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

AM 15 of 2021

REX

-v-

Tupou HAUPEAKUI

APPEAL FROM THE MAGISTRATES' COURT

BEFORE : THE HONOURABLE COOPER J
Counsel : ✓ Ms. H. Aleamotu'a for the Prosecution
Mr. S. Tu'utafaiva for the Defendant
Date of Ruling: 19 November 2021

1. The Prosecution have brought this appeal against the decision of Magistrate Tu'akalau on 6th July 2021 when he declined to allow the prosecution to amend the summons before him at trial, acceding to the defence submission that the summons, as worded, did not disclose an offence at law.
2. The case against the defendant concerned a stop and search of the and the seizure of a set of weighing scales and 6 empty packets (dealer bags) on 11th December 2020.
3. On that date at approximately 1850 hrs the officer saw the defendant drive off in a yellow car along the Vuna road, Tongatapu.
4. The manner of driving the officer judged to be deliberately making off from him. He had been given information regarding the defendant and his location and so was making enquiries, so that the sudden departure of Mr. Haupeakui in his car further

aroused in him reasonable suspicion as to the commission of offences under the Illicit Drug Control Act.

5. In the event Mr. Haupeakui was detained and the officer acting without a warrant searched him and his personal effects, including a bag.
6. Therein he found the items in question and the defendant was arrested.
7. The exhibits were handed over to fellow officers shortly on the scene. It is noteworthy \$385 was also seized as well as two straws adapted as scoops for drugs; in one of the officer's view, scissors and a lighter.
8. On 8th January 2021 two summons were issued in relation to two separate allegations.
9. Both contrary to section 5 A Illicit Drugs Control Act ; alleging the defendant wilfully and without lawful justification was in possession of equipment to be used "...in relation ("Feleva'i") to an offence against the Illicit Drugs Control Act", respectively they were (i) the weighing scale and (ii) the 6 empty packets.
10. In due course the defendant appeared before the Magistrates' court and a trial was heard before Magistrate Tu'akalau on 12th May 2021 Mr. Tu'utafaiva appearing for the defendant.
11. At the close of the Crown's case the defendant was not called and a number of submissions were made on behalf of the defendant by Counsel.
12. The first was that the summonses were legally inadequate; that there is no such offence under section 5 A as worded.
13. The submission was the way the summons should be worded under 5 A is that the equipment "...may be used in the commission of an offence in this Act."
14. Yet the summons in each case stated the possession of the equipment "...in *relation* ("Feleva'i") to an offence against the Illicit Drugs Control Act."
15. The submission made was that there was no such offence under section 5 A, that is to say, no such offence at law.
16. Firstly I consider what rules govern the form of a summons.

17. Those are contained in the Magistrate’s Court Act section 14 to 17 and further guidance is to be found in the Magistrate’s Court Bench Book at paragraph 12, page 122.
18. On the narrow point it appears to distil down to no more than this; that the offence charged must be simply stated.
19. That provides little guidance, or to put it differently, little restriction in what needs to be specified.
20. If one turns to the current UK Magistrates’ Court Rules 1981¹ at rule 89 it states this :
 - (1) A summons requiring a person to appear before a magistrates’ court may be issued in respect of more than one information or complaint.
 - (2) A summons must—
 - a) state the name and address of the complainant or informant;
 - b) contain notice of when and where the person is required to attend the court;
 - c) specify each information or complaint in respect of which it is issued;
 - d) identify the name and address of the court office for the court that issued it.
 - (3) A summons need not bear the name of the justice or other person issuing it, provided that the designated officer has recorded the name of that justice or other person.
21. For our purposes; “specify each information or complaint in respect of which it is issued”. Again, that tells us little, or, in another sense, and I think in the prevailing sense, it means there is little restriction on the form.
22. Therefore an offence needs to be disclosed. That will be by reference to a section of a statute, unless it is a common law offence.

¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005756/magistrates-courts-rules-1981-jul-21.docx

23. That means the way an alleged offence in a summons is expressed could be different in different summons, but that would not necessarily mean that there had been an error.
24. What is the wording of the Section 5A ? It is this :

“Any person who knowingly without lawful excuse, the proof of which shall lie on him, imports, exports, possesses, manufactures, uses or supplies utensils or any equipment or article that is capable of being used in the commission of an offence under this Act commits an offence...”
25. The argument before the Magistrates’ court was that the summons did not state the word “commission” of an offence, but rather what was stated was “...in relation to an offence against the Illicit Drugs Control Act”.
26. Yet, it appears to me that it is not the summons that defines the boundaries of an offence, but the legislation that the summons must clearly and concisely refer to.
27. If a summons did not mention a statutory defence, then that defence would nonetheless be open to a defendant. There would be no restriction.
28. The job of a summons is not to state every aspect of a section, but to clearly identify what the alleged transgression is by reference to the legislation.
29. If a word from the section in question is misplaced, replaced, missed out or substituted in the wording of a summons, in circumstances, such as these, where the statute and section are properly identified, the job of the summons is complete, it having identified the date of the allegation, the nature of the transgression, the person against whom it refers and where and when that person should attend court.
30. For there to be a material defect in the summons it would have to have misidentified the alleged behaviour as being sanctioned by law, for example, or the wrong person or some such fundamental error.
31. Here, the case was that the possession of both the scales and the empty bags, in the context of the facts as they were, amounted possession of drug related equipment, so an offence under section 5A of the Act.

32. Whether the summons had stated “commission” of an offence, or “relating” to an offence, or “to do with an offence” or event “S. 5A Illicit Drugs Control Act; unlawful equipment”, then there would not be an issue as to the allegation.
33. An analogous situation in terms of fundamentally informing a civilian of legal proceedings commencing against him is that of being arrested.
34. Archbold at 15A-132 “[an] arrest is constituted when any form of words is used which is calculated to bring to the suspect’s notice, and does so, that the suspect is under compulsion, and the suspect thereafter submits to that compulsion...”
35. To tell a suspect “you’re nicked” would conceivably be enough to arrest him
36. With the summons the imperative is to inform of the compulsion to attend court to answer the charge.
37. The charge is the breach of the law.
38. That is the intersection of statute and behaviour, as alleged.
39. A summons points to what that allegation is, but is not there to plead the legislation in every detail, because the Magistrates’ court is a court of summary jurisdiction.
40. I conclude that it matters not the difference that was argued in this case.
41. One sees very readily why the advocates and the Magistrate strove for detail and its correct iteration, but I conclude it is not in the summons the esoterica of the wording can be argued to be definitive and binding; but rather the summons is a vehicle to refer the lay man fairly to the nature of the charge he faces in a Magistrates’ court.
42. Therefore, I conclude that there was no need for any amendment in the first place.
43. As there was no need to amend the summons then the case ought not to have been concluded on the ruling as it was.
44. Miss Aleamotua for the Crown argued these points, in so doing Mr. Tu’utafaiva for the defendant conceded.

45. Therefore the appeal was allowed and the case is remitted back to the Magistrates' court for a re-trial before another Magistrate.

NUKU'ALOFA
19 November 2021



N. J. Cooper
JUDGE