the conclusions reached were as follows:

“ (a). Phosphate exceeded the recommended guideline values for marine environments at 2 sample locations. This is most likely due to the detergents that are collected through stormwater runoff and septic leaking directly into the coastal waters.

(b). Ammonia exceeded the recommended guideline values for marine environments at 1 sample locations.

(c). Nitrate exceeded the recommended guideline values for marine environments at all 6 sample locations.

(d). Faecal coliforms levels exceeded recommended guideline values for recreational swimming at all 6 sample locations. This is most likely due to the stormwater collecting animal faecal matter and septic leakage and illegal dumping of waste.

(e). The cause and duration of pollution requires further investigation and ongoing water quality monitoring. Although dumping and releasing of waste at sea is strictly regulated by local legislation.

(f). It is recommended that the coastal water of this village be monitored periodically and more sites for testing and sampling for further testing be chosen prior to any developments that could affect health and livelihood of people. This also recommended for the protection of the ecosystem that exists within this area”.

I added the paragraph numbering (a)(b)(c) etc for ease of reference.

10. Those conclusions were prefaced and preceded by the following statement by the writer:

“Due to the proximity of residential dwellings to testing and sampling sites and in an area greatly affected by tides and ocean movement, these recent microbiological contaminations of the marine waters can be easily explained”.

11. I am therefore of the view that even if I thought that the report be referred to in this appeal as showing that the offence committed by the respondent resulted in the excessive level of faecal coliforms ((d) above) because the analyst has stated that “illegal dumping of waste” contributed to it, he himself was not sure, because he only stated that this “is most likely”, and he had already stated in his said preface that these recent microbiological contaminations were easily explained by the proximity of residential dwelling to the testing sites and because of tides and ocean movements in those areas. The report would not assist this Court to ascertain just what damage was caused by the offence committed by the respondent.

The infringement notice fine

12. Upon discovery of the offending of the respondent in November 2017, he was served with an infringement notice in pursuance of regulation 18 of the Environment Management and Waste Control Regulations 2016. In that notice, he was charged with having breached regulation 6 (an offence with a maximum fine of \$5,000) and was required to pay a fine of \$2,000, and also a breach of regulation 14(2)(b) and was required to pay \$1,000, and a breach of regulation 14(2)(c) and was required to pay \$1,000. That notice was issued on 23 November 2017 and the respondent paid that total sum of \$4,000 to the Magistrate's Court on 24 November 2017.

13. On 22 May 2018, \$2,000 was refunded to the respondent upon the advice of the Ministry of Environment, which had issued the infringement notice, upon legal advice of the Attorney General's Office (that reg.14(2)(b) & (c) should not have been charged). A copy of a letter from the Ministry requesting that the refund be made to the respondent was amongst the further documents filed.

The Summons

14. On 12 June 2018, the respondent was issued with 2 summons, no. 229/2018 for breach of regulation 6(a) for dumping of hazardous waste in November 2017 (the same offence for which the infringement notice had been issued and \$2,000 paid for), and no.230/2018 for breach of regulation 7(1) for dumping waste which cause pollution in respect of the same act charged in summons no.229/2018.

The trial

15. On 19 June 2018, the respondent pleaded not guilty to both charges upon the ground that he had already been charged and fined \$2,000 on summons no.229/2018 – breach of regulation 6 when he paid the fine of \$2,000 in November 2017. The Magistrate adjourned the matter to give his decision on 20 June 2018.

16. On 20 June 2018, before the Magistrate gave his decision, the prosecutor asked to cancel the summons no.229/2018 and to proceed only with no.230/2018. The Magistrate agreed and cancelled no.229/2018.

17. The respondent then changed his plea from not guilty to guilty in respect of summons no.230/2018 – for dumping waste which cause pollution.

18. In the prosecutor’s submissions to the Magistrate, he, inter alia, stated as follows:

“There is evidence from the officer that he tested this area of the sea and confirmed living things in this area have died, like the shellfish, sea cucumber, and other sea life there. The source of livelihood of the poor people of Pangaimotu who mainly rely upon it is lost ... where else can the people of Pangaimotu hope to obtain their livelihood from? It is not known when the sea life in this area of the sea at Pangaimotu will return to its former state. What else can the people of Pangaimotu get to live on? ... There is presently a prohibition on the use of this part of the ocean...”

19. I can find no finding in the report as to what the prosecutor stated in his submission as stated above, and there was no such evidence given to the Court by anyone in the transcript forwarded by the Magistrate. I can only conclude that the prosecutor was only being fanciful or overzealous.

Sentencing

20. The Magistrate in his sentencing properly took into account the guilty plea of the respondent and his payment of \$4,000 right away in November 2017. He also properly considered that the respondent had not re-offended since then. And, he properly considered that the same offence for which the respondent had paid, \$2,000, was the same offence he was being charged again under regulation 7 instead, that he was being twice punished for the same act. But as the respondent did not raise any defence in respect of it and proceeded to plead guilty, and considering the seriousness of the offence, he imposed upon the respondent the maximum fine of \$1,000 which the regulation required, instead of the sum of \$250 submitted by the respondent’s counsel in his submission.

