Scan of File Mr Lutui DPP Crown Law

IN THE SUPREME COURT OF TONGA
APELLATE JURISDICTION
NUKU'ALOFA REGISTRY **AM 4 of 2020**

BETWEEN:

POLICE Appellant

-and-

MATIU PILIKIMI HE LOTU FALETAU Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr T. 'Aho for the Appellant
Mr Tu'utafaiva for the Respondent
Date of hearing: 12 May 2020
Date of judgment: 12 May 2020

Introduction

1. At the outset of the hearing of this appeal today, Mr Tu'utafaiva, who appeared for the Respondent, indicated that he had reconsidered the matter in light of relevant authorities and, after discussions with Mr 'Aho, who appeared for the Appellant, the Respondent agreed to concede the appeal.

2. For the reasons that follow, the concession was rightly made. For the purposes of consolidation of previous authorities and statements of principle on this issue, and guidance which might obviate such appeals in the future, I will explain why.

Background

3. The Respondent was originally charged on summons with one count of common assault contrary to section 112(c) of the *Criminal Offences Act* (CR 463/19) and one count of

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causing simple bodily harm contrary to section 107(1)(2)(c) and (5) of the same Act. The Respondent pleaded not guilty to both counts.

4. The matter came before the Magistrates Court for trial on 12 February 2020. The police led no evidence on the charge of common assault. During the course of her opening on the count of causing simple bodily harm, the Prosecutor stated the elements of that offence as including relevantly that the accused wilfully and without lawful justification caused bodily harm to the victim. The words "wilfully and without lawful justification" are derived directly from the text of s.107(1).

5. At the conclusion of the said opening, counsel for the defence (Mr Tu'utafaiva) objected to the form of the summons in that the words "wilfully and without lawful justification" were missing from the particulars. Because of that, he submitted, no offence was disclosed for which the Respondent had been charged.

6. The Prosecution applied to amend the summons. Mr Tu'utafaiva objected to the application saying that it was unfair and that it would cause serious prejudice to the accused. So far as the learned Magistrate's ruling reveals, that claimed prejudice was never expounded or specified.

7. After considering a number of authorities, the learned Magistrate considered, firstly, that the Prosecution had had "numerous opportunities" since the first mention of the matter in September 2019 to amend the summons which would have given the defence sufficient time to prepare its case. That, of course, assumes the Prosecution was aware of the omission prior to trial. Secondly, she considered that if the amendment were permitted, there would clearly be injustice and prejudice to the accused. Again, no particular prejudice was specified. On that basis, the learned Magistrate refused the application to amend. That led her to find that because there was a "substantial defect on the face of the summons", it did not disclose the offence by which the accused was charged. Therefore, the Respondent was acquitted of the charge.

8. The grounds of appeal against the Magistrate's decision were:

(a) there was no unfairness or prejudice to the accused as no witnesses or evidence had been heard or given;

(b) the statutory provision that creates the offence was clear and correctly stated in the criminal summons;

(c) all the evidence relating to the offending had been disclosed to the Respondent before trial;

(d) the omission of the two essential elements of the offence in the particulars meant the summons was merely defective but not a nullity and could have been cured by amendment; and

(e) the amendment could be made at any stage of the trial provided it could be made without injustice.

Correct approach

9. In my view, there are three steps to the correct approach to applications to amend either a summons or an indictment:

(a) firstly, the proper characterisation of the subject matter of the amendment;

(b) secondly, identification of the applicable principles governing the application; and

(c) thirdly, application of those principles to the instant case.

Characterisation

10. The omission of the words "wilfully and without lawful justification" from the particulars to the charge was nothing more than a clerical or typographical mistake. It is the specification of the section of the relevant Act, here s.107 of the *Criminal Offences Act*, which informs the accused as to the charge he or she is to face. The application to amend had nothing to do with altering that charge. Moreover, and by comparison to previous decisions on this topic, the application did not involve, for example, the addition or substitution of any different charge.

11. That the omission was as I have characterised it, is supported by the fact that in the summons on CR 463/19, the count of common assault, the Prosecution included the identical words "wilfully without lawful justification" as elements of that charge. Further, that the words were omitted from the CR 464/19 summons, but expressly referred to by the Prosecutor during her opening, plainly demonstrates an administrative oversight.

Applicable principles

12. Section 14 of the *Magistrates Court Act* requires a summons, relevantly, to state concisely the offence with which the defendant is charged. Section 90 of the same Act provides:

> **90 Variances and amendments in criminal cases**
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> Where at the hearing of any criminal case the evidence discloses a distinct offence from that charged in the summons or warrant, the Magistrate shall dismiss the charge, but where there is merely a variance between the summons or warrant and the evidence as to the time or place at which the offence charged was committed or some other minor error or discrepancy in the summons or warrant which may be amended without injustice to the defendant, the Magistrate shall amend the charge and if it appears to him that the defendant has been misled by the charge as originally stated, he may adjourn the further hearing of the case to some future day.

13. The relevant principles more generally governing amendment of (mostly) indictments have been the subject of numerous decisions here in the Kingdom and elsewhere in the common law world. The submissions on this appeal impliedly accepted that those principles ought also apply, mutatis mutandis, to applications to amend summonses.

14. From decisions such as *Pulu v R* [2000] Tonga LR 293, *Rex v To'ia* [2004] TOSC 52, *Pohiva v R* [2008] Tonga LR 266, *Police v Liava'a* [2013] TOSC 9, *Rex v Sefesi* [2013] TOSC 14, *Police v Tangifua* [2014] TOSC 20, *Police v Finau* [2014] TOSC 27,[1] the following principles may be distilled:

    (a) It is very important that the prosecution take care to charge correctly.

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[1] Referring to *R v Johal; R v Ram* [1972] 2 All ER 449, more recently applied in *Serious Fraud Office v Papachristos & Anor* [2014] EWCA Crim 1863.

(b) At trial, a defendant should face essentially the case on which he has been committed even though it may be modified.

(c) However, where at any stage of a trial (that is, even after verdict), it appears to the court that the indictment is defective, the court must make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

(d) The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused.

(e) Like any other procedural step in criminal law, in every case in which amendment is sought, it is essential to consider with great care whether the accused will be prejudiced thereby.

(f) The power to amend is not limited to those cases in which the indictment is bad on its face.

(g) Not every charge which is technically defective will be held to be a nullity. For example, if a person is charged with an offence that does not exist (e.g. because it has been repealed) then that charge will be a nullity. Where, however, the error is purely technical and the facts of the charge as pleaded clearly reveal the nature of the conduct complained of, a charge will not be bad.

(h) Clause 13 of the Constitution does not of itself prohibit alterations to details of an indictment, provided again that no injustice results to the accused. That is to be contrasted with situations where, for example, there being no evidence to support a particular count in an indictment, an application is made to amend the charge to an entirely different offence.[2]

(i) A prosecutor acting in good faith, will not apply to the court to add a charge which is not supported by evidence which he has already disclosed to the defence. If the whole

[2] Such as in *R v Jennings* 33 Cr. App R 143.

of any evidence relied on is entirely new and quite separate and different from the material before the Magistrates Court, so as to give rise to a different case altogether, then in principle, as a matter of general fairness, the court may be unlikely to allow such amendment. In that case, the Crown should, if it chooses, institute separate proceedings.

(j) Any proposed amendment in matters of description and other respects in order to meet the evidence in the case, or which does no more than take forward a case already laid on the evidence, reformulating it possibly with the assistance of some additional evidence, may be made so long as the amendment causes no injustice to the accused.

(k) As a general rule, any objection to the form of a charge should be taken before a plea is entered. If the error in the charge is slight or merely technical and the facts of the charge as laid clearly reveal the nature of the conduct complained of, then the charge is not bad, and the prosecution must be given an opportunity to amend. If the defendant is placed in a difficulty by the amendment, he may be granted an adjournment to consider his position.

(l) Accused persons should not be acquitted merely because a charge is technically defective, unless the defect cannot be rectified.

(m) The essential question is whether the accused will be prejudiced.

(n) The overall aim must be justice both to the prosecution and the defence.

Application to the instant case

15. The omission which the amendment sought below was intended to remedy did not render the summons a nullity. If anything, it was defective only as to the technical form of its particulars, not as to substance (s.107 being clearly specified). And, that defect was capable of being cured by amendment which would not have altered the substance of the offence charged, but merely have completed the recitation of the relevant terms of s.107.

16. Had the Magistrate appreciated the above nature of the proposed amendment, her attention ought then have been drawn to whether the Respondent would *in fact* suffer any prejudice by

reason of the amendment which could not be ameliorated by appropriate orders, including possibly adjourning the trial.

17. As noted above, identification of any actual or perceived prejudice to an accused is essential in determining whether a proposed amendment, if allowed, might result in injustice. Often, the timing of the application to amend, in terms of the stage of the proceeding, will inform the range and severity of potential prejudice which might be occasioned to an accused.

18. In the instant case, the application was made after the Prosecution's opening and before any evidence was called. Mr Tu'utafaiva did not specify any prejudice, only that it would be 'unfair'. The Magistrate assessed the issue likewise. Neither grappled with the question of what prejudice would *in fact* be caused by the amendment.

19. Any suggestion of prejudice occasioned by reason of the Respondent not being prepared to conduct his defence at trial that day because he expected the charge to be dismissed by reason of the omission on the words "wilfully and without lawful justification" in the summons would have been most forlorn and ought to have been rejected.

20. The simple fact is that the amendment did not seek to change the salient features of the charge which are stipulated in s.107 itself, nor the physical facts in the particulars that were presented. The Respondent knew the case he had to meet and, in the absence of any earlier application for adjournment, must be taken to have been prepared to conduct his defence of the charge that day.

21. If there was any doubt about that, and for some reason the Respondent was caught by surprise by the amendment or it otherwise had the potential to interfere forensically with the conduct of his defence, the appropriate solution would have been to adjourn the trial to enable the Respondent to consider the matter further and/or undertake any further preparation necessary for the conduct of his defence. It was not appropriate to dismiss the charge.

22. Accordingly, the objection taken as to the form of the particulars, whilst technically open on the face of the summons, ought not been advanced, or accepted, as a proper basis for opposing the Prosecution's application to amend.

Result

23. Based on the approach set out above, the learned Magistrate erred in law, and her exercise of discretion on the application to amend miscarried. It follows that her decision to dismiss (or acquit the Respondent of) the charge was also vitiated by those errors.

24. As conceded by the Respondent, and for the reasons stated above, the appeal is allowed.

Orders

25. The decision of Senior Magistrate Pahulu-Kuli in CR 464 of 2019 dated 12 February 2020, to acquit the accused (Respondent here), is quashed.

26. The Prosecution's application to amend the summons to insert the words "wilfully and without lawful justification" is allowed.

27. The matter is remitted to the Magistrates Court at Fasi for trial, to be mentioned on 26 May 2020.

NUKU'ALOFA
12 May 2020

M.H. Whitten QC
LORD CHIEF JUSTICE