

Crown Law
Sworn and filed.

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

AM 8 of 2020

BETWEEN:

POLICE

Appellant/Applicant

-and-

'OFA TAUKI'UVEA

Respondent

Application for leave to file appeal out of time

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN
To: Ms L. Macomber of the A.G.O. for the Applicant
✓ The Respondent
Date of ruling: 17 July 2020 (on the papers)

Application

1. On 15 May 2020, the applicant filed an application pursuant to s.75(1) of the *Magistrates Court Act* to extend the 28 day period within which to file a notice of appeal against the decision of Magistrate Tuita made on 23 January 2020 in Magistrates Court proceedings CR 10 to 13 of 2020.
2. The application is supported by the affidavits of:
 - (a) Senior Constable Paula Tu'itupou, the police prosecutor who appeared before the Magistrate, sworn 15 May 2020; and
 - (b) Ms Leotrina Macomber, a Crown Prosecutor, sworn 15 May 2020.
3. On 20 May 2020, directions were made including that:
 - (a) the application and supporting affidavits be served on the respondent by 27 May 2020;

20 JUL 2020

[Signature]

- (b) by 10 June 2020, the respondent either file a notice of opposition together with supporting material or a memorandum advising that the application is not opposed; and
 - (c) that if the application is not opposed, it would be decided on the papers.
4. On 25 June 2020, Mr 'Aho of the AGO advised that the police in Vava'u had served the respondent but that a certificate of service had not yet been issued. Directions were therefore made requiring the applicant to file a certificate of service by 3 July 2020.
 5. On 7 July 2020, a certificate of service was filed verifying that the application material and directions made on 20 May 2020 were served on the respondent on 20 May 2020.
 6. As no notice of opposition has been filed, I have proceeded to determine this application on the papers.

Background

7. From the two affidavits in support, the following background is distilled.
8. Senior Constable Tu'itupou commenced prosecuting summary offences in December 2019. On 23 January 2020, he appeared before Magistrate Tuita on the hearing of the summonses which alleged that the accused (respondent hereto) had committed two counts of common assault, one count of domestic violence and one count of a breach of a protection order under the *Family Protection Act*. The accused pleaded guilty to all counts.
9. In commencing his submissions on sentence, the police prosecutor submitted the accused's previous criminal record he had obtained from the Scene of Crime Unit within Tonga Police, which he described as 'maintaining all previous criminal records to the Court'. However, the court clerk informed the court that the accused had other criminal convictions according to the Magistrates Court case management database.

10. When that record was handed to him and the Magistrate, the police prosecutor observed that the additional offences indicated that the accused was a repeat offender for the same charges he was facing that day.
11. The Senior Constable deposed to then not being given time to make further submissions before the Magistrate imposed his sentence on the charges.
12. After discussing the Magistrate's decision with his superiors, Police Prosecution decided to forward the matter to the Attorney General's office for assessment on whether to appeal.
13. Ms Macomber is the Crown Prosecutor who was assigned to this matter.
14. She deposed that on or about 29 January 2020, her office received the relevant files from Police Prosecution. On 11 February 2020, the Director of Public Prosecutions assigned the case to her for assessment.
15. She was directed to report to the DPP by 28 February 2020. At that time, she was *"unaware that the decision by the Magistrate was made on 23 January 2020 and that the 28-day appeal time would lapse on 20 February 2020"*.
16. Part of Ms Macomber's task was to liaise with the police prosecutor. In particular, she required a record of what he had actually submitted to the Magistrate.
17. Following the declarations of emergency on 13 and 20 March 2020 in relation to the co-vid 19 pandemic, police officers were mobilised on those operations so that no further work could be performed on this matter. The associated National Lockdowns which commenced on 26 March 2020 further delayed progress on this matter.
18. It was not until 16 April 2020 that the police prosecutor was able to respond regarding further information required.
19. On 21 April 2020, Ms Macomber submitted an internal memorandum to the DPP recommending that the matter be appealed. On 23 April 2020, she

received approval from the DPP to file an appeal in the matter and to apply for leave to appeal out of time.

20. She deposed that further delays to the filing of the material on this appeal and application were occasioned by the police prosecutor's illness and absence from work.
21. At paragraph 17 of her affidavit, Ms Macomber refers to a draft Notice of Appeal having been attached thereto. The draft Notice was not attached to her affidavit, nor does one appear anywhere else in the court file.

Principles

22. Section 75 of the *Magistrates Court Act* requires any notice of intention to appeal against the decision or order of a Magistrate be filed and served within 28 days after the decision, although that period may be extended with leave of the Supreme Court.
23. The principles applicable to an application for leave to appeal out of time have been variously described as:¹
 - (a) a grant of leave to appeal out of time is entirely in the discretion of the Court;
 - (b) the discretion has to be exercised judicially;
 - (c) it is generally in the interests of the administration of justice that there should be finality in litigation meaning that judgments should be treated as final after the period for bringing an appeal has expired so that parties know where they stand and matters taken as decided are not later re-opened at the whim, as it were, of the losing party. Any other approach introduces unacceptable uncertainty into the Tongan legal system;
 - (d) the Rules of Court have to be observed and must not be disregarded or ignored;²

¹ *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1; *Moapa Enterprises v Island Beverages Ltd* [2009] Tonga LR 273; *Latu v Rex* [2011] TOCA 19; *Maini v Talanoa* [2015] TOSC 47.

- (e) any tendency to regard time limits as unimportant ultimately works to the disadvantage of litigants as a whole;
 - (f) it should not be taken for granted that the Court will exercise its powers to enlarge time – leave will not be granted as a matter of course;
 - (g) it is not sufficient merely to postpone a decision to appeal until a date long after the appeal period has expired.
24. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal include:
- (a) the history of the matter;
 - (b) the conduct of both parties;
 - (c) the nature of the litigation;
 - (d) the length of the delay;
 - (e) the explanation of the reasons for the delay;
 - (f) the prospects of the appeal succeeding if time for appealing is extended;
 - (g) the practical utility of the remedy sought on appeal;³
 - (h) the respective consequences or degree of actual prejudice for the parties of the grant or refusal of the extension;
 - (i) the extent of the impact on others similarly affected;
 - (j) any impact on the administration of justice;
 - (k) any floodgates considerations;
 - (l) any absence of prejudice to the Crown; and

² Halsbury's Laws (4th Ed) Vol 37 para 25; *Revici v Prentice Hall Inc* [1969] 1 All ER 772 (CA); *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803, 812 (CA)

³ *R v Knight* [1998] 1 NZLR 583 at 589, involving an application for leave to appeal out of time on the ground that there had been a restatement of the applicable law.

(m) whether leave is necessary to do justice between the parties.

25. While the failure of a legal adviser to take proper steps may be regarded as establishing sufficient cause to extend time,⁴ any litigant who suffers through the fault of its Counsel may have a remedy against him in respect of that failure.

Consideration

26. Of the various factors listed above, I consider the following to be relevant on this application.
27. The delay of approximately three months between the date by which the notice of appeal should have been filed and when this application was filed, when compared to other cases, is significant but not overly excessive. I regard it as a neutral consideration.
28. However, the explanation for delay is more concerning. While that part of the delay which is said to be attributable to the co-vid disruptions may be readily accepted as beyond the Crown's control, the initial operative delay was due to the failure of those handling the matter to have ascertained, at the outset, the date on which the 28 day period was to expire and to ensure that any assessment was completed and notice of intention to appeal filed on or before that date. Ascertaining that date should have been the first task upon receipt of the file from Police Prosecutions. No explanation has been proffered in the affidavit material for why that date was not ascertained. It was a simple matter which required no greater instructions than the date of the Magistrate's decision. That information must have been available at the outset of the assessment exercise. Accordingly, in my view, this factor militates against granting the application.
29. The additional delay of almost two months from filing the application to filing the certificate of service is inexcusable.
30. Further, the principle that the failure of a legal adviser to take proper steps may be regarded as establishing sufficient cause to extend time will usually operate

⁴ *Scott v Jess* (1986) 12 FCR 187 at 190

in favour of a grant of leave because of the likely and serious prejudice to the client if leave is not granted. In such cases, it is often said that the 'sins of the lawyer should not be visited on the client'. The alternative panacea is for the client to exercise whatever legal rights may be available against the lawyer for negligence if the lawyer's failure can be established as such. However, in my view, appeals by the Crown stand in a different position. There is no private lawyer/client relationship. The Crown acts on behalf of the State. Therefore, the focus turns more to whether any prejudice may be occasioned to the Crown/State if the application is refused. That in turn calls for consideration of the public importance of the point sought to be appeals and the prospects of its success if leave is granted.

31. Here, it is impossible to assess the Crown's prospects of appeal because the affidavit material:
 - (a) did not state the sentence imposed by the Magistrate;
 - (b) did not specify the extent of further convictions on the accused's court record so as to determine whether due consideration of them should have resulted in a greater or more severe sentence and by how much;
 - (c) did not establish whether the Magistrate in fact took the additional convictions into account;
 - (d) did not identify any error in the Magistrate's approach to or exercise of discretion on sentence notwithstanding he did not hear further from the police prosecutor in respect of any additional history; and
 - (e) did not contain any draft Notice of Appeal.
32. Further, for the reason just stated, the material does not disclose any practical utility in the unstated remedy sought on appeal.
33. The Crown has not specified any specific prejudice if the application is not granted. On the other hand, the Respondent will suffer prejudice because he is entitled to assume that once the date for appeal has passed (now

approximately five months), the matter is finalised. There is also no evidence as to whether any sentence imposed has been served.

34. It may be accepted that any failure by a judicial officer to afford natural justice or procedural fairness when new and important evidence comes to light during any proceeding may impact on the administration of justice. Any actual impact and the extent of it will depend on the materiality of the error in result which flowed from the failure and whether any affected party was denied a reasonable opportunity to present their case.
35. However, in the instant case, the underlying vice was the apparent difference between the criminal history records kept by the police and those kept by the Magistrates Court. The affidavit material did not seek to explain why there was a difference. The proper administration of justice requires that all arms of law enforcement have co-ordinated and consistent records of all criminal convictions. If this case is not an isolated one, then the remedy is for the DPP and the Commissioner of Police to agree on a system for ensuring congruity of conviction records. I can see no good reason for those agencies not having a common database.
36. Finally, for the reasons given, there is nothing in the material which persuades me that leave is necessary to do justice between the parties.

Result

37. After weighing the factors considered above by reference to the affidavit material in support of the application and having regard to the general principles governing applications of this kind, I am compelled to the conclusion that this application should be refused.

NUKU'ALOFA
17 July 2020




M.H. Whitten QC
LORD CHIEF JUSTICE