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

AM 2 of 2022

BETWEEN:

POLICE Appellant

-and-

SIKUVEA TAULAKI Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Appellant
Respondent in person
Hearing: 3 May 2022
Judgment: 3 May 2022

1. This is an appeal against the ruling of Senior Magistrate Tu'akalau on 4 March 2022 in which he acquitted the Respondent, Mr Taulaki, of one count of possession of police property contrary to s. 167 of the *Police Act*.

2. The prosecution of Mr Taulaki initially involved four criminal summons, of which, three were withdrawn immediately prior to and during the trial below.

3. In the trial, the Police called evidence from three officers to effect that a search was conducted at a residence at which Mr Taulaki was living at the time and that items belonging to the Police were found there including banners which were the subject of the summons which was determined by the Magistrate. The police witnesses also gave evidence that Government policy required:

   (a) all new property bought was to be registered and distributed to where it was needed;

   (b) any damaged property was to be reported;

   (c) before any such property could be destroyed, a written decision and direction was required;

   (d) any request to retain any such damaged property or property no longer required has to be determined by the Commissioner of Police.

4. It transpired that the banner in question was identified by two police officers on Mr Taulaki's Facebook page amongst photos posted there. The police witnesses also that there had never been any decision to their knowledge to give the banner to Mr Taulaki even though he had approached one of them, Officer Kolopaeo, on two occasions asking whether he could have them. There was also no evidence of the property in question having been taken without being registered as such.

5. Mr Taulaki's counsel below, Mrs Sisi Ebrahim, cross-examined those three police witnesses. Suffice to say, from a review of the transcript, that none of their evidence was damaged in any significant way. More importantly, however, when Mr Taulaki elected to give evidence, he explained the situation as follows:[1]

> *"At the time when Tupouniua, a Senior officer of the police, gave instructions for us to pick the old records of the ministry which was stacked in front of the old residence of Minister Akau'ola it was needed to be destroyed. I directed some of the practical students to do this work. My vehicle was brought to do this work and I asked for a trailer from the outside to do this work. These rubbishes were not needed to be taken to Tapuhia or leave it but the direction that was given was to take them and burn it and the picking of rubbish that these students did, they went and there was tarpaulin or this little banner that I am being brought for to this honourable court. Your Worship, these students then because it was ripped covered the rubbish with this paper because at the time they put it in the trailer. The trailer had no fencing and they took this rubbish to my residence and what they did was burn it. This work was done from morning to night. I went back home and saw them burning. Told them to take the banner because it will be of use. So that was the reason why this banner was seen at my residence was the work that was done by these students in 2018. Your, Worship. I just found out in 2020 when this man was put out that this banner was one of the allegations against this man."*

6. In his ruling, Senior Magistrate Tu'akalau reviewed and summarised the evidence of each of the witnesses including that of the accused. He then recorded the following:

> *"9.2 There was an order from Tupouniua to collect he old records from the house that Akau'ola stayed in when he was minister told these students to do this work.*
>
> *9.3 There was no vehicle so they use my [sic] vehicle and they asked someone from the outside for a trailer to pick this rubbish. The order was to take this rubbish and take it and burn it and this banner was one of them which they used to cover up the rubbish and take it to where I stayed to burn it there.*

[1] From line 313 and following of the transcript on page 26 of the appeal book.

9.4 I told them to take the banner because it was still of use."

7. In the section of his Ruling entitled "What's to prove" the Magistrate then stated:

> *"This is a criminal trial and the Crown promise to prove this case beyond any doubt that the accused is guilty of the summons that he is charged with as was accepted and used in this trial."*

8. The Magistrate set out the elements of the offence and then, in bullet point form, a summary of his reasons for verdict. They included relevantly:

> *"The court believes that the Crown has not yet proved the element of possession without lawful excuse two banners to a high standard with no doubt in this court that when the accused possessed this white banner was unlawful but based on these reasons."*

9. He then set out a number of reasons related to the evidence of the police witnesses and then stated:

> *"This court believes that if the accused knew that this property was possessed unlawfully, he would not have put it up on his Facebook page for this banner to be seen. Police Eliesa's evidence was that this work was based on a decision from Tupouniua but it was not given to him via letter or Tupouniua to be called and give evidence about this case because there is a possibility that she wanted this banner to be collected from the place and burnt. Which is consistent with what the accused said about the decision made by Tupouniua to the accused to collect all the old records and the rubbish from the house that the retired Honorable Minister of Police 'Akau'ola (stayed in and destroy (burnt). Therefore, if this banner was in the place where they were told to collect the court believes that the accused did not unlawfully possess the banner."*

10. On that basis, the Magistrate acquitted the Respondent.

11. By Notice of Appeal filed on 9 March 2022, the appellant seeks an order that the decision below be quashed and be replaced with a verdict of guilty. The two grounds of appeal are:

    (a) that the Learned Magistrate erred when he stated that the standard of proof in a criminal trial was "beyond any doubt" as opposed to beyond any reasonable doubt, which resulted in the Magistrate making a ruling that was contrary to the evidence adduced in court; and

(b) the Magistrate erred in law when he failed to consider breaches by the defence of the rule in *Browne v Dunn*[2] which again resulted in the Magistrate making a ruling contrary to the evidence adduced in court.

12. In relation to the first ground, there was some dispute earlier on about the proper translation of the words used by the Magistrate. Mr 'Aho, who appeared for the appellant, included in his submissions, what he regarded as the proper translation of the words used by the Magistrate when he described the standard of proof as 'beyond any doubt'. Mr 'Aho also identified that a similar problem occurred with the same Magistrate in the recent decision of *Police v Siu Holani* (AM17/2021) which was decided by Cooper J and which involved similar grounds of appeal.

13. In that case,[3] Cooper J observed:

> *"28. The Magistrate is very experienced. I suspect very strongly he was applying the correct test in his own mind, but it is so vital that the pronouncement of the core function of court and the test towards the proving of guilt be stated accurately that the departure from the correct words is not permissible and could of itself lead to the setting aside of a verdict.*
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> *29. I had in mind the words of Justice Foskett in Shehzad, R (on the application of) v Newcastle Court and another 2012 EWHC 1453 (admin).*
>
> > *'10. I am bound to say that this being an extremely experienced Judge who plainly applies the statutory test on an almost daily basis is very unlikely to have misapplied the usual approach to the decision of this nature and in many cases I might have been disposed simply to say that this was an unintentional misuse of language that did not reflect as accurately as it might the normal statutory test. That may well indeed simply be the case, but on the other hand, this does involve the liberty of the subject'."*

14. In relation to the second ground of appeal, appellant relies on the decision in *R v Langi* [2021] TOSC 148 at [84] citing the following excerpt from the Court of Appeal decision in *Australia and New Zealand Banking Group Limited v Lasike* [2016] TOCA 7:

> *"[71] The failure to cross examine a witness on a particular topic has legal consequences. In Browne v Dunn, a decision of the House Lords reported only in (1894) 6 The Reports 67, 70 Lord Herschell LC said that it was:*

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[2] (1983) 6 R 67 (H.L.)
[3] *R v Holani* [2022] TOSC 13

> *'absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth ... to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made ... If you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him.'*
>
> *[72] In the same case Lord Halsbury said at 76-7:*
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> *'To my mind nothing would be more absolutely unjust than not to cross examine a witness ... and ... to ask the Jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to ... [He considered the facts of that case and continued at 78] Under those circumstances what question of fact remains? What is there now for the Jury after that? If [counsel] admits before the Jury ... by the absence of cross examination ... that these statements are true, what is there for the Jury. It is impossible ... to dispute ... that that absolutely concluded the question.'*
>
> *[73] In other words in a proper case, such as the present, the failure to challenge the evidence of a witness by appropriate cross examination involves the acceptance of his evidence if it is otherwise credible. Browne v Dunn has been followed in Australia and New Zealand."*

15. The rule in *Browne v Dunn* was also discussed in the very recent decision of *R v 'Anitema* [2022] TOSC 11. There it was explained that the rule:

> *"... is a general rule of practice by which a cross-examiner should put to an opponent's witness matters that are inconsistent with what that witness says and which are intended to be asserted in due course.[4] The central object of the rule is to secure fairness.[5]"*

16. Mr 'Aho submitted before the Magistrate below, in summary, that:

    (a) Mr Taulaki's failure, by his counsel, to challenge the evidence of the police witnesses meant that the defence accepted their evidence;

    (b) it ought therefore be accepted by the Magistrate that the property belonging to the police was found at the accused's residence;

    (c) Mr Taulaki had no lawful right to possess the property;

    (d) he had asked Officer Kolopaeo at an earlier time for the property was told 'no';

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[4] *R v JAE* [2021] QCA 287 at [45] citing *R v Foley* [2000] 1 Qd R 290 at 290-291; (1998) 105 A Crim R 1.
[5] *R v Birks* (1990) 19 NSWLR 677; (1990) A Crim R 385.

(e) Mr Taulaki had the means, motive and opportunity to take the property; and

(f) Mr Taulaki's evidence that the banners were disposed of was a 'recent fabrication' and should be rejected.

17. In his submissions on this appeal, Mr Taulaki disputed both grounds advanced by the appellant. In relation to the first, he contended that the Magistrate did in fact apply the correct standard of proof, namely, beyond reasonable doubt. Having reviewed the translations provided, I am inclined to the view that the proper translation of the words used was "beyond any doubt".

18. As to the second ground, Mr Taulaki contended that there was no breach by his counsel or himself of the rule in *Browne v Dunn* and that the police officers who were called were properly challenged on their evidence. He also emphasized, quite correctly, that it was the Prosecutor's duty to prove the case against him, to call the appropriate witnesses to do so and that it was not his duty to make explanations about any other police witness who was not called.

19. It is common ground that Officer Tupouniua was not called during the trial below. Mr 'Aho explained that Officer Tupouniua was not relevant to the summons which is the subject to the appeal although she was relevant to another summons which was one of those withdrawn prior to verdict. Therefore, he submitted that the police had no indication that there was any need to call Officer Tupouniua in relation to the subject charge.

20. Mr Taulaki's submissions also included an allegation that he was the subject of 'inducement, intimidation and promises' by Mr 'Aho on behalf of the police in the trial below. I have considered the details of Mr Taulaki's allegations, as well as an affidavit by Mr Aho filed herein with the appellant's submission. In summary, Mr 'Aho explained that, in the presence of Mrs Ebrahim, he had explained to her and Mr Taulaki the nature of the penalty the police would submit before the Magistrate if he decided to plead guilty to the subject charge. In other words, it was an attempt at a plea bargain. The offer was rejected by Mr Taulaki in any event. In my view, nothing further turns on it for the purposes of the disposal of this appeal.

21. I have considered the evidence below, the submissions of the Police and the submissions that were filed in writing by Mrs Ebrahim on 8 February 2022 in

which, relevantly, she also summarised the evidence of the police witnesses and that of her own client. At paragraph 5.5, Mrs Ebrahim submitted:

> *"There was one important witness Lauaitu Tupouniua that the prosecution did not call. [I]t was really important for this witness to be called upon as this was her complaint in accordance to Section 56 of the Tonga Police Act. This is when the charges made against the defendant. He was also temporarily suspended from his job. Not bringing this witness has affected the fairness of justice and all the summons should have been dismissed."*

22. No explanation was given in those submissions as to why she had not put to any of the police witnesses the evidence that Mr Taulaki gave, essentially, that he was directed by Officer Tupouniua to dispose of or burn the rubbish from the former Minister's residence.

23. More importantly, however, neither Mrs Ebrahim's submissions nor the Magistrate's reasons for verdict contained any legal analysis, upon an assumed acceptance of Mr Taulaki's evidence, of whether, and if so how, his decision to have the banners extracted from the rubbish that was to be burnt because he saw them as useful, could amount to a lawful excuse or defence to the charge. That, in my view, is a significant omission in the way in which the trial was conducted below, both in terms of the failure by Mr Taulaki, through his counsel, to observe the requirements of the rule in *Browne v Dunn*, and perhaps more importantly, the Magistrate's own reasoning process in determining whether in fact there was a legal defence open on the evidence properly considered.

24. For the same reasons adumbrated by Cooper J, I am satisfied that the first ground of appeal in this case has been made out. The bare minimum required for any judicial determination, particularly of a criminal charge, is for the relevant court to accurately identify the relevant principles of law; to then apply those principles to the facts as found on the evidence before the court, including taking into account all relevant considerations and drawing all reasonable inferences open upon the facts found; and to expose the path of reasoning by which the judicial officer applies the law to the facts thereby explaining how he or she arrived at their conclusion.

25. In this case, the learned Magistrate failed to fully observe those requirements. Not only did he state an incorrect definition of the requisite standard of proof for the criminal proceeding, but he failed to consider what were obvious and

significant breaches of the rule in *Browne v Dunn*, let alone what consequences, if any, ought to have flowed from the breaches. That is, he also failed to consider, in the terms used by the Court of Appeal in *Lasike*, whether the case before him was a 'proper case' to draw any adverse inference against Mr Taulaki in relation to either his evidence about the instruction from Officer Tupouniua being a recent fabrication or whether there might have been some other reason that Mrs Ebrahim did not put that evidence to the police witnesses.

26. All up, I am satisfied that the verdict is unsafe and unsupported by a proper consideration of the evidence and having regard to the potential implications of the rule in *Browne v Dunn*.

27. Accordingly, the appeal is allowed.

28. In all the circumstances, and given the question I have raised about the intermediate issue as to whether Mr Taulaki's admitted decision to extract the banner from the rubbish which he said he was directed to destroy, could itself amount to a legal defence to the charge, it is appropriate to order that:

    (a) the decision of the Magistrate below is quashed; and

    (b) the matter is remitted back to the Magistrate courts for a re-trial, if the Prosecution wish to proceed further with the matter, and before a different Magistrate, according to law.

NUKU'ALOFA
3 May 2022

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE