Solicitor General

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

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11/11/19.

BETWEEN: 'AMANITA TANGULU
- Appellant

AND : 'ANASEINI TAUKOLO
- Respondent

BEFORE HON. JUSTICE NIU

Counsel : Mr. To'imoana Taufaeteau for appellant.
Mrs. 'Anaseini Taukolo herself as respondent.

Hearing : 8 October 2019 at Neiafu, Vava'u

Ruling : 14 October 2019

RULING ON APPEAL

Background

[1] The respondent had brought a civil claim against the appellant in respect of the same matter which was subsequently brought as a criminal private prosecution in respect of which this appeal has been made. In that civil claim the appellant was held liable to pay $1,200 to the respondent. The appellant did not pay it and a distress warrant was issued but the appellant had no property to be sold and the judgement debt remained outstanding. The respondent then brought this criminal private prosecution under S.164

rec'd 08/11/19

of the Criminal Offences Act, that the appellant had obtained the respondent's 20 foot mat worth $1,200, (which had been the subject of the civil claim) by false pretence.

[2] The appellant raised in defence that the criminal prosecution brought by the respondent was an abuse of the process of the Court because the same matter had already been dealt with by way of civil action by the Court. He also argued that the appellant had described in evidence that the mat was to be packed and sent to New Zealand for the exchange (katoanga) there and then the money would be sent here. He submitted that the prosecution had not proved that that statement was false.

[3] The decision of the Magistrate was brief. He said:

> "If a person makes a statement and another person believes it and parts with his property (as a result of it) but that the person making the statement knows very well that his statement is false (then the offence is complete).
>
> In considering this case, the prosecutor believed that the statement of the accused was true and she thereby parted with her 20 foot mat.
>
> The accused knew very well her statement was false because 2 years have now passed without her paying for the value of $1,200 of the mat. I believe in accordance with the evidence in this trial that the prosecution has proved her case beyond a reasonable doubt. I find the accused guilty."

The appeal grounds

[4] The appellant has appealed against that decision upon the following grounds:

a) the Magistrate was wrong to have concluded that since the accused had not paid the value of the mat to the prosecutor, it amounted to obtaining by false pretence;

b) the Magistrate was wrong to have convicted the accused because there was no evidence that she had committed the offence;

c) the Magistrate was wrong to have entertained the criminal action when there had already been a civil action in respect of the same matter; and

d) the Magistrate was wrong to have ordered the compensation of $1,200 because a Magistrate was only allowed by S.25(2) of the Criminal Offences Act to order compensation up to $500.

Prior civil action

[5] I will deal first with the ground of prior civil action (ground 4(c) above). There is no law that a criminal prosecution cannot be brought if there has already been a civil action in respect of the same matter. But there is a practice that a civil action should be deferred until the criminal prosecution in respect of the same matter is completed. The reason for that is to afford to the accused in the criminal trial his right to remain silent and to the prosecution his obligation to prove the guilt of the accused. If the civil action is tried first, the accused is obliged to disclose his defence to the claim and to plead to the allegations against him, including disclosure and production of documents in his possession. If his criminal trial is then subsequently prosecuted, his right to remain silent becomes meaningless because he had already divulged his defence and even his evidence before he is tried for the criminal offence. He is thereby prejudiced in his defence.

[6] As it was his right, the appellant was obliged to raise his objection to the criminal private prosecution brought by the respondent, but there is no record in the transcript that he raised such objection. The only objection which is recorded is an objection by the appellant to the production of the record of the civil action as evidence in the criminal prosecution, and it was rightly upheld by the Magistrate and that record was not allowed to be referred to. The appellant did not claim her right in this trial. She allowed the trial to proceed to the end and then submitted simply in her submissions "that the civil case had abused the process of the Court" without saying why or how. She ought to have pointed out that she had been prejudiced, and to what extent, by the civil case having been held first, but she didn't. Even in stating this ground of appeal, she does not say in what way, if any, she had been prejudiced by the civil case having been held first.

[7] Now having considered what transpired in this trial before the Magistrate, I do not find that the appellant had been prejudiced in any way, and Mr. Taufaeteau has not pointed to any prejudice which had been caused to the appellant. I therefore do not find any reason to hold that there had been any abuse of the process of the Court, or more correctly, unfairness to the appellant.

Excess compensation

[8] I will also now deal with the ground of appeal 4(d) – that the compensation ordered of $1,200 exceeded the limit of $500 in S.25(2) of the Criminal Offences Act. That

subsection has now been amended by Act no. 19 of 2012 to increase the limit of compensation in the Magistrate's Court to $5,000. Accordingly, the order for compensation of $1,200 cannot be faulted for that reason.

The offence of obtaining by false pretence

[9] I will now deal with grounds 4(a) and (b) together, and straight off I agree with the appellant, that the Magistrate was wrong to have held that the offence was proved because the "accused knew very well her statement was false because 2 years have now passed without her paying the value of $1,200 of the mat". What the law requires to be proved in a case of obtaining by false pretence is that at the time of making the statement, the accused was making a false statement of an existing fact or that a fact existed but which did not. For example, if A says to B "Give me $10.00 now and I will give you $11.00 tomorrow", and B gives A the $10.00 but A fails to give B the $11.00 the following day. That is not an obtaining by false pretence because A does not say anything about any fact existing at the time he made the statement. But if A says to B, "Give me $10 because my weekly allowance from my parents will not arrive until tomorrow and I will then give you $11.00". And B gives A the $10 but A fails to give B the $11.00 the following day, that is an offence of obtaining by false pretence, if, and only if, A had never had any weekly allowance coming to him, because he was representing falsely to B, as an existing fact, that he was receiving a weekly allowance. The Magistrate was therefore wrong to have held there was a false pretence simply because there was a failure to pay the price of the mat for 2 years.

[10] However in the present case, the appellant had represented to the respondent that there was an existing arrangement which had been made with a person in New Zealand for an exchange (katoanga) to be made of mats sent by her to New Zealand for money to be given by that person in New Zealand as an exchange for those mats. That representation was of an existing fact of an exchange arrangement. If that statement was true, there is no offence. If there was no such arrangement, then the statement was false and the appellant is guilty of obtaining the mat by false pretence.

Was there an arrangement?

[11] The only evidence I can gather from the transcript (of the evidence) is that the appellant said there was an arrangement with someone in New Zealand. No name, address or

telephone number of that person was given in evidence. No evidence was given of any bill of lading or of an airway bill of shipment of the 7 mats which the appellant said were packed and sent to New Zealand, if they were sent there at all.

[12] The appellant did not have to give evidence because she was entitled to remain silent in a criminal trial and to leave it to the respondent, as prosecutor, to prove that she was guilty. But she chose to give evidence and in making that choice, she thereby impliedly represented to the Court, that what she had stated to the respondent about the arrangement was true, and that she could prove it to be true. She then proceeded to explain to the Magistrate that another woman had just spoken to her by telephone that that other woman was no longer able to provide the mats that she had said were to be sent for the katoanga in New Zealand, and that as a result of that conversation, the respondent then offered her 20 foot mat. But then she jumped to the end and said that ever since the mats were sent no money was received for them and that the respondent repeatedly came to her and asked for the money.

[13] The appellant thereby made no attempt at all to explain about the arrangement with the person in New Zealand. It would have been reasonable for her to inform the respondent of the name, address and phone number of the person with whom the arrangement was made because the respondent would be entitled to know the name of that person because, according to the appellant, that person was the one who was failing to pay the $1,200 of the respondent. It would have been easy for the appellant to do that, if the appellant had been telling the truth about the arrangement. But she didn't.

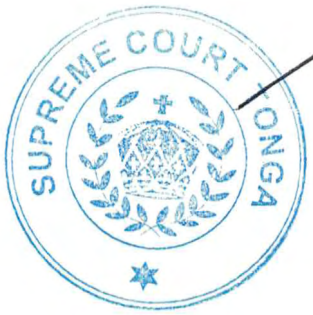
[14] It would have also been easy for the appellant to have shown to the respondent, and to the Court, copies of the bill of lading or airway bill of the shipment of the mats to New Zealand and the receipt for payment of the freight and of quarantine clearance. But she did not.

[15] Those failures of the appellant were and are glaring. A reasonable inference to be drawn from that is that there was no arrangement with any person in New Zealand at all, or elsewhere for that matter. And that is supported by the evidence of the respondent that the appellant told her when she repeatedly went to see her about the money, that she would weave her a mat in exchange for her 20 ft mat, which, I take it, would be for free. I would conclude, and I conclude, that that offer was made by the appellant because she

knew that there had been no arrangement at all. I therefore conclude, from the evidence at the trial before the Magistrate, that the statement made by the appellant to the respondent that there was an arrangement for exchange of mats for money in New Zealand, was false because there was no such arrangement. I therefore find that the conviction of the appellant by the Magistrate was correct, and that the orders that he made are valid.

Conclusion

[16] Accordingly, I order that the appeal of the appellant is dismissed. As the respondent represented herself, I make no order as to the costs of this appeal.



Niu J

NEIAFU: 14 October 2019 **J U D G E**