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

AM 4 of 2023

SAMIU MAFI

-v-

REX

RULING

BEFORE: ACTING JUSTICE LANGI

Appearances: Mr. 'Elisiva Lui for the Respondent

Mr. Samiu Mafi

Hearing: 2023

Ruling: 2023

A. Introduction

1. This is an appeal from a decision of Senior Magistrate Peni Ma'u where he convicted the appellant of the following offences:
    a. Possession of illicit drugs contrary to section 4 (1) (a) (iii) of the Illicit Drugs Control Act, in that he had in his possession a Class A drug, namely 0.09 grams of methamphetamine;
    b. Possession of illicit drugs contrary to section 4 (1) (a) (i) of the Illicit Drugs Control Act, in that he had in his possession a Class B drug, namely 0.09 grams of cannabis;
2. The appellant was unrepresented and chose to run his appeal on his own. He had advanced numerous grounds of appeal and after careful consideration it was obvious that some of the grounds were repetitive and others otiose. All grounds of appeal have been considered and are addressed below.

B. Summary of the grounds of appeal.

3. A summary of the appellant's grounds of appeal are as follows:
    a. Dissatisfaction with the work carried out by the Police in searching the residence at Haveluloto and subsequently arresting and charging him and others;
    b. Inconsistency in the Police statements and their brief of evidence;
    c. It was not proved beyond reasonable doubt that the appellant was in possession of illicit drugs due to the procedure used by the Police and the conviction was only because of Police powers;
    d. The procedure used in analyzing exhibits 4 & 7;
    e. That during the trial the Learned Magistrate had stated "I mean, if you give sworn evidence, the Prosecution will cross examine you" and that meant that I should not give sworn evidence;
    f. The residence in Havelu where they were arrested belongs to Nisifolo Pisima'ake. Mr. Pisima'ake had informed the police and had arranged for the appellant to be arrested;

C. Prosecutions reply to the grounds of Appeal

4. The Prosecution made submissions in answer to the Appellant's grounds of appeal as follows:
    a. "*Dissatisfaction with the work carried out by the Police in searching the residence at Haveluloto and subsequently arresting and charging him and others*" – The Learned Magistrate had already addressed this issue in paragraphs 14 – 18, 20, 23-24 of his written judgement. In these paragraphs, the Magistrate had summed up the evidence and the procedure taken during the search by the Police. It is also clear from this ground of appeal that the appellant is not questioning an error in law or in fact by the Learned Magistrate to order for this court to review. As such, it is submitted that this ground of appeal must fail because the appellant had an opportunity in the lower court to put this to the Prosecution witnesses;

b. *Inconsistency in the Police evidence and their briefs of evidence* – The Prosecution submit that this ground must also fail because the appellant had an opportunity to put this point to the witnesses so that the Learned Magistrate can consider it and this cannot be heard in this court. Again, there is nothing in this ground of appeal to suggest that there was any error in law or in fact in the Learned Magistrates conclusion in this case;

c. *It was not proved beyond reasonable doubt that the appellant was in possession of illicit drugs due to the procedure used by the Police and the conviction was only because of Police powers* – There is no lawful basis upon which this ground of appeal is made because it is clear from the Learned Magistrates summing up and decision that he had heard and considered the questions and the submissions made by both sides. Moreover, the appellant had not put this to the witnesses so that they can respond and this court cannot hear their evidence again;

d. *The procedure used in analyzing exhibits 4 & 7* – This court cannot hear this ground of appeal because the appellant had every opportunity to put this to the Learned Magistrate during the trial in the lower court;

e. *That during the trial the Learned Magistrate had stated "I mean, if you give sworn evidence, the Prosecution will cross examine you" and that meant that I should not give sworn evidence* – The Prosecution accepts that the Learned Magistrate did say this to the appellant when the Prosecution closed its case. However, the Prosecution does not accept the interpretation put forward by the appellant that the Learned Magistrate said this so that the appellant would not give evidence. The Prosecution submits that the true meaning of why the Learned Magistrate had said these words were to inform the appellant that if he will call evidence or give evidence they will be cross-examined by the Prosecution. This is in line with the timing the Learned Magistrate said these words, which was at the close of the Prosecution's case. The Learned Magistrate had stated *"if you give evidence*" which gave the appellant an opportunity to choose whether to give evidence or not and that if he did, they will be cross-examined. The appellant's reasoning is wrong and the Learned Magistrate did not say those words to stop him from giving or calling evidence. The Learned Magistrate did not say "do not give evidence" which will then make the appellants submissions correct. However, it is clear from

the appellants closing submissions in this case, that he had identified his case and the facts that he believes happened. In paragraph 17 and 18 of the Learned Magistrate's judgment, his Worship stated that he did not accept the appellant's submissions because he had not given the Prosecution an opportunity to reply to them. The Prosecution submits that the outcome of this case would have remained the same even if the appellant had given evidence because he had failed to put his case to the Prosecution witnesses when they had given evidence. This is the rule in the case of *Brown v Dunn*. Lastly, this is not the first time the appellant has appeared in court and he is familiar with the procedure although he did not have legal representation.

D. Analysis

5. There is a general right of appeal from a judgement of the Magistrate's Court in both civil and criminal matters under section 74 (1) Magistrates Courts Act;
6. It is evident from the grounds of appeal that the appellant challenges the Learned Magistrate's findings of fact and the procedure in the lower courts. I caution myself that an appellate court should be slow to differ from a finding of fact which was made by the judge of first instance who had the opportunity to see and hear the witnesses
7. There was little or no cross-examination recorded in the transcript of the witness contesting this evidence. It is fundamental that where issues of fact are in dispute that counsel challenge a witness so that the witness may respond. If counsel does not then the evidence of the witness may be accepted as reliable. This is known as the rule in *Brown v Dunn* (1894) 6 R 67 (HL) referred to by the Prosecution above.
8. In relation to the first ground of appeal, the Magistrate had referred to this issue in paragraphs 14 – 24 of his judgement. The appellant had also filed a letter dated 16 November 2022 also referring to dissatisfaction with the work carried out by Police. These submissions were considered by the Magistrate but he preferred the evidence of the Crown and ruled that the search was lawful.
9. The second ground of appeal was also not put by the Appellant to the witnesses. I agree with the Crowns submission that nothing in this ground of appeal demonstrates any error in law or in fact in the Learned Magistrates ruling.

10. The third ground of appeal again has no merit as the Magistrate had covered in his judgment the evidence and the reasons why he found the appellant guilty beyond reasonable doubt.
11. I do not accept the appellants fourth ground of appeal as he had every opportunity to put this to the Magistrate but failed to do so.
12. Lastly, I do not accept the reasoning put forward by the appellant in his last ground of appeal where he alleges that the Magistrate had warned him against giving evidence. He claims that the words *if you give sworn evidence, the Prosecution will cross examine you* meant for him to not give evidence. The appellant is not a young child and is no stranger to the courts to now claim he was intimidated by what the Magistrate said. He is misguided in his interpretation of what the Magistrate's words meant.
13. I note that the appellant was unrepresented by counsel of his own choice. However, the transcript clearly shows that because of this, the Magistrate had assisted the appellant in explaining the procedures to him and instructing him on how to draft his closing submissions.
14. Section 81 of the Magistrates Courts state that any appeal of a decision of the Magistrate shall be decided only on its merits. There is a plethora of authorities which emphasize the need for an appellate court not to interfere with the findings of a trial judge on facts. After analyzing the transcripts and judgment of the Learned Magistrate, I cannot see any shortcomings in the trial judges analysis of the evidence. In my opinion, his findings were consistent with the evidence placed before him and the law.
15. Additionally, the Learned Magistrate was in the best position to judge matters of fact and this court should only interfere with findings of a trial court on matters of fact only in extreme and exceptional cases. An appellate court should not interfere with findings of fact of a court of first instance unless they are shown to be plainly wrong. *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1WLR 2477. The reasons given for this principle include the expertise of the trial judge in determining what facts are relevant to the legal issues to be decided and what those facts are if they are disputed, that trials are not to be regarded as dress rehearsals for appeal, that the duplication of the trial judge's role is a waste of resources which will seldom produce different outcome in an individual case and that in making his decision the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate

court will only be island hopping (Lewison L.J. in Fage *UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26 at para [114]).

16. A relevant guideline can be taken from the case of Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1997] 3 NZLR 190 (CA). Thomas J stated as follows: "*As evidence unfolds the trial judge gains an impression from the evidence which is not necessary or usually apparent from the cold typeface of the transcript of that evidence on appeal. The judge forms a perception of the facts in issue from which he or she adds or subtracts further as witnesses give their evidence and so obtains as a complete picture as is possible of the events in issue. The judge perceives firsthand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result. An appellate court has none of these advantages and must acknowledge that the court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate court to assert the capacity to be able to "second-guess" a trial judge's findings of facts when it does not share those advantages. Exceptional caution from departing from the trial judge's findings of fact are therefore regarded as imperative*".
17. In light of the above, the appellant has failed to demonstrate, by a considerable margin, that the findings of the Magistrate were plainly wrong and there is therefore no reason for this court to interfere with them.

E. Result

18. The result is that the appeal is dismissed.
19. There was no appeal on the sentence passed by the Learned Magistrate and the appellant is ordered to immediately serve the sentence given by the Magistrate in the lower court as follows:
    a. CR 276/21 – Possession of Class A drug – 12 months imprisonment
    b. CR 277/21 – Possession of Class B drug – 6 months imprisonment concurrent to the sentence in CR 276/21.

'E. M. L Langi

JUDGE

NUKU'ALOFA: 23 January 2024