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IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY

AM 24 of 2018
[CR 127-128 of 2018]

BETWEEN: REX

Appellant

AND: TEVITA MATANGI 'ATOA

Respondent

BEFORE HON. JUSTICE NIU

Counsel: Ms. 'E. 'Akau'ola for the appellant
Mr. Tevita Matangi 'Atoa, Ha'atu'a, 'Eua the respondent

Date of Hearing: 9 November 2018

Date of Ruling: 14 November 2018

RULING

The charges

- [1] The respondent was charged with 2 offences in the Magistrate's Court:
 - (a) found by night in a town in an enclosed area of the town allotment of the complainant, contrary to s.175(1) of the Criminal Offences Act;
 - (b) trespass by entering the town allotment of the complainant without lawful justification, contrary to s.188(1) of the Criminal Offences Act.

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Guilty pleas

[2] The respondent pleaded guilty to both charges.

The facts

[3] At about 3:00am at night whilst the complainant and her child were lying down, but not asleep, in their dwelling house, the respondent softly pushed the door open and asked if one Tino was there. The complainant said no. The respondent told her that Tino had lived there and that Tino had texted for him to come over and he came thinking Tino was texting from there. The complainant was not satisfied and she telephoned the police and they came and took the respondent away. He had been drinking and was intoxicated.

[4] The respondent had gone and apologized to the complainant and the complainant accepted.

[5] The respondent had no previous conviction.

Sentence

[6] The Magistrate held that the charge of trespass was invalid because the alleged trespass was in respect of a town allotment but s.188 was only in respect of tax allotments, and dismissed that charge.

[7] In respect of the charge of found by night in a fenced town allotment, the Magistrate discharged him without conviction under s.204 of the Criminal Offences Act.

Appeal of the appellant

[8] The prosecution has now appealed to this Court that the decision of the Magistrate (to dismiss the trespass charge) was wrong, because s.188 does not only specifies tax allotment, plantation, and garden, it also includes "other lands", and such other lands include town allotments.

[9] No other order of the Magistrate is challenged in the appeal of the appellant.

Representation

- [10] The appellant was represented by Ms. 'Akau'ola from the Crown Law Office and she confirmed the ground of the appeal, that town allotments are properly included in the words "other land" in s.188 (1).
- [11] The respondent had no one to represent him, and I explained to him what s.188(1) provides and what the Magistrate decided and what the appellant has argued and asked him what he thought of it. He replied that the appellant was right. I however know that the accused just had no idea what the law was, and had simply relied on what the police told him. That was why he had pleaded guilty.
- [12] I informed them both that I would think about this and then make my decision and let them know so they could come and see what I have decided.

Ejusdem generis rule

- [13] The ejusdem generis rule is a rule of construction or interpretation of statutes. It provides that where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. The rule must however be applied with caution and subject to the primary rule that statutes are to be construed in accordance with the intention of the Legislature. For the ejusdem generis rule to apply, the specific words must constitute a category, class or genus, then only things which belong to that category, class or genus fall within the general words: Halsburys Laws of England, (Third Edition, Vol. 36, p.397, para 599).
- [14] S.188(1) of the Criminal Offences Act does have general words following particular and specific words. That provision, which is the one in issue in this appeal, is as follows:

"88.(1) Every person who without lawful excuse enters upon the tax allotment, plantation, garden or other land belonging to or in the possession of another person shall be liable at the prosecution of such owner or occupier to a fine not exceeding \$1,000 of which half shall be paid to such owner or occupier and the other half to Government."

- [15] The specific words are "tax allotment, plantation and garden" and the general words which follow those specific words are "or other land". The specific words do constitute a category, namely, a place where crops are grown. The tax allotment is where the holder

or occupier normally grows his crops. The plantation can be the plantation of crops, like yams, kumara, manioke, bananas, pineapples, etc. The garden can be the garden of vegetables, watermelons, and even yams, kumara, manioke, etc. They constitute that category, class or genus of crops. The general words, “or other land” must therefore be interpreted to mean land, other than a tax allotment, on which crops are normally planted or grown. Such land can be a leased land which has not been granted as a tax allotment, but which has been leased from the estate of a noble or matapule or from the Crown. Such land can also be just part of the estate of a noble or matapule and which is farmed by such holder or with the permission of such holder.

- [16] An application of that rule was made by the Court in *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385 where goods were shipped on a bill of lading which provided: “Should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place” The Court held that the words “or other cause” must be read as being ejusdem generis with war or disturbance and therefore the discharge of the goods on ice was a breach of the terms of the bill of lading.

Intention of the Legislature

- [17] Because the rule is subject to the intention of the Legislature, as may be gathered from the context of the statutory provision, I have found that the omission of the words “town allotment” from s.188 (1) can be attributed to nothing other than deliberate.
- [18] The first appearance of the offence of trespass in the laws of Tonga was in the 1903 Consolidation of the Laws of Tonga. S.457 of the Tongan version of the laws (which was the only copy I could find) provided as follows:

“KO E HALA LOTO-ABI

457. Ka 'iai ha taha te ne hu ki he abi 'o ha taha 'i kolo pe 'i 'uta be 'oku loto kiai pe 'ikai kapau 'oku 'ikai koe fekau 'e ia 'oku 'o'ona 'ae 'abi 'e fakamaau ia pea ka 'ilo 'oku mo'oni 'e totongi ia e pa'anga 'e nimangofulu (\$50) pe ngaue popula pe nofo pilisone mei he 'aho 'e taha (1) ki he mahina 'e ono (6) ka 'ikai lava 'o totongi 'o hange koe tu'utu'uni 'ae fakamaau.”

(TRESPASS)

(457. If anyone shall enter the allotment of another in town or in the bush whether or not intentionally if not authorised by the owner of the allotment and if it is found to be true he shall pay a fine of fifty pa'anga (\$50) or work as a prisoner or stay in prison from one (1) day to six (6) months if it is not paid as shall be ordered by the judge)

[19] There would have been difficulties with the enforcement of such an offence with regard to town allotments at that time, for the following reasons:

- (a) **Ownership of town allotments.** At the time, 1903, only tax allotments were required to be registered by the Minister of Lands. Town allotments on the other hand were not required to be registered. They were lawfully granted by the estate holders themselves and the grants were not required to be made in writing.
- (b) **No prescribed size or area of town allotments.** Whereas tax allotments were required not to be more than 8 and one quarter acres in area, the size of town allotments had no restriction at all. Town allotment varied in size and shape according to the need of the allotment holder and as approved by the estate holder.
- (c) **No surveying and no map of town allotments.** Whereas tax allotments were surveyed, or measured by use of kafa ropes (made of coconut fibre) 100 fathoms long to have a 100 fathoms long and 100 fathoms wide tax allotment (which is the equivalent of 8¼ acres) marked out, town allotments were not so measured and demarcated. No maps or plans of town allotment were required to be drawn up or given to a holder.
- (d) **No fencing of town allotments.** Whereas tax allotments had always been fenced and demarcated by fences made of kaho (reeds), pitu (bamboo) and fakapae (horizontally laid sticks held together by wooden posts) to protect the crops from wild and domesticated pigs, no such fencing was erected to demarcate the boundaries of town allotments in the villages at all.

[20] A simple trespass trial in respect of a town allotment would have practically be a land dispute trial in which the estate holder would almost always have to be involved in order to prove ownership alone, not to mention the size and extent of the allotment.

[21] It was therefore of no surprise that when the present provision of s.188(1) was enacted as s.166(1) in the Criminal Offences Act in 1926, the words “town allotment” were omitted and only the words “tax allotment” were specified in the provision of s.166(1) of that Act, which is the present Criminal Offences Act.

[22] Accordingly, I am satisfied that the intention of the Legislature was that town allotments were deliberately omitted because of those problems, and because I do not believe that the draftsman had simply overlooked to include town allotments in s.166(1).

[23] I may add that the Legislature did not do nothing about town allotments altogether. It did provide protections to town allotments by enacting the offences in s.174 (unlawful entry into dwelling house, etc by night) and in s.175 (unlawfully being on enclosed premises at night in any town).

[24] It is for the Legislature to change the law and make trespass to town allotments an offence.

Conclusion

[25] For the foregoing reasons, I find that the Magistrate was correct. S.188(1) does not apply to town allotments. Accordingly, I order that the appeal is dismissed.

NUKU’ALOFA: 14 November 2018.



A handwritten signature in black ink, appearing to read "L. M. Niu", is written over the seal.

L. M. Niu
J U D G E