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

AM 11 of 2020

BETWEEN:

**POLICE**

Applicant

-and-

**LOSE HANSEN**

Respondent

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APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

## **RULING**

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC

To: ✓ Ms L. Macomber of the A.G.O. for the Applicant  
Mr S. Tu'utafaiva for the Respondent

Date of ruling: 21 July 2020

### **The application**

1. By application filed 5 June 2020, the Police seek leave to appeal out of time against two decisions of Senior Magistrate Pahulu-Kuli made on 12 February 2020.
2. The application is supported by the affidavits of;
  - (a) Acting Sgt Aluani Puafasi, sworn 5 June 2020, who appeared before the learned Magistrate; and
  - (b) Ms Leotrina Macomber, also sworn on 5 June 2020, who is the Crown Prosecutor assigned to this matter.
3. That affidavit material reveals the following background.

22 JUL 2020  
*JH*

## Background

4. On 12 February 2020, the respondent stood trial on one count of common assault contrary to s.112(a) of the *Criminal Offences Act* [CR 635/20] and one count of causing a disturbance contrary to s.3(g) of the *Order in Public Places Act* [CR 636/19]. Mr Tu'utafaiva appeared for the respondent.
5. The particulars of the first summons alleged that the respondent "*wilfully and without lawful justification using your hands punched the head of Lini Koloa (fm) and you hit her head with a garden watering can and hit her face on the edge of the table causing swelling*". Mr Tu'utafaiva submitted that the summons was defective in that it was duplicitous and therefore contravened s.15 of the *Magistrates Court Act*. The learned Magistrate agreed and dismissed the summons.
6. The particulars to the second charge - causing disturbance in a public place - alleged that the respondent "*swore at Lini Koloa (fm) and said 'ava elo' (disgusting hole), 'ava palaku (ugly hole) and other different words within the boundaries of Kolomotu'a*". Defence counsel submitted that the appropriate charge should have been under ss. 3(h), use of abusive language, and not ss. 3(g). The learned Magistrate disagreed and the matter proceeded to trial. After hearing the evidence, the police prosecutor submitted that swearing was within ss. 3(g). The Magistrate disagreed. She considered that the charge of "causing a disturbance in any other manner" should be in a manner that causes "loud noise". She was not satisfied that the prosecution had proven the element of "loud noise" and, as a result, she acquitted the respondent of that charge.
7. The police prosecutor discussed the decisions with his superiors. They decided to refer the matter to the Attorney General's office for assessment on whether the decisions should be appealed.
8. On 28 February 2020, the Attorney General's office received the file from police prosecutions. That same day, the Director of Public Prosecutions assigned the matter to Ms Macomber to conduct an assessment. She was directed to report back to the DPP by 9 March 2020. She deposed that, at that time, she was

unaware that the Magistrate's decisions were made on 12 February 2020 and that therefore the 28 day appeal time under s.75 of the *Magistrates Court Act* would expire on 11 March 2020.

9. In performing her assessment, Ms Macomber was required to review the documents provided and speak with the police prosecutor to obtain a full record of the submissions made before the Magistrate as well as clarification of her decisions.
10. Due to the state of emergency declared in March 2020 in response to the Covid-19 pandemic, police officers were immobilised to other operations associated with the National Lockdowns that have ensued. As a result, no further work was performed on this matter by the police prosecutor, until May 2020 when he was then able to provide Ms Macomber with the information she required.
11. At paragraph 13 of her affidavit, Ms Macomber deposed that thereafter "*due to other pressing court matters, [she] had also overlooked the filing of the notice of appeal.*"
12. On 25 May 2020, Ms Macomber submitted a memorandum to the DPP recommending that the matter should be appealed. On 31 May 2020, the DPP instructed that the appeal proceed together with an application for leave to appeal out of time.
13. Ms Macomber deposed further that the filing of material in this matter has been further delayed due to the police prosecutor's "commitments on trials in the Magistrates Court".
14. Finally, in her affidavit, Ms Macomber referred to a draft notice of appeal as being attached to her affidavit. Unfortunately, no such draft notice of appeal was attached to her affidavit nor has one been located anywhere else on the court file.
15. On 11 June 2020, and on the assumption that the applicant's material had been served on the respondent, I directed the applicant to file submissions in support of the application by 18 June 2020. Any notice of opposition was to be filed

with submissions by 25 June 2020. Any party requiring an oral hearing on the application was required to file a notice to that effect by 2 July 2020, failing which, the matter would be determined on the papers.

16. On 22 June 2020, the applicant filed submissions on the application.
17. On 3 July 2020, at my direction, the Acting Registrar contacted Ms Macomber with a request to file a certificate of service to confirm service on the respondent of the original application material. On 10 July 2020, the applicant filed a certificate of service stating that on 26 June 2020 the respondent had been served with "Appellant/Submission". It is unclear whether the documents which were served on the respondent included the original application for leave to appeal out of time and the two supporting affidavits.
18. In any event, there has been no indication from the respondent that she opposes the application for leave. In those circumstances, I have proceeded to determine the application on the papers.

### **Applicant's submissions**

19. The grounds for the application for leave to appeal out of time are twofold, namely, that:
  - (a) the reason for the delay is the lockdowns due to the covid-19 pandemic and the file being overlooked; and
  - (b) the errors of the learned Magistrate are so plain and obvious that the interests of justice require leave to be granted.
20. The applicant's submissions may be summarised as follows:
  - (a) In *Vakuata, Fotu & Pale v Police* (AM 14/16), which involved a delay of almost 2 years, Cato J exercised his discretion to extend time notwithstanding certain delay being due to counsel's oversight. His Honour considered that the extension was justified in the inherent jurisdiction of the court to avoid a miscarriage of justice.

- (b) In *Police v Mosese Faka'osi* (AM 8/17), which involved a delay of about five months, Cato J again exercised his discretion to grant leave notwithstanding the delay being "seriously compounded by the file being overlooked". He said that ordinarily he would exercise his discretion against extending time for such a lengthy delay because of the importance of the public interest in finality in litigation. However, he considered that the error below was so clearly plain and obvious that the interests of justice required leave to be granted".
- (c) In *R v Knight* [1998] 1 NZLR 583, Richardson P identified the considerations relevant to the grant of leave to appeal out of time as including some special feature or features particular to the case that lead to the conclusion that, in all the circumstances, justice requires leave be given; the strength of the proposed appeal; the practical utility of the remedy sought; the length of the delay and the reasons for it; the impact on others similarly affected and on the administration of justice, that is, floodgates considerations; and the absence of prejudice to the Crown.
- (d) The Magistrate's finding that the summons on the common assault charge was duplicitous, that is, that it contained three separate offences under s.112(a), contained a 'plain and obvious fundamental error in the interpretation and application of the relevant law such that it would be contrary to justice for this Court not to correct it'.
- (e) The Magistrate's decision on the second summons - causing a disturbance in a public place - was erroneous because she based her analysis of the Prosecution evidence on the element of 'loud noise' which was not relied on by the Prosecution. The Prosecution relied on the element of 'causing a disturbance' which it contended was created by the respondent's use of swear words toward the complainant. Alternatively, the applicant submits that it was open to the Magistrate to have convicted the respondent under ss. 3(h) of that Act pursuant to clause 13(d) of the Constitution which provides:

*"No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial:..."*

*Save and except that - (d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances."*

### Applicable principles

21. Section 75 of the *Magistrates Court Act* requires any notice of intention to appeal against the decision or order of a Magistrate to be filed and served within 28 days after the decision, although that period may be extended with leave of the Supreme Court.
22. Recently, in *Police v Tauki'uvea*,<sup>1</sup> the principles applicable to an application for leave to appeal out of time were surveyed from a number of decisions.<sup>2</sup> They include:
  - (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;<sup>3</sup>
  - (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;

<sup>1</sup> [2020] TOSC 49; AM 8 of 2020 (17 July 2020)

<sup>2</sup> *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.

<sup>3</sup> *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)

- (g) it is not sufficient merely to postpone a decision to appeal until a date long after the appeal period has expired.
23. Those decision also identified the following factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal:
- (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;<sup>4</sup>
  - (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
  - (m) whether leave is necessary to do justice between the parties.
24. While the failure of a legal adviser to take proper steps may be regarded as establishing sufficient cause to extend time,<sup>5</sup> any litigant who suffers through the fault of its Counsel may have a remedy against him in respect of that failure.

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<sup>4</sup> *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.

<sup>5</sup> *Scott v Jess* (1986) 12 FCR 187 at 190

## Consideration

25. In relation to the delay here of approximately three months, the applicant's only submission is that it is "not as gravely excessive" as the two Tongan cases referred to in its submissions.
26. In my view, that is an unsatisfactory response. The authorities make plain that given the mandatory nature of s.75, the length of delay and a full and proper explanation are essential considerations for the determination of any application for leave to appeal out of time. Here, that latter factor appears to have also been largely overlooked.
27. In *Vakuata, Fotu & Pale v Police*, the delay of almost two years was described by Carto J as "being almost entirely reflective of systemic problems in the Magistrates' Court". Further, in relation to the appeal by Pale in that case, his Honour described his counsel's oversight as being 'understandable'. No such concessions can be applied to the instant case.
28. The stated reasons for the delay (as opposed to an explanation for the reason) contained in Ms Macomber's affidavit are lamentable. With all due respect to her and those within the Attorney General's office charged with such work, being unaware of the date on which the decision below was made is not an acceptable explanation for the ensuing delay in filing a notice of appeal. It is also difficult to believe. The Attorney General's office received the file from police prosecutions some 16 days after the Magistrate's decision. That period of delay is not adequately explained. Upon receipt, the most obvious piece of information which must have been contained in the file was date of the Magistrate's decision which the Attorney General's office was requested to consider.
29. I accept that some delays and disruptions have been caused by the covid-19 pandemic to all sectors of government and other essential services through at least March and April 2020,.
30. However, Ms Macomber's explanation that after she received further information from the police prosecutor in May 2020, she overlooked the filing of

a notice of appeal (or application for leave to appeal out of time) is truly unsatisfactory, to say the least.

31. As opined in *Tauki'uvea*,<sup>6</sup> I consider that on the issue of 'oversight', appeals by the Crown stand in a different position to those incepted by private lawyers on behalf of their clients. There may well be circumstances in which a lawyer overlooks an important professional matter which do not necessarily amount to negligence. In such cases, and subject to other relevant factors weighing in favour, the court may exercise its discretion to ensure that the client is not unduly prejudiced by being shut out of advancing a meritorious case. In this case, no such circumstances are revealed.
32. In my view, for the Court to condone the failure by any legal practitioner of one of the most fundamental and rudimentary obligations of legal practice, namely, to properly diarise the dates on which important events and/or steps are required to be taken in the management of any case, especially the filing of a notice of appeal, would be to risk setting a dangerous precedent of permitting and promoting a culture within the legal fraternity of Tonga of systematic professional ineptitude and irresponsibility. That is not something this court will countenance.
33. For those reasons, the unsatisfactory explanations for the delay here militate against the application.
34. But that is not the end of the matter. Of those catalogued above, the only other relevant considerations identified by the applicant in its submissions or which arise from its affidavit material are whether the applicant's proposed appeal has reasonable prospects of success and whether it is in the interests of justice that the application be granted.
35. Normally, when a party asserts that it has reasonable prospects on an appeal, one would expect to see that articulated in a proposed Notice of Appeal. As noted above, that document was missing from the applicant's material on this application. Nonetheless, the synopsis of submissions provided by the applicant in respect of each of the decisions sought to be appealed sufficiently

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<sup>6</sup> [30]

identifies the proposed grounds of appeal and imputed errors by the learned Magistrate.

36. After having considered the submissions in relation to the common assault count, I am satisfied that the applicant has reasonable prospects of success on that appeal.
37. However, I am less optimistic about the applicant's prospects in relation to the charge of causing a disturbance in a public place.
38. Subsection 3(g) of the *Order in Public Places Act* creates an offence of:

*"shouting or beating any drum, tin or tank without just cause, blowing any horn, quarrelling or in any other manner, makes any disturbance or loud noise in any public way or within the boundaries of any town..."*

39. Here, so far as the affidavit material and submissions reveal, the allegations were that the respondent and complainant swore at each other. The material does not indicate whether the swearing occurred in a public place. It does not indicate whether the swearing was loud in the sense that the parties were 'shouting' at each other; or, if they were, whether that made a disturbance. Similarly, if their swearing constituted 'quarrelling', again it is not clear from the material whether that caused any disturbance in any public way.
40. Further, on the alternative submission that it was open to the Magistrate to convict the respondent on an alternative charge under ss. 3(h) - use of abusive language - the argument depends for its success on the proper interpretation and application of clause 13(d) of the Constitution. The submissions do not identify which, if any, part of the *Order in Public Places Act* '**provides** that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances'. Compare, for example, s.131 of the *Criminal Offences Act* which provides that where an offender is charged with rape or unlawfully carnally knowing a girl under the age of 12 years, the Court may acquit the defendant of the offence charged and may find him guilty of an offence under sections 124, 125 or 127, as the case may be. Answers to those questions may become clearer on a more fulsome presentation of the evidence below and submissions on appeal.

**Result**

41. Overall, and on balance, I am satisfied that the applicant's demonstrated prospects in relation to, at least, the common assault charge are such that the interests of justice require leave to be granted.
42. Accordingly, pursuant to s.75(1) of the Magistrates Court Act, the date by which the Applicant is to give written notice to the Magistrate and to the Respondent stating its intention to appeal and the general grounds of such appeal, is extended to 31 July 2020.
43. For the avoidance of doubt, I direct that:
  - (a) The applicant is to file and serve a copy of this ruling and its notice of appeal on the Magistrates Court and the respondent by 31 July 2020.
  - (b) A certificate of service is to be filed within seven days thereof.
  - (c) The matter will be mentioned on 14 August 2020 at 9 AM.

NUKU'ALOFA  
21 July 2020



A handwritten signature in black ink, appearing to read "M.H. Whitten", with a long, sweeping flourish extending to the right.

M.H. Whitten QC  
LORD CHIEF JUSTICE