



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

AM 7 of 2022

BETWEEN : POLICE

Appellant

AND : MELE TEUSIVI 'AMANAKI

Respondent

Appearances: Mr J. Fifita for the Appellant
The Respondent in person

Hearing : 13 October, 2022

Judgement : 11 January, 2023

RULING

The Appeal

1. Ms. 'Amanaki pleaded not guilty to a charge of failing to deliver a signed statement of her election expenses within 14 days from the date of election pursuant to s.24(4) and (5) of the Electoral Act which provide:
 - (4) Within 14 days of an election, every candidate shall deliver to the Supervisor a signed statement of his election expenses in Form 7 of the Schedule, itemized and complete in all respects.
 - (5) It is an offence for any candidate to spend on an election campaign more than the sum of \$20,000 or to fail to deliver the statement referred to in sub-section (4) or to deliver a false statement, and any person found guilty shall be liable to a fine not exceeding \$10,000.
2. On 25 May, 2022, Ms. 'Amanaki was found guilty and convicted for failing to deliver a signed statement of her election expenses within 14 days from the date of election.
3. On 1 June, 2022 Ms. 'Amanaki was sentenced and discharged without conviction under s.204 of the Criminal Offences Act.
4. This is an appeal against that sentence.

5. The crown argues that the Learned Magistrate ought not to have discharged Ms. 'Amanaki without conviction and his doing so was a misapplication of s.204 of the said Act. The Crown said the appropriate sentence was a fine ranging from \$100-\$200.
6. Ms. Amanaki argued that the Learned Magistrate correctly applied his discretion in discharging her without conviction and that I should not allow the appeal.

The Facts

7. A general election of representatives of the nobles and the people to the Legislative Assembly Parliamentary of Tonga was held on 18 November, 2021.
8. The Respondent stood as a candidate for the Tongatapu 7 Electoral District seat.
9. This was the 5th time she had run as a candidate and admitted she was familiar with the requirements for filing statements of expenses.
10. The deadline for the relevant statement was 4pm on 2 December, 2021. The Respondent filed her statement on 3 December, 2021 and accepts it was late.
11. In spite of that she maintained a not guilty plea.
12. In respect of the sentencing she argued as she did in the trial that she had good reason for the lateness of her statement and that because two other candidates had filed their statements after 4pm on 2 December, 2022 and were not charged by the Supervisor of Elections, she should receive the same treatment and be fined \$0.00.
13. The Crown argued that the aggravating factors were;
 - a) the Respondent despite not denying her statement was late entered a not guilty plea, wasting the court's time and resources;
 - b) she was no stranger to elections and politics and is well acquainted with the relevant laws;
 - c) blaming the radio station 87.5fm indicate she was not remorseful; and
 - d) her statement was false.
14. The mitigating factors in the Respondent's favour were her good character and good record.

15. The following comparable cases were referred to by the Appellant;
- a) *R v Saulala* CR 84 of 2022 – Mr. Saulala was competing for the same seat as Ms. Amanaki. He failed to file a statement and pleaded guilty at the first opportunity and was fined \$400 or 1 month imprisonment in default.
 - b) *R v Filimoehala* CR 89 of 2022 – Mr. Filimoehala stood as a candidate in the same election and failed to file a statement of expenses. He pleaded guilty and was fined \$300 or 2 weeks imprisonment in default.
16. A starting point of a fine of \$1,200 was proposed with a reduction by \$200 for good record and character, resulting in a sentence of \$1,000.

The Judgment below

17. In granting Ms. 'Amanaki a discharge without conviction the Learned Magistrate relied on *Fifita v R* [2000] TLR 289¹ where the Court of Appeal opined;

"The purpose of a sentence imposed on an offender were to punish so far as was just and fitting in the circumstance."

18. The Learned Magistrates considered the following as the relevant circumstances of the case:
- a) Ms. 'Amanaki submitted documents to the Supreme Court at 2pm on 2 December, 2022;
 - b) she had a meeting at 4pm on the same day;
 - c) she went to submit her report after the office had closed;
 - d) at 6:02pm she emailed the Supervisor to inform that her report was late because the office was closed; and
 - e) on that same date, two other candidates submitted their statements at 4:30pm and was accepted by the Supervisor.
19. In his conclusion it appeared that he considered the Supervisor of Elections' choosing not to charge the 2 candidates who filed their statements after 4pm on the due date a "just and fitting circumstance" and said that he would grant the Respondent the same grace those candidates received and discharged the Respondent without conviction under s.204.

The Appeal

20. The Crown relied on the following grounds of appeal:

¹ which he was referred to by the Crown

- a) that the Learned Magistrate wrongfully imposed s.204 of the said Act because;
 - (i) he failed to refer to any relevant authority to justify his decision;
 - (ii) he had no regard to the seriousness of the offence, Ms. 'Amanaki's character and circumstances; and
 - (iii) the decision was out of proportion to the gravity of the offending;
- b) that the Learned Magistrate did not raise with the parties the possibility that a discharge without conviction may be imposed;
- c) that the sentence imposed by the Learned Magistrate is inconsistent with other sentences for the same offending which the Crown had referred to in *Saulala* and *Filimoehala*.

Submissions

- 21. The Crown's submissions referred to the Court of Appeal decisions *R v Tu'iha'ateiho*², *R v 'Ala*³ and *R v Maile*⁴ that provide guidance as to how the courts should approach granting of a discharge without conviction under s.204 of the Criminal Offences Act.
- 22. In *'Ala* the court set out the following as the correct approach. The court must;
 - a) Assess the seriousness of the offending and Parliament's attitude to such offending together with any aggravating and mitigating factors;
 - b) Consider the character and circumstances of the offender including any previous offending and the effect an entry of a conviction against them will have on career, finances, reputation or any civil disability and/or any indirect consequences;
 - c) Be satisfied that the consequences of entering a conviction is out of all proportion to the gravity of the offending; and
 - d) Stand back and consider whether in all circumstances of the case the granting of a discharge without conviction is the appropriate result;

² [2015]TLR 44

³ AC 19/2018

⁴ AC 23/2018

23. An offender's general good character, lack of previous conviction, youth and forgiveness by the victim will not be sufficient to warrant a discharge under s.204.
24. The offender must by evidence satisfy the court that there is a real and appreciable risk that adverse consequences will ensue and not accept mere speculation in that respect.
25. In *Maile*, the court said that;

"In circumstances where he intended to depart from what all parties proposed as the appropriate sentence the Judge was obliged to raise that possibility with both counsel."
26. The Respondent opposed the appeal and argued that the Learned Magistrate:
 - a) had correctly applied s.204 of the said Act;
 - b) Had raised the possibility that he may impose a discharge without conviction; and
 - c) The sentence imposed was consistent with sentences for the same offences for other candidates.

Consideration

27. The question for this Court to decide is whether the Learned Magistrate was wrong to grant the discharge without conviction in this case.
28. Section 204 of the Criminal Offences Act provides;

Discharge without conviction
 - (1) Where a court is of the opinion, having regard to the circumstances including the nature of the offence and character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may make an order discharging him absolutely or alternatively discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified therein.
 - (2) A discharge under this section is deemed to be an acquittal.
 - (3) A court discharging an offender under this section may —
 - (a) make an order for payment of costs or the restitution of any property; or

- (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered —
- (i) loss of, or damage to, property;
 - (ii) emotional harm; or
 - (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.
29. After setting out the circumstances of the offence the Learned Magistrate turned to the Supervisor of Elections failure to charge 2 other candidates who had filed their statements after 4pm on the same date it was due and concluded he would extend the same grace to the Respondent and discharged her without conviction.
30. Respectfully, I do not accept the Supervisor of Elections decision not to lay charges against 2 other candidates was a relevant consideration nor should it have been given any weight with respect to sentencing of the Respondent. The Supervisor of Elections decision in the course of his duties was not binding on the courts and to rely on it as if it was precedent is unheard of. Acceptance of this judgment will entitle any future candidates who file their statements late in breach s.24 to a discharge without conviction as a result of the Supervisor of Elections decision not to prosecute 2 candidates.
31. As to why the said candidates were not charged was not in evidence before the court below. On the other hand, *Saulala* and *Filimoehala* were 2 candidates that stood for election in the same year and were charged, convicted and fined under s.24 of the Electoral Act.
32. This does show inconsistencies in decisions to prosecute by the Supervisor of Elections but is not basis for distraction from the case being prosecuted, the applicable law and guidance provided by relevant authorities.
33. Further, having assessed the papers before me⁵, I am satisfied that;
- a) neither party had proposed the application of s.204 in their sentencing submissions;
 - b) at no point did the Learned Magistrate raise with the parties the possibility that he might discharge the Respondent under s.204. I reject the Respondent's insistence that he did because during her submissions on this appeal, she was asked if the Learned Magistrate indicated application of s.204, she said;
- “Not in those words but he kept repeating that we should address the reduction of my sentence. He said I was guilty – but determination of reduction of sentence, so I submitted a fine of \$0.00.”;

⁵ transcript of the hearing, the parties closing and sentencing submissions and the Learned Magistrate's decision

- c) the Learned Magistrate did not refer to the relevant authorities available on applying s.204 such as *Tu'iha'ateiho*, *'Ala* or *Maile*. Had he raised the possibility with the parties and invited submissions, his attention would have been drawn to those cases.
- d) Accordingly, he fell short of observing the proper approach set out under s.204 and those authorities set out in paragraphs 22-25 above.

The appropriate sentence

34. In *Supervisor of Elections & ors v Tupouniua*⁶, the Court of Appeal had this to say,
- "The representatives of the people who are involved in the making of the laws, must themselves comply, and be clearly seen to comply with the fundamental law of Tonga."*
35. In my view, this extends to anyone standing as a candidate vying for a seat in Parliament.
36. The Crown had abandoned its proposed sentence of \$1,000 in the trial below and proposed a reduced sentence between \$100-200 here, contrary to its complaint that the sentence below was inconsistent with comparable sentences for similar offending in *Saulala* and *Filimoehala*. Both Respondents having pleaded guilty in the first instant.
37. However, I adopt the submission and consider a fine of \$200 appropriate although this should not be regarded as a precedent in future cases. Bearing in mind that the maximum penalty fixed by Parliament for this offence is \$10,000 and the Respondent was convicted after trial, this sentence is lenient.

Result

38. The appeal is allowed. The order discharging Ms. 'Amanaki without conviction is quashed.
39. Ms. 'Amanaki is convicted of failing to deliver a signed statement of her election expenses within 14 days from the date of election under s.24(4) and (5) of the Electoral Act and is fined \$200 to be paid within a period of 1 month or on failure to pay, 1 month imprisonment.

Nuku'alofa: 11 January, 2023



P. Tupou
P. Tupou KC
JUDGE

⁶ Citing *Attorney-General v Fuko*[2002]TLR 184)