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

AM 01 of 2021

BETWEEN : POLICE
- Appellant

AND : TELEFONI KAUFUSI
FAKA'ANAUA 'ALATINI
TOMA 'AKINO TOUTAI'OLEPO
'AHOIA TATU'A
TEMIPALE SIOPE
- Respondents

JUDGMENT

BEFORE: HON JUSTICE TUPOU
Counsel: Mr. T. 'Aho for the Appellant
Ms. A. Kafoa for the Respondents
Hearing Date: 16 February 2021
Judgment Date: 25 February 2021

1. This is an appeal by the Police against a decision of Senior Magistrate Tuita on 3 December 2020 that:
 1. The summons is defective because it does not include the particulars for the offence of theft:
 2. The case is dismissed and the Respondents are discharged.

2. The Appellant requests an Order that:

1. The Learned Magistrate's decision is quashed; and
2. That the Respondent's matters are re-tried before another Magistrate.

FACTS

3. On 27 June 2020 at about 2pm one of the witnesses and his wife and another person were walking along the road to their home and saw the defendants picking taro leaves in the plantation of the complainant Kaufo'ou Fatai, which is a neighbour to the home of the witness. The witness identified the defendants who formed a group who worked on farms. The witness informed the complainant.
4. The complainant lodged a complaint with the Police which resulted in a summons being issued out of the Magistrates Court for theft of the taro leaves on 23 November 2020 to appear before the Magistrates Court on 26 November 2020.
5. On 26 November 2020 the case was called before Senior Magistrate Tuita and all 5 defendants appeared with their counsel Mr. Sifa Tu'utafaiva.
6. From the transcript it appears that these summons 429-433/2020 were new summonses issued at a previous request by the Police and allowed by the Court. The record sent does not include the original summons but this can well show the reason that the present summons were issued in late November 2020 when the offence was committed in late June 2020.
7. Counsel for the defendants was asked by the Magistrate if he wishes to say anything about the new summons and counsel confirmed his acceptance because of the request by Sgt. Moimoi who was prosecuting the case. He also asked that the summons be read to each defendant and ask for their plea.
8. The summonses were read to each defendant and all pleaded not guilty. The Prosecutor open his case describing the facts of the theft of the taro leaves on 27 June 2020 referred to above and asked to call his witnesses.

9. Defence counsel then asked for permission to make his submissions that will have a bearing on the continuance of this hearing. He submitted that these new summons are incomplete and should be dismissed because:
 - a. as an example summons 429/20 and refer to section 143 of the Criminal Offences Act which the defendants are charged which require 3 elements: -
 - (a) (i) a guilty intent or motive
 - (ii) an intent to take away from the owner
 - (iii) an intent to use it for the benefit of another person.
 - (b) the word “colour of right” does not include a right in law or legal justification which is used in the summons.
 - (c) the summons does not say that the goods were taken for the use of another as seen in section 143.
10. As Defence Counsel was going through each summons the Magistrate suggested that he puts his submissions in writing, serve on the Prosecution which was accepted and recall on 3 December 2020.
11. The submissions of the Defence Counsel was filed on 31 November 2020 which repeated what is stated above and requested that the Magistrate does not allow a request for amendment or the issue of a new summons by the Prosecutor.
12. On 2 December 2020 the Prosecutor filed his submission and requested that he be given another opportunity to file a new summons.
13. On 3 December 2020 the case was called and Senior Magistrate Tuita informed that he had considered the submissions of the parties and ruled that an opportunity had already been given to amend the summons which was done and that he will not give another opportunity to amend or issue a new summons. He then made the order to dismiss all summons and release the defendants.

GROUNDS OF APPEAL

14. The following are the grounds of appeal filed by James Lutui, the Director of Public Prosecutions:

1. That the Learned Magistrate's ruling was inconsistent with the precedent laid down by *Police v Faletau*, AM4/2020 (12 May 2020) which dealt with the same issue, accordingly it would be in the interests of justice that the appeal is granted to correct the error in the lower court.
2. That the Learned Magistrate erred in law by not allowing the application to re-issue a new criminal summons, based on the following grounds:-
 - (i) there was no unfairness or prejudice to the Accused person, as no witnesses or evidence had been heard or given;
 - (ii) the statutory provision that creates the offence was clear and correctly stated in the criminal summons;
 - (iii) that the evidence relating to the offending had been disclosed to the Respondents before trial;
 - (iv) the omission to include the wording of the offence in the particulars could have been cured by either an amendment or issuance of a new summons on the same charge;
 - (v) the application to issue a new summon on the same charge may be made at any stage of the trial provided that the amendment or issuance of the new summons be made without prejudice.

15. There was no response filed from the Respondents.

16. On 9 February 2021 the appeal was called for mention before me and I set the hearing for 16 February 2021. Counsel for the Appellant was Mr. Tevita 'Aho and Counsel for the Respondent was Ms. Alyssa Kafoa. At this stages I had not read the order made on 19 January 2021 by the Lord Chief Justice on an appeal for leave to appeal out of time which he granted and ordered that the Notice of Appeal exhibited to the affidavit of Ms. L Aonima sworn on 15 January 2021 shall stand as Notice of Appeal in these proceedings, to be served on the Respondents by 29 January 2021 and any respondent who opposes the appeal shall

file a notice of opposition by 12 February 2021, and the matter will be listed for direction on 19 February 2021.

17. So, when the appeal was called on 16 February 2021, I informed both counsel of the order made on 19 January 2021 by the Lord Chief Justice and it was unfortunate that neither of them had informed me of it. I therefore directed that a Notice of Opposition be filed by 24 February 2021 and served on the Appellant on the same day, and that the matter will be listed for direction on 25 February 2021.
18. On 25 February 2021 both counsel appeared and counsel for the Respondents asked if she can make their response orally. This was accepted by counsel for the Appellants. The response was short and directed my attention to the fact that the summons had already been amended once and it should not be allowed to be done again as this could go on forever. Counsel for the appellant responded on the line shown in the Notice of Appeal with the support of the *Faletau* case.
19. I orally gave judgment in favour of the appellant and made the order referred to hereunder.

DISCUSSION

20. The summons for each accused was in Tongan which is translated into English as follows:

No. 429/20

To Telefoni Kaufusi, aged 49(Ha'alalo)

Complaint has been made to me that you on the 27 of June 2020 at Ha'alalo, you committed 'theft' breaching section 143(a), 145(a) of the Criminal Offences Act, when you intend with no legal right at all to deprive from the rightful owner, when you, together with others, take and stole the taro leaves (lu) from the plantation of Kaufo'ou Fatai.

You are, therefore, hereby summoned to appear before me at the Magistrate's Court at Nukunuku at the hour of 10AM on 26 of the month of November 2020 for the determination of your matter.

And take notice that if you fail to obey this summons a warrant may be issued for your arrest.

Dated the 23 day of November 2020

21. The case of *Faletau* clearly set out the correct way to treat an application to amend or issue a new summons. I am surprised that Mr. Sifa Tu'utafaiva, who represented the respondent in that case and withdraw his opposition to the application to amend a summons, did not do the same in this case. He gave the case to another officer in his firm Ms. Alyssa Kafoa to continue and I am not surprise that at the end of the case Ms. Kafoa could not give any solid or valid ground in opposition.
22. Considering the summons as translated it is clear that the charge against the Respondents is theft or stealing under section 143 of the Criminal Offences Act. It identifies the crime alleged – theft under section 143. In the particulars it states “when you take and stole the taro leaves.” Clearly, the charge of stealing or theft is what all Respondents are charged with and they ought to know it. The other particulars have to be proved by the Prosecutor to satisfy the crime of theft under section 143. This falls in with the statement in *Faletau* (14g) “where, however, the error is clearly technical and the facts of the charge as pleaded clearly reveal the nature of the conduct complained of a charge will not be bad.”
23. Also in *Faletau* we get the following principles relevant to this case –
 - [14.j] Any proposed amendment in matters of description and other respects in order to meet the evidence in the case, or 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 as long as the amendment causes no injustice to the accused.
 - [14.k] 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.

[14.l] Accused person should not be acquitted merely because a charge is technically defective, unless the defect cannot be rectified.

[14.m] The essential question is whether the accused will be prejudiced.

24. All the above principles apply to this case. The substance of the charge is clear – the crime of theft. The amendment to the summons is only of a technical nature. There is no prejudice or injustice to the defendants. The application to amend or issue a new summons should have been allowed by the Magistrate.

RESULT

25. Based on the facts and principles applicable to a request to amend the summons, the Magistrate erred in law and his exercise of discretion on the application to amend miscarried. It follows that his decision to dismiss (or acquit the Respondents of) the charge was also vitiated.

26. For the reasons stated above, the appeal is allowed.

ORDERS

27. I make the following orders:

- (1) The decision of Senior Magistrate Tuita in CR429-433/2020 on 3 December 2020 to acquit the accused persons (Respondents here) is quashed.
- (2) The Prosecution's application to amend and issue a new summons is allowed.
- (3) The matter is remitted to the Chief Magistrate to assign to another Magistrate and, to be mentioned on 11 March 2021 at 10:00 am.

NUKU'ALOFA: 25 February 2021




Tupou J
ACTING JUDGE