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

AM 13 of 2019

BETWEEN: REX

- Appellant

AND : SIONE VUNA FA'OTUSIA

- Respondent

BEFORE HON. JUSTICE NIU

Counsel : Mr. T. 'Aho for appellant.
Mr. S. Fonua for respondent.

Hearing : 13 September 2019

Ruling : 18 September 2019

RULING

Background

[1] The respondent is the Minister of Justice. In February this year, he was charged with two criminal offences, namely,

(a) using threatening language towards a Government officer, and

(b) attempting to interfere with the course of justice.

mail 26/09

[2] He was granted bail by the Magistrate Court on his own recognizance of $1000 on condition:

(a) he was not to leave Tonga without leave of the Court,

(b) he was not to leave Tongatapu without leave of the Court,

(c) he was not to commit any offence, and

(d) he would surrender his passport to the Court.

[3] On 29 May 2019, the Chief Executive Officer (CEO) of the Ministry of Justice wrote to the Chief Magistrate of the Magistrate's Court and asked for the leave of the Court for the respondent to travel to Vanuatu the following day, 30 May 2019, for work purpose, and to return on 1 June 2019.

[4] On the same day, 29 May 2019, the Senior Magistrate of the Magistrate's Court, without consulting the police or the Crown Law, made an order that -

"1. The Restraining Order against the Defendant prohibiting him from leaving the Country is now lifted. The Accused may be allowed to travel overseas.

2. That his Passport is released to him."

thereby removing conditions (a) and (d) in paragraph [2] above. It would appear that that order was not issued because another order was issued by the Senior Magistrate on the same day, in the Tongan language, as follows (as translated):

"1. The accused be allowed to travel overseas.

2. The accused to report to the Court on the 19 June 2019."

[5] On 20 June 2019, a Magistrate Court clerk (Mina Pule) brought a letter from the CEO of the Ministry to the Chief Magistrate dated 19 June 2019 requesting the leave of the Court for the respondent to travel to New Zealand on Friday 21 June 2019 and returning on 24 June 2019. The Chief Magistrate was in Court at Fasi and because of the urgency, the letter was given to Magistrate Kaufusi. Magistrate

Kaufusi directed that the letter be scanned by email to Crown Law and request that someone from there come to chambers and clerk Satini Laulotu did that.

[6] At about 12:15pm, the Chief Magistrate arrived back from Court and the clerk Satini Laulotu (Palanite) informed him of the letter. The Chief Magistrate directed and the letter was returned from Magistrate Kaufusi to him. Satini Laulotu informed the Chief Magistrate that she had telephoned Crown Law twice for someone to come but still no one came. The clerk Mina Pule also told the Chief Magistrate that when she was given the letter to bring to him, she was told that the Court order was needed to be submitted together with the visa application of the respondent to the New Zealand office before it would close at 1:00pm that day, 20 June 2019.

[7] Chief Magistrate Lokotui thereupon issued the required order and the application was lodged and the visa was issued by the New Zealand office and the respondent left to New Zealand on 21 June 2019 and returned on 24 June 2019.

[8] The copy of the letter of the CEO of 19 June 2019 was left in the inward tray of the Attorney General when Crown Law received it on 20 June 2019. She subsequently directed that counsel (Mr. 'Aho) attend to it. Counsel was away from his office at the time. He did not receive the instruction until after the order had been issued by the Chief Magistrate. Upon being informed of the Court's decision, he was instructed to and he filed this appeal on the same day.

[9] Subsequent to that decision of the Senior Magistrate, and after the Crown had lodged its appeal to this Court in respect of that decision on the same day, the respondent applied to this Court for variation of the conditions of his bail, namely, that his passport be retained by him, that he did not require the leave of the Court to travel overseas and that his name be removed from the no-fly list. By consent of the Crown and the respondent, the Lord Chief Justice of this Court ordered that those variations be forthwith effected on 19 July 2019.

[10] The notice of appeal of the Crown prays for two orders:

(a) A declaration that the Learned Magistrate erred in law when he granted the respondent a variation of bail on an ex parte basis, and

(b) that the Supreme Court will now determine the bail conditions of the respondent and any further application to vary his bail, pursuant to section 5(3) of the Supreme Court Act.

Submissions of the Crown in support of appeal

[11] Mr. 'Aho for the appellant filed submissions in support of the appeal and also an affidavit by the Crown Law clerk, who had received the copy of the CEO's letter of 19 June 2019, describing in detail why Crown Law was unable to have someone attend on its behalf for hearing of the respondent's request.

[12] He refers to S.6 (1) of the Bail Act. That section provides as follows:

> *"6. **Conditions of bail may be imposed or varied.***
>
> *(1) Where a Court or a police officer has granted bail, a Court, or a higher Court on appeal, may on application –*
>
> *(a) by or on behalf of the person to whom bail was granted; or*
>
> *(b) by the prosecutor or a police officer,*
>
> *vary the conditions of bail or impose conditions in respect of bail which has been granted unconditionally."*

[13] He submits that that provision requires that an application be made to the Court and that such application state the order requested and attach an affidavit of the facts relied upon for the order sought and that a copy of such application be served upon the opposing party to the application. He says that the request made by the CEO accordingly did not comply with S.6.

[14] He submits that the application of the respondent completely disregarded the requirement of section 6 because it was not by way of an application, it was not supported by a sworn affidavit and it was not served upon the Crown who was a necessary party to the matter. He also says that the CEO was not properly

representing the respondent because she was not a legal counsel or that she had represented him in any proceeding in Court.

[15] Section 6 deals with the imposition of conditions on a bail granted to an accused person and with the removal or variation of a condition imposed on a bail. The application made by the respondent described in paragraph 10 above (for the removal of the condition that he must not leave Tonga without the leave of the Court and that his passport be held by the Court) was the application envisaged by S.6. That application was in the proper form, made by legal counsel, setting out the grounds of the application and the order sought. It was supported by sworn evidence by way of affidavit, and it was filed in Court and served upon the Crown. The Crown consented to the order sought and the Court, this Court, duly granted the order removing those conditions of bail of the respondent.

[16] In the present case, there was no application for removal or variation of the condition of bail of the respondent at all. The condition of the bail was to be left as it was. The request made on behalf of the respondent was that the leave of the Court, which was required by the condition of the bail already granted, be given by the Court. It was never an application to remove or to vary that condition of the bail. It in fact was a confirmation that that condition of the bail be maintained, and that the leave of the Court be given, as was required by that condition.

[17] There is no procedure described or indicated in the Bail Act or in any Act as to how the leave of the Court is to be sought as required by a condition of bail granted. All that is prescribed by the wording of the condition of the respondent's bail is that he must have the approval of the Court to travel overseas. And in exercising that discretion, the Court is only required to exercise it reasonably as the circumstances require.

[18] In this case, the Court thought it fit to see if the Crown had any objection to the request of the respondent and it did seek that view by scanning and emailing a copy of the letter of request on behalf of the respondent to the Crown Law Office. That copy was placed in the inward tray of the Attorney General. When she saw the

letter, the Attorney General would have seen the urgency of the matter. It is clear that she saw no reason to oppose the request. Otherwise she would have responded right away to the Court and inform it of her view. She instead instructed that Mr. 'Aho attend to it without giving him any view she had of the matter. Mr. 'Aho, when he finally became aware, saw no reason to oppose the request either. The Court, having taken the necessary step to obtain the view of the Crown, by telephoning the Crown Law twice for a counsel to attend and give such view but no such counsel attended, decided the matter as it saw fit in the circumstances of urgency that prevailed and granted the approval sought.

[19] When Mr. 'Aho filed the Crown's notice of appeal that same day, he did not state in it any reason why the approval of the Court should not have been given, for example, that it had information that the respondent was not intending to return to Tonga if he was allowed to leave, or that he had committed another offence, or any such reason that approval should not have been given for him to travel overseas. That confirmed to the Court that it should not cancel the approval already given, and it allowed the respondent to travel as it had approved. It had made the right decision to let the respondent travel.

[20] Mr. 'Aho further argues that the principle of giving the opposing side an opportunity to be heard, the principle of audi alteram partem, was breached by the Senior Magistrate when he granted the approval for the respondent to travel overseas without the Crown having been afforded an opportunity of being heard. He referred to the Supreme Court Practice Direction which requires that the opposing side be notified at least 48 hours before the hearing of an application of a party is heard.

[21] That principle was sufficiently complied with, in my view, when the Court sought by telephone, twice, that a representative from the Crown Law come over and be heard, in the circumstances of urgency of the matter. And the 48 hour rule in the Supreme Court may in appropriate circumstances be varied in accordance with the justice of the case. It is not a hard and fast rule because it could work and result in injustice if strictly followed.

[22] It is clear from the letter of the CEO, copy of which was scanned to and received by the Attorney General, that the matter was urgent, that approval be given by the Court, if it was to be given, that day, because the overseas trip was the following day, Friday 21st (not 20th as stated in the letter). To me that is sufficient compliance with the principle of audi alteram partem. If the Attorney General had wanted to oppose the request she could have immediately contacted the Court and conveyed her objection and reason for so doing, or if she wanted more time, to ask for more time to respond. But she did not. She did not see any need to convey any such wish to the Court. I am therefore satisfied that there was no breach of the principle in this instance.

[23] That is confirmed by the statement made by Mr. 'Aho in paragraph 4 of his synopsis of submissions. He says: "At the outset, the Appellant has no objection to the application made by the Respondent on 19 June 2019 to vary bail to allow him to travel, subject to conditions made by the Court." He confirmed that verbally during the hearing. He said, "This appeal is only in respect of the procedure taken in the Magistrate Court and not with regard to the actual decision itself". Later on in his oral submissions, he said that the breach by the Senior Magistrate of the procedural requirements as he had referred to, namely, S.6 and of audi alteram partem principle, was substantial, and was therefore the basis for this Court to declare that the learned Magistrate had erred in law and to order that any bail condition variation in respect of the respondent be made only by this Court as prayed for in the notice of appeal.

[24] Mr. Fonua for the respondent referred to S.81 of the Magistrates Court Act which provides as follows:

> *"S.81. No decision of a Magistrate shall be reversed or varied for any defect in form therein or in any of the proceedings before the Magistrate but every appeal shall be decided on its merits only."*

He says that the right to appeal against a decision of a Magistrate is a right to challenge the order made by the Magistrate. That is supported by section 74(1) which provides as follows:

> *"74(1). In every civil case and in every criminal case triable summarily any party shall have a right of appeal to the Supreme Court from the judgement, sentence or order of a Magistrate."*

[25] In the present case, it is in respect of the order of the Chief Magistrate giving the respondent leave and approval to travel overseas. If, as Mr. 'Aho says, the Crown is not appealing against that order but only in respect of the procedure used by the Magistrate, then the appeal is not an appealable matter. Mr. Fonua argued that the appeal must be on the merit or non-merit of the order granting the respondent approval to travel overseas, and that as the Crown was not appealing that the order granting approval should not have been made, the appeal was misconceived.

[26] I agree. If an appellant agrees with the order made by the lower court but disagrees with the procedure taken by the lower court, S.81 expressly, provides that the order made cannot be reversed or varied simply because the procedure taken was wrong.

Orders sought

[27] In this appeal, the Crown seeks an order of declaration that the Senior Magistrate erred in law in that he granted a variation of bail on an ex parte basis. As I have stated, the request of the respondent was not to vary his condition of bail. It was in fact a confirmation of his condition of bail that he must have the leave of the Court before he could travel overseas because he was only requesting the leave of the Court to travel to New Zealand. He was not asking to cancel that condition of his bail. He was therefore not making an application under S.6 of the Bail Act and the Senior Magistrate had therefore made no error in law in granting the leave to the respondent to travel overseas.

[28] The Crown also seeks an order in this appeal that this Court (the Supreme Court) now determine the bail conditions of the respondent, and also any further application to vary his bail. It seeks to rely on the provisions of S.5 of the Supreme

Court Act as the basis for such order. That provision provides that the Supreme Court shall have the power to exercise all the powers of the Magistrate's Court. However, that provision does not mean that the Supreme Court can thereby oust the Magistrate's Court of its jurisdiction duly granted to it by law. Section 4 of the Supreme Court Act provides that the Supreme Court shall (also) have jurisdiction in any other matter not specifically allotted to any other tribunal.

[29] Section 6 of the Bail Act, as quoted above, specifically allotted the consideration of bail and of the conditions of bail to the Magistrate's Court or a police officer (except in respect of a person charged with murder or treason) unless it is appealed to the Supreme Court. Accordingly, the Supreme Court has no jurisdiction to consider the bail or the conditions of the bail, of the respondent, unless it is on appeal from the Magistrate's Court. It would therefore be wrong for this Court to make the order sought by the Crown in this appeal.

[30] It is true that, after this appeal was filed, this Court (the Supreme Court) has ordered that the condition of the bail of the respondent (which required that he must not leave the country without the leave of the Court) be removed, but that was done by this Court upon the consent of both the Crown and the respondent. And even then, that cannot be said, let alone held, to be a precedent to give this Court such jurisdiction, because the parties cannot by consent grant to a Court a jurisdiction it does not have: *Rex v Tau'alupe* [2012] Tonga LR 141. 144 (Court of Appeal).

Conclusion

[31] I therefore find that the appeal is misconceived and is without merit. I order that it be dismissed with costs to the respondent to be taxed if not agreed.

SUPREME COURT TONGA

Niu J

NUKU'ALOFA: 18 September 2019 **JUDGE**