Solicitor General

02/07/19

Scan, email, upload + file.

IN THE SUPREME COURT OF TONGA
CRIMINAL APPEAL
NUKU'ALOFA REGISTRY AM 8 of 2019

BETWEEN: POLICE

- Appellant

AND: KAIVAI HEIMULI

- Respondent

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. T. Kafa for the Appellant
Mr. S. Tu'utafaiva for the Respondent

## JUDGMENT

[1] This appeal raises a breach of the *audi alterem partem* rule, a limb of natural justice, that requires courts and administrative tribunals to afford an affected or interested party an opportunity to disabuse the trier of fact of some adverse or injurious matter that has been raised by the other party to a dispute. It is a very important rule and aspect of procedural justice intended or aimed at ensuring a decision maker is properly informed of relevant material and requires a decision maker to hear both sides of any dispute and not act on a material which is damaging to the other party without that party being first given the opportunity to make representations about it. *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130(CA) and *re Erebus Commission* [1983] NZLR 662.

[2] In this case, the Appellant has appealed the judgment of a Magistrate dismissing two summonses laid under the Traffic Act; first a charge of reckless driving with the Respondent being in charge of a motor vehicle under the influence of drink contrary to section 26 (1) of the Traffic Act (502/18) and another charge of reckless driving under section 25(1) of the Traffic Act; lack of due care and attention (503/ 18).



recd 02/07/19 SMC

[3] Although this prosecution has had something of a procedural history, it is the dismissal of these two summonses only with which I am concerned on this appeal. The prosecution had sought to amend the charge because I am told it had difficulty in identifying which of two roads in Kolomotu'a, the Respondent had been driving on before allegedly going off the road and coming to rest hitting an electric pole. The road particularized in the summonses, I am informed by the Prosecution, may not have been the road the Respondent was driving on, there being another in the immediate area it seems where the car came to rest. The prosecution sought, prior to trial to amend the information to allege simply that the offence occurred in Kolomotu'a. Mr Tu'utafaiva had objected to this at the hearing making a number of submissions which did not, however, include the objection that ultimately had resulted in the two summonses being dismissed by the Magistrate before the trial was to commence.

[4] Mr Tu'utafaiva had filed an additional submission contending that the summonses did not particularise an offence because the Prosecution in the amendment sought had not allege that the Respondent was driving on a road but merely in Kolomotu'a. Mr Tu'utafaiva's office through inadvertence had not served the objection on the Prosecution, so that it did not have adequate opportunity to consider its position or the merits of the objection prior to the Magistrate ruling, shortly before the trial was to commence, that the summonses did not reveal an offence and then dismissing them. I am informed and accept that Mr Kefu, who had appeared for the Crown at trial, and Ms Kafa as second counsel, were both taken by surprise at this course of events and could not make timely representations.

[5] Mr Tu'utafaiva accepted that his objection had not been served on the Prosecution. He submitted, however, that this did not matter because the Appellant did not ask for a right of reply when the Magistrate directed on the 28th March 2019 that the parties file submissions on any new point by Monday 1st April 2019 and he would make his ruling on Tuesday 2nd April 2019. He confirmed that the Respondent's submissions were filed on the 29th March 2019 and the Court's ruling was made on the 2nd April, 2019. I do not accept his submission on this point, however, that the appellant is effectively estopped from challenging the dismissal because Ms Kafa had failed to seek a right of reply. In my view, it is fundamental when a party introduces, as here, a fresh objection or argument that the application of objection be served in a

timely way so that an opponent may properly consider and evaluate it and make representations to the Magistrate.

[6] Had a notice been served on the Crown, I have no doubt that Mr Kefu as a senior and experienced counsel, would have taken steps to address the objection which, in my view, could have been circumvented simply by revising the amendment to include the word road in the particulars. Had the defence sought any further particulars, then they could have been provided by the Prosecution nominating the roads that the Respondent may have been travelling upon so as to end up in the position he was found, if the Appellant was uncertain, which seems unlikely.

[7] The Prosecution must prove beyond reasonable doubt that the Respondent had been driving on a road or any road under the provisions of the legislation, before alleging driving off it and coming into connection with a pole. It does not have to prove what particular road he had been travelling on, only that he must have been travelling on a road under the influence and or carelessly.

[8] Accordingly, through no fault of the Learned Magistrate I uphold the Appeal. The summonses are remitted to the Magistrate's Court for a rehearing on whether they should be dismissed after the prosecution has had the opportunity to be heard on Mr Tu'utafaiva's objection, and has considered its position.

SUPREME COURT TONGA

C. B. Cato

**NUKU'ALOFA: 28 June 2019**

**J U D G E**