

- (a) causing bodily harm contrary to s.107(1) of Criminal Offences Act in that he wilfully and without lawful justification punched the complainant causing injury to just above his eyebrow and to his mouth;
- (b) assault contrary to S.112 (a) of the Criminal Offences Act in that he wilfully and without lawful justification punched the complainant on the head and other parts of his body.

[3] The offences took place on 26 January 2011 and the two summons were issued on the same day for the respondent to appear and answer to the charges on 31 January 2011. There is no record as to what happened on 31 January 2011, but the record of the case in the Magistrate's Court show that on 7 February 2011, the charges were read to the respondent and that he pleaded guilty to both of them. Thereupon, the prosecutor informed the Court that the respondent had no (criminal) record. The Court then stated:

“The accused has pleaded guilty and he has no (criminal) record and this is the sentence. For the charge of causing bodily harm he is fined \$100 which must be paid now and in default he serves 6 weeks imprisonment. For the charge of assault you are fined \$50 to be paid now and in default you serve 3 weeks imprisonment.”

[4] The Police filed its appeal against those sentences on 17 February 2011, the last of the 10 days provided in the Magistrate's Court Act at that time for filing of appeals to this Court.

[5] For some unknown reason, the appeal was not forwarded by the Magistrate's Court to this Court for some 7 years. It was only forwarded on 17 October 2018, after Mr. 'Aho wrote about it to the Registrar of this Court on 10 October 2018. Mr. 'Aho says that it was only through routine scrutiny of outstanding files in their office that the oversight to follow up this appeal was discovered.

[6] This matter was assigned to me on 25 October 2018 and I issued a direction notice to Mr. 'Aho and the respondent on the same day to attend before me in

chambers on 29 October 2018 for directions, and directed that the Court serve the respondent with a copy of that notice.

- [7] On 29 October 2018, it was discovered that the notice had not been served upon the respondent and I directed that the hearing be held on 21 November 2018 and that the bailiff serve the respondent with the notice of it. I also directed the Crown to file and serve upon the respondent by 14 November 2018, a summary of the facts, a summary of the proceedings that took place before the Magistrate, a medical report of the injuries of the complainant and any confession or statement of the respondent.
- [8] On 20 November 2018, the Crown filed the summary of facts, the record of interview and statement of the respondent in which he admitted assaulting and causing the injuries to the complainant, a medical report of those injuries and coloured photographs showing the bleeding cut eyebrow and lips and bleeding and swollen nose of the complainant. On 21 November 2018, Mr. 'Aho's synopsis of submissions in support of the appeal were filed.
- [9] On 21 November 2018, Mr. 'Aho appeared but the respondent did not. I discovered that the respondent had not been notified of the hearing at all. I adjourned the matter to 23 November and directed the bailiff to serve the respondent with the notice of it.
- [10] On 23 November 2018, the matter was called in Court but the respondent did not appear and the clerk informed me that the bailiff went to serve him and he was told that the respondent had gone overseas. I adjourned the matter to 14 December to see when the respondent would return from overseas.
- [11] On 14 December 2018, the respondent had still not returned from overseas and the matter was adjourned to 17 January 2019 to see if something definite would be known about the respondent.
- [12] On 17 January 2019, Mr. 'Aho advised that the police had inquired and were told that the respondent was said to be in the U.S. and that there was no indication when, if ever, the respondent would return to Tonga. He requested that the

hearing of the appeal be held in the absence of the respondent. I set down the hearing to be held on 31 January 2019 and advised Mr. 'Aho to provide by then any case authority that such hearing can be held in the absence of the respondent.

- [13] On 31 January 2019, at the hearing, Mr. 'Aho produced a decision of His Honour, Cato J, dated 27 July 2017 in the case AM21/2016, *Police v Tevita Tau*, an appeal from the Magistrate's Court by the Crown against the sentence imposed as well. In that case, the respondent had pleaded guilty to housebreaking and theft charges of properties worth about \$3,400, \$1944.00 of which worth being recovered. He had previous convictions, 6 of which were offences of dishonesty from 2008 to 2012, 3 of which were for house breaking, and that he had been imprisoned to periods of imprisonment varying from 3 months to 12 months and 2 sentences being suspended. Despite all that, the Magistrate Court sentenced him to one year probation on both counts to be run concurrently, it seemed, because the respondent had told the Court that he was a changed man and that he was getting married the following week.
- [14] His Honour heard the appeal in the absence of the respondent and upheld the appeal of the Crown, and varied the sentence on housebreaking and theft to 9 months imprisonment on each count both of which to be served concurrently. He also issued a warrant for the arrest of the respondent in order that he would commence his imprisonment sentence.
- [15] His reason for hearing the appeal in the respondent's absence was because the respondent had been well aware of the date of the hearing and that the appeal was to be heard that day. That was because when the case was called on 29 June 2017, the respondent was there and he requested an adjournment so that he could consult legal counsel and the Court adjourned the matter to 27 July 2017 to enable him to do that. The respondent was well aware that the appeal would be held that day.
- [16] That case however is distinguishable from the present case because in the present case, the respondent was never aware that the hearing was to be held on,

31 January 2019. He was never notified of it (because he was not in Tonga and could not be located overseas). He had no obligation to remain in Tonga until the appeal against his sentence, filed 7 years ago, was heard. He had no responsibility or obligation to inquire as to when his appeal was to be heard.

[17] The duty and obligation to give notice to and to require the attendance of the respondent is placed upon the Registrar of this Court. Section 78 of the Magistrate's Court Act provides as follows:

“78. The Registrar of the Supreme Court shall as soon as possible give written notice to the parties of the date fixed by the Supreme Court for the hearing of the appeal.”

[18] The duty and obligation to forward the appeal to the Supreme Court is placed upon the clerk of the Magistrate's Court. Section 77 provides as follows:

“77. As soon as the provisions of section 75 hereof have been complied with by the appellant, the clerk shall forward to the Registrar of the Supreme Court:

- (a) the appellant's notice of appeal;
- (b) the recognizance entered into by the appellant;
- (c) a correct transcript of all proceedings in the case in the Magistrate's Court.”

The respondent had no responsibility for that or to inquire as to whether the clerk had carried out his responsibility at all.

[19] On the other hand, the Crown did. Although the clerk was the person directed by the Act to attend to those matters, the Appellant had the obligation to be concerned that its appeal was being attended to by the clerk reasonably quickly. This is especially so because, at the time of filing of that appeal, the respondent had had his \$150 fine paid on the same day of his sentence, 7 February 2011, and was indeed a free man, having already discharged his criminal liability for these offences.

[20] The Crown failed in that obligation. It failed for 7 years.

[21] I hold that the provisions of S.78, quoted above, is mandatory. It requires that the Registrar “shall” notify the respondent of the date for the hearing of the appeal. Without such notice having been served upon the respondent, I hold that I do not have any jurisdiction to hear the Crown’s appeal.

Orders

[22] Accordingly, I order that this appeal is adjourned sine die, unless the Crown chooses, in the circumstances, to withdraw it.

NUKU’ALOFA: 6 February 2019




L. M. Niu
JUDGE