CROWN

IN THE SUPREME COURT OF TONGA
APELLATE JURISDICTION
NUKU'ALOFA REGISTRY AM 13 of 2020

BETWEEN:

POLICE Applicant

-and-

SIOPE FALEVAI Respondent

APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN
To:	Ms L. Fakatou of the AGO for the Applicant
	The Respondent
Date of application:	18 June 2020
Date of submissions:	Applicant 6 July 2020
Date of ruling	28 July 2020

The application

1. On 1 February 2019, in proceeding CR 49 of 2019, the Respondent pleaded guilty to one count of common assault. The offence occurred in 2013 when the Respondent was a 17 year old schoolboy. Magistrate Tuita sentenced the Respondent by way of reprimand.

2. On 18 June 2020, the applicant filed an application for an extension to the 28 day appeal period provided by s.75(1) of the *Magistrates Court Act*. The grounds for the application are stated as:

   (a) there are "strong grounds of appeal"; and

   (b) "it is in the interests of justice that leave be granted".

29 JUL 2020

3. The application is supported by the affidavit of Lute Fakatou, sworn 18 June 2020. She deposes, relevantly, that:

   (a) she is the Crown Prosecutor assigned to the matter;

   (b) immediately after the sentence, the former Director of Public Prosecutions instructed her to return to Court "because there is no such sentence as a reprimand under law";

   (c) between 4 February 2019 and 24 June 2019, a number of unsuccessful attempts were made (including with the Attorney General) to discuss the matter with the Magistrate;

   (d) on 6 April 2020, she was instructed by the DPP to write to the Magistrates Court informing it of this issue;

   (e) on 6 May 2020, she wrote a letter for the DPP in which she informed the Registrar of the Magistrates Court of the different kinds of punishment under law, that the Respondent had not been properly sentenced and proposed that the matter be recalled in Vava'u where the respondent was residing, to be properly sentenced by the Magistrate there;

   (f) on 19 May 2020, the Magistrates Court responded that the decision of 1 February 2019 stands and that the only avenue available was to appeal;

   (g) on 22 May 2020, she recommended to the DPP that there were grounds for appeal;

   (h) on 18 June 2020, this application was filed.

4. The primary ground of appeal in the draft Notice of Appeal is that:

   > *"The Learned Magistrate erred in law when he imposed a punishment on the Respondent which was unavailable to him under Part IV of the Criminal Offences Act."*

5. On 19 June 2020, I made directions for the filing of material on the application and that if it was not opposed and neither party required a hearing, the application would be decided on the papers. The Respondent has not filed any notice of opposition.

Neither party has requested a hearing.

Applicant's submissions

6. The Applicant's submissions may be summarized as follows:

   (a) the sentence was an 'administrative error' in the sense that because a reprimand is not provided for within Part IV of the *Criminal Offences Act*, no decision was in fact made by the learned Magistrate; or, if it was, it was incomplete;

   (b) the 28 day appeal period expired on 16 June 2020;

   (c) the relevant delay therefore is only two days;

   (d) reference was made to the considerations referred to by Richardson P. in *R v Knight* [1998] 1 NZLR 583;

   (e) the present application should be distinguished from *Pohiva v Edwards* [2012] TOSC 28; AM 24 of 2011 where Scott J struck out an appeal which had not been prosecuted for nearly 12 months which his Honour described as "inordinate and inexcusable delay" and which had "caused substantial prejudice to the Respondent";

   (f) the appeal has reasonable prospects of success; and

   (g) refusing the application "may hinder the administration of justice or contradict its purpose".

Principles

7. Section 74(1) of the *Magistrates Court Act* confers a right of appeal to the Supreme Court from the judgment, sentence or order of a Magistrate. But as Scott J observed in *Pohiva v Edwards*, supra,[1] "the conditions imposed by statute must be complied with."

---

[1] [6]

8. Section 75(1) of the *Magistrate's Court Act* provides:

> *"The appellant shall within 28 days after the date of the magistrate's decision give written notice to the magistrate and to the other party stating his intention to appeal and the general grounds of such appeal.*
>
> *Provided that the 28 days within which the notice of appeal shall be given, may be extended with leave of the Supreme Court."*

9. Recently, in *Police v Tauki'uvea*,[2] the principles applicable to an application for leave to appeal out of time were surveyed from a number of decisions.[3] 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;[4]

   (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.

---

[2] [2020] TOSC 49; AM 8 of 2020 (17 July 2020)

[3] *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.

[4] 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)

10. Those decisions also identified the following factors as among those relevant to the exercise of discretion:

    (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;[5]

    (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.

Consideration

11. By application of those principles and considerations, I make the following observations in respect of the present application.

12. The applicant's calculation of the delay in seeking to file its notice of appeal, of two days, is misconceived. The proposed appeal is not against the Magistrate's Court affirmation on 16 June 2020 of the decision of the learned Magistrate on 1 February 2019. It is, and can only be, against that latter decision. The date by which a notice

---

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

of intention to appeal that decision ought to have been filed was 1 March 2019. From that date to the date of filing the instant application represents a delay of approximately 475 days.

13. The characterisation of the learned Magistrate's sentence as an 'administrative error' is inapposite in the context of an appeal or application for leave to appeal out of time. If the Magistrate's exercise of discretion in sentencing miscarried because the sentencing option he sought to impose was not available as a matter of law, then he erred in law. If so, the appropriate course was to file a notice of appeal pursuant to s.74 of the *Magistrates Court Act*.

14. The purported explanation for the delay, namely, attempts to discuss the matter with the Magistrate, reflects the Applicant's misconception about the nature of the alleged error in sentencing, and the need to have appealed the decision within the statutory 28 days. It was always open to the applicant to file a notice of appeal within time.

15. Further, it is not entirely clear what was hoped to be gained by those discussions. Once the learned Magistrate had concluded his sentencing remarks and entered orders accordingly, he was functus officio. With the possible exception of calling back a case during the same session in order to correct an error, once a court has pronounced a decision, it is functus officio and has no right to alter it. Correction or alteration thereafter is for an appellate court: *Bourke v Police* [1999] TOSC 67; *Booth v R* [2017] 1 NZLR 223 at 228. In criminal proceedings, a Magistrate may not, except in certain specific circumstances, re-open the case after sentencing. The common law power to re-open a case is limited to a decision that has been made as a result of a substantial procedural error, defect or mishap only: *R (on the application of Broxbourne Borough Council) v North and East Hertfordshire Magistrates' Court* [2009] All ER (D) 96.

16. That may be distinguished from a court's implied or inherent power to recall or correct an order made by it in the absence of a party where the absence is through no fault of that party or the Court or where the absence is excusable, and consideration of delay, acquiescence or prejudice are not countervailing: *Piukala v*

Bank of Tonga [2001] TOCA 7.[6]

17. Also, in Australia, it has been held that a judge has power to set aside his/her order upon being satisfied either that the order has been made improvidently, or that facts have been withheld from him which should have been disclosed to him, but which were not disclosed either through negligence or some other cause, or where the order was made under circumstances which operated to deprive his/her mind of the power of exercising a fair judgment at the time: *Re Bruce* (1886) 12 VLR 696. The jurisdiction is, however, to be exercised with great caution, having regard to the importance of the public interest in the finality of litigation. However, that public interest will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law: *Autodesk Inc. v. Dyason [No. 2]* (1993) 176 CLR 300 per Mason CJ (dissenting) at [4], approved by the majority in *Aktas v Westpac Banking Corporation Limited* [2010] HCA 47 at [6].

18. Returning to the reasons for the considerable delay, no explanation has been proffered for the period between the last attempt to meet with the Magistrate in June 2019 and the next step taken of writing to the Magistrates Court in May 2020, some 11 months later. Nor for that matter has there been any explanation for not making this application in June 2019 after the attempts to meet with the Magistrate.

19. On the prospects of appeal, if leave be granted, true it is that a reprimand is not one of the sentencing tools expressly provided by Part IV of the *Criminal Offences Act*. However, the material on the application does not reveal any consideration as to whether s.24(1) of the Act, which lists punishments which *may* be inflicted, is to be interpreted as an exhaustive code of the only sentencing options which *can* be inflicted. Further, no reference has been made to Part XIV or any comparative analysis of analogous orders such as release on adjournment under s.201 or discharge without conviction under s.204. The existence of Part XIV tends to suggest otherwise. To illustrate the issue, Order 38 of the Supreme Court Rules provides for

---

[6] Citing *Taylor v Taylor* (1978-9) 143 CLR 1.

contempt of court. The only specified punishment is committal. And yet, in *Attorney General v Moala (No. 2)* [1996] Tonga LR 164, Chief Justice Hampton determined to reprimand the respondent there for contempt.

20. I need say nothing more on this factor for the purposes of the application, other than that, on an elementary analysis, the applicant has some prospects of success on the intended appeal.

21. The material does not address the practical utility of the remedy sought on appeal. Somewhat surprisingly, on 29 June 2020, and before this application had been determined, the Applicant filed its submissions on the substantive appeal. At paragraph 7 thereof, the Applicant submitted that on a re-sentencing, having regard to all the circumstances, the respondent should be convicted and discharged. Curiously, the *Criminal Offences Act* does not contain a sentencing option of conviction with discharge. However, s.204 provides for discharge without conviction. If that is what the applicant actually had in mind, then subsection (1) provides that such an order may be made where, among other things, the nature of the offence and character of the offender render it inexpedient to inflict punishment or even a probation order. Subsection (2) deems the discharge to be an acquittal.

22. It has been about seven years since the offence was committed. The respondent was then a youth. The Magistrate obviously considered the circumstances of the offending to be at the lowest end of the scale of seriousness for offences of that kind. The applicant's intended remedy, if successful on appeal, reflects the same assessment. There is no suggestion on the material that the respondent has since committed any other offence/s. The Crown has made its position clear to the Magistrate through correspondence. I am not aware of any other instances in Tonga where a reprimand has been given by a Magistrate as a means of dealing with a common assault charge. The only reference to a reprimand being imposed in any published criminal decision my researches have been able to unearth has been the *Moala* decision referred to above. There is no suggestion that the subject sentence has created or will create any precedent.

23. In those circumstances, I see little to no practical utility in the appeal.

24. To grant the application would inflict actual prejudice on the respondent. To require him to have to revisit this matter again after the length of time since the offence and since he was dealt with by the Magistrate, only for the purpose (if the appeal is successful) of altering his sentence to being discharged without conviction (a deemed acquittal), is, in my view, grossly disproportionate to the offence itself and is unlikely to serve the interests of justice. Against that, the applicant has not identified any actual prejudice to the Crown or the administration of justice which could outweigh that which would be suffered by the respondent, or at all.

25. There is no suggestion of impacts on others similarly affected or that there are indeed any others similarly affected by the learned Magistrate's decision.

26. It follows that I do not consider that leave is necessary to do justice between the parties.

Conclusion

27. There has been substantial delay in bringing this application which has been poorly explained and fuelled by a misconception as to the true nature of the Magistrate's decision and what ought to have been done about it. The prospects on appeal rise no higher than arguable. There is next to no practical utility in the appeal even if successful. In all the circumstances, proceeding with the appeal would occasion undue prejudice to the respondent far greater than any service to the interests of justice that might be achieved.

28. For those reasons, the application is refused.

NUKU'ALOFA
28 July 2020

M.H. Whitten QC
LORD CHIEF JUSTICE