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IN THE SUPREME COURT OF TONGA **CR 71 of 2015**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **SEKITOFA MALUPO** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Lutui for the Prosecution
Mr Niu SC for the Defendant

RULING AS TO THE LEGALITY OF COUNT ONE OF THE INDICTMENT

[1] Mr Niu SC, for the accused, prior to the trial commencing, but after the defendant had been arraigned submitted that count one in the indictment serious causing bodily harm contrary to section 107(1) Criminal Offences Act was deficient or illegal in that the section did not prescribe any statutory basis for the exercise of a prosecutorial discretion as to whether the charge was serious, in which case it required to be tried on indictment, or a simple offence, in which case it required to be tried summarily. For the offence of serious causing bodily harm, the maximum penalty is 5 years imprisonment and for simple offending, the maximum sentence is 3 years imprisonment (section 107).

[2] The point was not only novel but, if Mr Niu were correct, this would mean that there was a major difficulty with the legislation

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passed as amending legislation in 1912 to the Criminal Offences Act, in the case of a number of offences introducing degrees or classes of serious and minor offending. After discussions with Mr Niu and Mr Lutui for the Crown, it was decided that I should adjourn the case to enable the Crown to file submissions and for me to consider the matter further on the 4th May, 2016. I heard counsel further on that date, and have considered their submissions.

[3] I have regard to the legislation which is that contained within the 1912 Amendment to the Criminal Offences Act, the preamble of which reads;

> "An Act to amend the Criminal Offences Act to make numerous changes to reform the Act and create difference degrees of offences that reflect their relative seriousness and for related matters."

The sections which make provision for serious and simple degrees or classes of offences are; section 53, fraudulent conversion by government servant (section 7 of the Amendment); section 107, bodily harm (section 10 of the Amendment); section 108, attempt to intimidate (section 11 of the Amendment); section 111 threatening documents (section 12 of the Amendment); section 116 enticing or taking away children (section 13 of the Amendment); section 124 indecent assault (section 14 of the Amendment); section 155, assault with intent to rob (section 17 of the Amendment); section 157, demanding property with menaces (section 18 of the Amendment) section 162, fraudulent conversion of property (section 19 of the Amendment); section 173 housebreaking (section 20 of the Amendment); section 174, unlawful entry into buildings at night (section 20 of the Amendment);section 176, possession of housebreaking instruments (section 21 of the

Amendment); section 177, arson (section 21 Amendment) section 178, wilful damage to buildings (section 22 of the Amendment. Section 187, willful damage to things not otherwise provided for (section 24 of the Amendment).

[4] There are, accordingly, a significant number of offences which Parliament decided could be classified as serious or simple. In almost every instance, the boundary between an indictable and a summary prosecution is the maximum sentence of imprisonment of three years which is the maximum sentence also for a Magistrate to sentence to imprisonment under section 11(2) Magistrates Court (Amendment) Act, 1912.

[5] Mr Niu contended that there should be a defined statutory basis to govern the discretion of the prosecutor when laying a charge as either indictable or summary. He put his argument in this way. Parliament had, he submitted, provided two alternative offences under section 107 and there was no criteria or criterion prescribed or definition provided as to what constitutes each of the alternative offences. He submitted further that clause 103 provided that "The Legislature shall determine the time and place for holding the Courts and shall limit the powers of the Magistrates in criminal and civil matters and shall determine what cases shall be committed for trial to the Supreme Court." He complained that the Constitutional provisions expressly required the Legislature to determine what cases shall be committed to the Supreme Court for trial. He submitted that it was for the Legislature to make the determination, and the Legislature cannot delegate that duty to the Attorney – General. He acknowledge that section 196 of the Act again as enacted in 2012 provided that "...the choice of which [of the two alternative offences] shall be charged and prosecuted shall be decided by the Attorney-General, but submitted that this delegation did not

provide any criteria, criterion, or definition or even guidelines as to how an upon what basis the Attorney-General was to make his decision to charge the one or the other of the two alternatives.

[6] Mr Lutui argued that there was no such requirement. Parliament had plainly intended, he submitted, to develop classes of offending so as to give the jurisdiction to Magistrates to deal with lesser instances of the offending which could be accommodated within their jurisdiction. It was not a case of separate offences with different venues and sentencing maxima leading to a classification of serious or simple. The essential elements the Crown had to prove were the same irrespective of which class was chosen. He submitted that clause 11 of the Constitution had been complied with because the indictment clearly stated the offence charges and the grounds for the charge as required under clause 11 of the Constitution, and the particulars provided further information. He submitted Parliament had given an absolute discretion under section 196 of the Criminal Offences Act to the Attorney General to choose which of the two offences was appropriate in which to commence proceedings. There was no need for any further statutory requirements as Mr Niu contended. It was for the Attorney General to consider which class of case the facts fitted into, taking into account the distinct features and circumstances peculiar to each cause bodily harm case. Features that would make the case fall within the serious category may include amongst other things, the use of a weapon or the nature and extend of the injuries caused.

[7] It is plain, when considering the object of the reform that there was an intention to devolve lesser offending to the jurisdiction of the Magistrate's Court so that the Supreme Court was concerned with the more serious class of case. This was plainly to lessen the pressure on the Supreme Court (there being only two permanent Supreme Court Judges available in Tonga) so as to

reduce the number of cases reaching the Supreme Court of a less serious kind. Magistrates were able to hear cases where the maximum sentence was three years which as I have said the maximum sentence was three years which as I have said coincided with the boundary between serious and simply offending. In my view, Mr Lutui is correct; the legislation is not deficient in not providing a statutory basis delineating the boundaries between serious and minor offending; rather, it is clear that Parliament intended and gave the Attorney-General the power to assess which class the offending in the individual circumstances fell into, the essential elements being the same. The Attorney General would have to assess the overall seriousness of the case and the public interest in ensuring that prosecutions were commenced in the appropriate way the boundary being the relative seriousness of the offending which will vary from case to case. Such a discretion, which Mr Lutui described as absolute, has to be exercised, as with any prosecutorial discretion, bona fide and reasonably. In my view, the accused cannot complain about being prosecuted in this Court on indictment; the charge of serious injuring arising out of the discharge of a firearm and was one of several indictable charges that were laid involving a firearm.

[8] I do not consider that the defendant is prejudiced; the Crown has to establish beyond a reasonable doubt the essential elements and the Crown has provided particulars to him of his alleged offending. I do not consider that the fact that there is no defined statutory formula of framework as Mr Niu contends is fatal to the operation of his legislation, although novel in form. The purpose of the legislation as I have said was to allow less serious cases of bodily harm to be dealt with by Magistrates and Parliament plainly gave the Attorney General the discretion to determine in which category the offending fell depending on his reasonable assessment of the seriousness of the offending, the

more serious instances being dealt with in this Court. That is the kind of assessment,that is determining the seriousness and incidences of offending that an Attorney General or other senior prosecuting counsel commonly has to undertake in the discharge of his prosecutorial duties. I do not consider the Legislature, in providing a discretion for the Attorney- General to determine into which class the offending fell without a defined basis, acted unconstitutionally, nor was the exercise of the discretion in this case unreasonable or unconstitutional. Accordingly, the application to discharge the accused on this ground and count one is rejected.

C. B. Cato

DATED: 4 **MAY 2016** **J U D G E**