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

AM 26 of 2018

BETWEEN: **POLICE** - **Appellant**

AND: **KALIOPASI TONGA VAIKONA** -
Respondent

BEFORE THE HON. JUSTICE CATO

Counsel: Mr 'A. Kefu for the Appellant
Mr Tu'utafaiva for the Respondent

JUDGMENT ON APPEAL

[1] This appeal raises some interesting issues. The Appellant contends that the Magistrate was wrong to discharge the Respondent, a serving police officer and a Sergeant of Police of some 10 years standing on one count of house breaking and one of theft.

[2] The circumstances were that, late on the evening of the 4th February 2018, the accused had entered the Tongan Police Training school using a key which he had in his possession for the purpose of using it to provide food for the cafeteria to feed Tongan recruits for the Police.

[3] The evidence revealed that the Respondent had been drinking with friends after attending a meeting of ex-students at various drinking establishments before turning up at the Tongan Police Training school where the cafeteria was about midnight.

[4] The evidence revealed that he had been given a key to enter the kitchen because his duty was to ensure the supply of goods including meat to the Tongan police kitchen.

[5] He was observed by one of the recruits getting out of the car, drinking from a bottle, and then walking to the entrance. He had difficulty in entering two of the doors but used a key to enter a third door. He had with him another unidentified man.

[6] He was seen to walk to a refrigerator and remove a blue plastic bag which he put into the boot of the car. The other unidentified person got into the front seat. There was evidence that the accused had said to one of those recruits that he had come to take food to eat. He then drove away.

[7] The food that had been taken consisted of 6 kilos of lamb chops, 3 packs of sausages, and five packs of hotdogs, the value in total being $98.50. The following day, on the 5th May 2018, at about 9am, the accused returned the meat he took after his father had asked him about it.

[8] The material aspects of the Magistrate's reasoning to which the Crown objects is the finding that when he entered the cafeteria area he was not a trespasser. The evidence was that the accused had a key for the purpose of entering at any time he pleased to prepare food. The Magistrate considered that this meant that he was allowed to enter at any time, and thus he could not be a trespasser. Mr Kefu submits that the Magistrate erred in dismissing the charge of housebreaking contending that he had a key to enter only for a purpose connected with supplying food for the recruits and not otherwise.

[9] I have come to the conclusion that Mr Kefu is correct and the Learned Magistrate in what I found to be a well presented judgement took an overly narrow view of trespass. He reasoned thus that the Respondent was allowed to go to the cafeteria at any time. In my view, that was incorrect. The Respondent may well have had a right to enter the cafeteria at any time he pleased for the purpose of victualing or supplying foodstuffs to the cafeteria but not otherwise. In *R v Smith and Jones*, (1976) CR App Rep 47, at pp 51-2, the Court of Appeal had been asked to accept a submission that a person who has been given a general permission to enter premises could not be a trespasser even if, as it was argued, he had decided to enter the house to commit theft. In rejecting this submission described as "bold", the Court of Appeal cited Lord Atkin in *Hillen and Pettigrew v ICI* (Alikai) LTD [1936] AC 65 where it was observed;

> "My Lords, in my opinion, this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and

> reasonable use of the premises by the invitee for the purpose for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use"

Rather colourfully, the Court also referred to a dictum of Scrutton LJ in The *Calgarth* [1926] 93 at p 110 where it was said in a civil case,

> "When you invite a person into your house to use the staircase you do not invite him to slide down the bannister."

It seems clear to me, although it may not have been particularized in the information that in entering the premises (probably effecting this by key) the Respondent had abused or exceeded the terms of the licence given to him under his employment. The invitation could not extend to theft. I have no doubt at the time he took the meat the Respondent did so dishonestly with the intention of consuming it. I see no other available inference albeit that he went subsequently to sleep and, after he had woken up, changed his mind and returned the property without consuming any part of it.

[10] Accordingly I consider that the Magistrate did materially fall into error. I see no reason to refer the case back to him, however, because the evidence is clear. I quash the discharge and substitute a conviction for housebreaking as charged.

[11] I have also carefully considered the charge of theft. The Magistrate found that there was no dishonesty because what had been done was not done in secrecy. He also accepted the Respondent' statement (he did not give sworn evidence) that he did not intend to deprive the police of the meat and had returned it the next morning.

[12] Whilst I have considered the Magistrates' observations concerning dishonesty and permanent loss, I consider Mr Kefu is correct when he says that the time at which the intent of the accused must be considered is the time at which entry to the building was effected and the meat taken, and there is no other reasonable inference in my view that is available other than it was removed dishonestly and with intent to deprive police permanently of it, albeit that the Respondent thought better and returned the property the next morning There was no evidence before the Court, for example, to suggest that taking the meat was merely a ruse, or a drunken prank and that it was always intended to restore it to the cafeteria. Rather, there was evidence he had said he had come to get eat food to eat.

[13] I consider that the Magistrate was plainly wrong to conclude that dishonest taking had not been established or that the meat was not intended to be taken permanently. I can see no other rational reason for the Respondent going to the cafeteria in the evening and removing the meat other than to deprive the Police permanently of it by consuming it. I accept the events were probably motivated by drunken bravado that evening and coming to his senses, the next morning, he returned the property but that does not assist the Respondent. He plainly had committed theft when he took it home from the cafetaria. I enter a conviction for theft and quash the discharge.

[14] I posed with counsel whether a discharge without conviction would be appropriate aware that a conviction could place the accused's career in jeopardy. Mr Kefu opposed this saying he had stolen from his employer, had committed the act in front of recruits, and suggested that a police officer who engaged in criminal activity should not be afforded a discharge without conviction. Whilst I would not necessarily agree that a police officer could not ever gain a discharge without conviction, in this case I agree with Mr Kefu that it would not be appropriate. His actions did amount to an abuse of his relationship with his employer and were accordingly serious albeit in mitigation, and when, in sober mind, he had a change of heart and returned the property. I note that Mr Tu'utafaiva supported a discharge without conviction, but although having certain sympathy for this approach in the light of his client's return of the property for reasons given I do not think it would be appropriate for me to discharge without conviction.

[15] In my view, it is for the Police ultimately to determine what disciplinary sanction should follow these convictions. Mr Kefu suggested a fine was appropriate in these proceedings and I agree. I fine the Respondent $100.00 on the theft and $150.00 on the housebreaking. He is ordered to pay this fine of $250.00 by no later than the 31st January 2019, or in default he is to serve 5 days imprisonment. The Appeal is allowed.

SUPREME COURT TONGA

C. B. Cato

NUKU'ALOFA: 19 December 2018 JUDGE