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

AM 11 of 2020

BETWEEN:

POLICE Applicant

-and-

LOSE HANSEN Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Appellant
No appearance for or by the Respondent
Date of hearing: 22 October 2020
Date of judgment: 22 October 2020

Background

1 On 12 February 2020, the Respondent appeared for trial before Senior Magistrate Pahulu-Kuli on two summonses. In CR 635/2019, the Respondent was charged with one count of common assault contrary to s.112(a) of the *Criminal Offences Act*, which provides:

> ***112 Common assault***
>
> *Every person who wilfully and without lawful justification —*
>
> *(a) strikes at or actually hits another person with his hand or with anything held therein; ...*

2 By the particulars to the charge, the Police alleged that the Respondent "*wilfully and without lawful justification, using your hand, 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 a table causing swelling*".

3 Section 15 of the *Magistrates Court Act* provides:

> *15 Summons to be for one offence only*
>
> *Every summons shall be for one offence only but a complainant may bring more than one charge against the same defendant at the same time by taking out a separate summons in respect of each such charge and the Magistrate may where he considers it expedient deal with such summonses either together or separately.*

Decision below

4 Mr Tu'utafaiva, who appeared for the Respondent below, objected at the outset to the form of the summons as contravening s.15 because, he submitted, the charge as framed actually constituted three offences and therefore the summons was bad for duplicity.

5 The Senior Magistrate accepted Mr Tu'utafaiva's submission and found that each of the assaults particularised were different offences which should therefore have each been the subject of separate summonses. Her Worship compared s.112(a) with s.80(1) of the Act which creates offences in relation to keeping a brothel. Reliance was also placed on the decision of Ford J in *Mataele v Police* [2003] Tonga LR 44, in which His Honour interpreted that provision as constituting four different offences each separated by the disjunctive "or". By analogy, the learned Magistrate held that s.112(a) comprised three different offences. However, she also found that the provision did not contain any offence in the terms as stated in the particulars. For those reasons, the Magistrate ordered that the summons be withdrawn.

6 The Police appeal that decision.

7 The Respondent has not participated in this proceeding. Evidence of service on her has been filed.

Appellant's submissions

8 Mr 'Aho submitted that the summons was not duplicitous and that the Magistrate erred for the following reasons, in summary:

(a) *Mataele* is distinguishable because the Accused there was charged with "keeping *and* managing a brothel" whereas s.80(1) refers to offences of "to keep a brothel, *or* to manage...";

(b) rather than focussing on the use of the disjunctive "or", the Magistrate should have interpreted the entire text of s.112(a) in accordance with its plain and ordinary meaning;

(c) so interpreted, the provision can include a sequence of events resulting in the same consequence (here, alleged swelling to the Complainant's head); and

(d) it would be absurd to assume that it was Parliament's intention to require separate summonses for separate assaults on the same person arising out of the same incident.

Consideration

9 The general principle in respect of what has come to be known as the rule against duplicity is that no one count of an indictment or summons should charge the accused with having committed two or more separate offences. The purpose of the rule is to enable an accused to know the case he or she is required to meet. It is a rule of elementary fairness but also necessary for the purpose of such matters as a submission of no case to answer or a plea in mitigation. Accordingly, it is necessary to consider the underlying principles of fairness and clarity in deciding whether a count is bad for duplicity: *Kaufusi v Rex* [2014] TOCA 17.[1]

10 The question whether a statute creates one offence or several, or attaches criminality to an on-going criminal enterprise, as opposed to a particular act, is a question of construction and which depends upon its subject matter and language considered in their context: *Ex parte Polley; re McLennan* (1947) 47 SR (NSW) 391 at 392. There are two steps in the process of identifying duplicity or uncertainty. The first is to consider the statutory description of the

[1] At [11] and [12], referring to Archbold, Criminal Pleading, Evidence and Practice (2009) at 1 – 135. See also *Rixon v Thompson* (2009) 22 VR 323 at [46] and *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204 referring to the 2013 edition of Archbold at [1-216].

offence in order to identify what is the act or conduct prohibited. The second is to identify the act or conduct set out in the pleading as constituting the offence in the particular case. Where a particular act is prohibited if it has one of a number of qualities, it is likely that only one offence is committed in relation to each act, even if such an act has more than one of the proscribed qualities: *Hannes v Director of Public Prosecutions (Cth) (No 2)* (2006) 165 A Crim R 151 at [9], endorsed in *Einfeld v R* (2010) 200 A Crim R 1 at [131].

11 Ultimately, questions relating to duplicity, for the purpose of deciding what constitutes one offence, "are best answered by applying commonsense and by deciding what is fair in the circumstances" and "in a practical, rather than a strictly analytical, way": *Director of Public Prosecution v Merriman* [1973] AC 584 at 539, 607.

12 A further formulation of the general rule, which is apposite to the present case, is that unless the allegation constitutes a continuing offence or offences which are closely related, amounting to the one activity, they should be separately charged. For example, if criminal acts occurred within a few minutes of time and in close physical proximity, such that they can be regarded as components of the one activity, or if the events are seen as part of the one transaction or criminal enterprise, then a single count is permissible: *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204.[2] It follows that if the particulars of a count can fairly and sensibly be interpreted as alleging a single activity or transaction, it will not be bad for duplicity, even if a number of distinct criminal acts are implied: *Rex v Funaki* [2005] TOSC 13.[3]

13 Here, the objection was taken and determined before the Magistrate heard any evidence. In *Funaki*, it was observed[4] that "where a count is bad on its face for duplicity, the defence should move to quash it before the accused is arraigned. Although the objection can be taken at a later stage, the Court of Appeal has disapproved of the defence postponing the application to quash for purely tactical reasons... In cases of quasi-duplicity, the defence should wait until the close of the prosecution case."

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[2] Citing *Walsh v Tattersall* (1996) 188 CLR 77 at 107. Applied in *Cha v R* [2012] NSWCCA 142 at [29].
[3] Referring to Blackstone's Criminal Practice, third edition, p. 8.10 and D8.16.
[4] Again by reference to Blackstone's, at D8.23.

14 A cursory examination of the record of interview with the Respondent and the Complainant's statement would have revealed that the alleged assault appeared to have taken place in an instantaneous eruption of anger by the Respondent following an escalating verbal exchange with the Complainant. There is every indication that the three blows were landed in an continuing, unbroken sequence; in other words, as a single activity or transaction.

15 In my opinion, the learned Magistrate misdirected herself in the interpretation of s.112(a) by focussing (it would appear exclusively) on the use of the disjunctive "or" between the various actions described therein to conclude that they must constitute three separate offences. In fact, there are four actions referred to: striking at (presumably meaning without actually contacting) a person with a hand; striking at a person with an object in hand; actually hitting a person with a hand; and hitting a person with an object in hand. But that is not determinative of whether any one or more of those actions is to be treated as a single common assault or separate offences. As stated above, the test for duplicity in that context is whether the actions alleged occurred within close temporal and physical proximity.

16 To illustrate, if A is charged with punching B six times in quick succession, could it seriously be suggested that six summonses must be presented, one for each punch? Conversely, if A punched B once each day for six days, it would clearly be expected that separate summonses would be appropriate for that protracted and temporally disparate offending.

17 Accordingly, I agree with the Appellant that having regard to the nature of the alleged conduct, the three sequential hits were part of a single activity or transaction. Any one of the three alleged strikes, if proved to the requisite standard, could constitute a common assault. If more than one of them are proved, they will still constitute one common assault; the likely difference then being as to penalty.

18 Thus, it was appropriate to charge them as one count of common assault. As such, the summons was not bad for duplicity.

Result

19 The appeal is allowed.

20 The decision of Senior Magistrate Pahulu-Kuli on 12 February 2020 to order the withdrawal of criminal summons 635/2019 is quashed.

21 The matter is remitted back to the Magistrates Court for hearing of the said summons before a different Magistrate.

NUKU'ALOFA
22 October 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE