

Sam & A.

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

AM 5 of 2021

BETWEEN:

LONI KUPA AFU

Appellant

-and-

POLICE

Respondent

REASONS FOR JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr V. Latu for the Appellant
Mr F. Samani for the Respondent
Date of hearing: 21 April 2021
Date of judgment: 21 April 2021
Date of reasons: 27 April 2021

1. In this matter, the appellant, Loni Kupa Afu, appeals against the decision of Magistrate Tuita on 17 March 2021 in which Mr. Afu was sentenced to a term of 3 months imprisonment for a breach of a protection order issued under the Family Protection Act on 30 July 2019.
2. Even though this matter was listed today for directions, it became clear after discussions with counsel, that based on the documents which had been filed to date and from the Magistrates Court, that the appeal was capable of resolution without any further documents or submissions being formally filed. Both counsel agreed. As a result, after hearing from counsel, delivered an ex tempore decision. This is the transcript of the reasons for decision, edited as to form only, not substance.
3. On 9 March 2021, Mr. Afu pleaded guilty to breaching the protection order. It appears from Magistrate Tuita's record of a chambers hearing on 17 March 2021, that Mr. Clive Edwards SC, on behalf of Mr. Afu, had filed submissions in mitigation for the purposes of sentencing.
4. The background facts may be shortly stated. The appellant was married to Siosiana Afu on 23 July 2008. They had four children of the marriage. They separated and a decree of divorce nisi was issued on 23 October 2020. Order 3 of the decree by Niu J required that access by Mr. Afu to the children of the marriage would, in terms, have to be facilitated by contacting the officer in charge

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of the Family Protection Legal Aid Center at Fasi to arrange for supervised access.

5. The Magistrate's reasons below refer to a protection order being issued against Mr Afu on 30 July 2019 in proceeding FA 25/2019. As I understand it, there does not seem to be any dispute between the parties to this appeal that the sentence the subject of this appeal was imposed for breach of that order. I can only surmise that that order restrained Mr. Afu from having any contact with his ex-wife.
6. At the relevant time, Mr Afu was serving a period of imprisonment. His criminal record, which explains the term of imprisonment, is a lengthy one stemming back to 2005. It contains a number of offences for assault and domestic violence through 2013, 2016 and 2017 culminating on 17 April 2019 when he was convicted of a number of offences involving bodily harm, assault, domestic violence and the like. The net sentence was 2 years and 6 months commencing 30 April 2019 when he was remanded in custody. Subject to any other remission that might have been available under the Prison Act, Mr Afu would therefore had been eligible for release at the end of August this year. However, Mr. Latu tells me that the Appellant was released in February this year.
7. Returning then to the facts of the offending, on 20 November 2020, whilst he was still serving that term of imprisonment, Mr Afu was in the custody of prison warders visiting the town. He had \$10 in his possession. He asked the prison officers whether they would take him to the primary school attended by his children so that he could the \$10 to them. The officers evidently agreed. When they arrived at the school, Mr Afu's ex-wife was also present and he came into contact with her. On the facts stated, and accepted by the Respondent here, the only interaction was Siosiana asking Loni what was he doing there and telling him that he was only allowed to see the children in the time and hours specified in the access orders. Loni said that he was with the prison guards and that he was just dropping \$10 off to the children, which he did, and he left.
8. As a result of that contact, Mr. Afu was charged (presumably upon complaint by Siosiana) with breaching the protection order in summons CR 31/2021 which resulted in the sentence hereunder review.
9. Magistrate Tuita's reasons do not explain the basis upon which he considered it appropriate to impose a further three months sentence on Mr Afu, although his criminal record may provide some insight. However, the interaction between and Loni and Siosiana could hardly be regarded as domestic violence or any wanton disregard for the terms of the order. The orders by Niu J in the decree nisi only pertained to the children, with whom, Mr Afu did not in fact come into contact. Certainly, the contact with his ex-wife appears to be technical breach of the protection order but, as Mr. Latu submitted, it was unintentional. Mr. Afu's only intention, in fact, was only to give some money to his children. It is perhaps even more remarkable that he did that at a time when he was incarcerated under guard

but just happened to be in a position where those prison guards agreed to take him to his children's school.

10. In all those circumstances, I am of the view that the Magistrate's discretion miscarried. A sentence of three months' imprisonment was excessive. Mr Samani, on behalf of the Respondent, concurred and does not oppose the appeal. Mr Latu submitted that six weeks imprisonment would have been an appropriate sentence. In my view, even that is excessive. The Appellant had no previous convictions for breaches of a protection order. He was serving a term at the time which was soon to expire. He has now spent five weeks serving the current sentence. In my opinion, a sentence of one month would have been sufficient.
11. Therefore, I allow the appeal. The order of Magistrate Tuita is set aside. In substitution therefore, I order that Mr. Afu be sentenced for breach of the protection order to a period of 1 month imprisonment. Given that he's already served that, he is to be released immediately.

NUKU'ALOFA
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A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE