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

CR 70 of 2019

BETWEEN: REX

- Prosecution

AND: RODNEY TOMASI

- Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. T 'Aho and Mr. Samani for the Prosecution
Mr. Tomasi in person

Date of Hearing: 24 June 2019
Date of Ruling: 25 June 2019

RULING BEFORE TRIAL

The issue

[1] Mr. Tomasi is to stand trial on charges that include possession of firearms and ammunition, contrary to the Arms and Ammunition Act.

[2] Prior to the commencement of his trial, the prosecution asked me to make a ruling whether a written statement made to the Police by Mr. Tomasi's estranged wife is admissible in evidence against him. The statement contains assertions that Mr. Tomasi owned and possessed the unlicensed firearms and ammunition, that are the subject of the indictment.

[3] I understand that it was on the basis of Mrs. Tomasi's statement that the Police, with her consent, conducted a search of the couples' home and discovered a number of firearms and ammunition.

The submissions

[4] Mr. 'Aho accepts that Mr. Tomasi's wife cannot be called by the prosecution as a witness to give evidence (ss. 121(1)(b), (d) and (4) and 128 of the Evidence Act).

[5] However, Mr. 'Aho argues that there is nothing in the Evidence Act that prevents the prosecution putting into evidence Mrs. Tomasi's voluntary statement. Whilst conceding that the statement is hearsay (as it is to be admitted to prove that Mr. Tomasi was the owner and possessor of the firearms), Mr. 'Aho submits that it is admissible under exceptions to the hearsay rule, to which I shall shortly refer.

[6] Mr. Tomasi is representing himself and, understandably, was not able to offer any submissions on the issues of law that arise.

Discussion

[7] Given the time restrictions upon me to research and prepare this ruling, my reasons are rather shorter than might otherwise be the case. I have, however, come to the very clear view that the statement of Mrs. Tomasi cannot be put into evidence by the prosecution to prove that Mr. Tomasi possessed the firearms and ammunition for the reasons that follow.

[8] The provisions in the Evidence Act that prevent one spouse being compellable to be called to give evidence against the other, or, to disclose any communication between them made during the marriage, have their origins in the common law and are based on public policy considerations. These considerations are, principally, the importance of the unity of husband and wife and the privilege against self-incrimination (*Hoskyn v Metropolitan Police Commissioner* [1979] A.C. 474, 488 per Lord Wilberforce).

[9] Attitudes and priorities in the law change over time and in *R v L* [2008] 1 Cr. App. R 18 at 251-252 the Court of Appeal said:

> It was however, not obvious that it was repugnant to permit, or even require, a wife to give evidence against her husband in all circumstances. In some circumstances at least it might be said to be repugnant that, through absence of a wife's evidence, a husband might fail to be convicted of serious criminality. Thus Wigmore on Evidence, 3rd ed. (1940) p. 232, described the rule that precluded a wife from giving evidence against her husband as:
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> > "the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.

[10] In *R v L* the Court of Appeal held that there was no requirement on the Police to tell a wife that she was not a compellable witness against her husband before interviewing her, nor did the fact that the wife could not be compelled to give evidence (and refused to do so) prevent the prosecution from putting into evidence her statement implicating her husband.

[11] For my own part, I am uncomfortable with this approach. Even the Court in *R v L* saw the paradox in excusing a spouse from an obligation to be called as a witness and then tendering a written statement of the very evidence that he/she refuses to give in person (at pg 253).

[12] It is well established that relevant evidence may be excluded on public policy grounds, which include instances where the public interest in the exclusion of evidence is considered more important than disclosure of the facts. There is a strong argument that in a Tongan context the admission of Mrs. Tomasi's statement effectively circumvents those provisions of the Evidence Act that prevent her from being compelled to give evidence against her husband.

[13] I note also, there is authority in Canada that the approach which makes a spouse's out-of-court statement admissible represents a drastic change in the role played by the spouse in criminal law trials and reform of the spousal incompetency rule is a matter better left for Parliament (*R v Couture* [2007] 2 S.C.R 517)

[14] I do not need to choose between the competing positions on this important point of principle. Mr. 'Aho concedes that if Mrs. Tomasi's statement is to be admitted it can only be under an exception to the hearsay rule. That was also the basis upon which the wife's statement was admitted into evidence in *R v L*, where the statutory provisions relating to the admission of hearsay evidence were much different than those that apply in Tonga.

[15] In *R v L* the relevant provisions were ss. 114(1) and (2) of the Criminal Justice Act 2003 (UK). Section 114(1)(d) provided that the Court could admit hearsay evidence if it was "satisfied that it is in the interests of justice for it to be admissible." Section 114(2) set out the considerations that the Court was to have regard to in deciding whether to admit evidence under s. 114(1)(d).

[16] In Tonga there is no provision similar to s. 114. Section 89 of the Evidence Act sets out the exceptions to the general rule that hearsay evidence is not admissible. Mr. 'Aho, argues that s. 89(a) and (f) apply in this case. Those sections provide:

> 89 General rule
>
> The Court shall not admit hearsay evidence except in the following cases —
>
> Exceptions
>
> (a) where the statement forms part of the fact or transaction which is being investigated by the Court;
>
> .....
>
> (f) where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of a duty enjoined by the law of the country in which such book, register or record is kept;

[17] In my view neither section assists the prosecution in this case.

[18] Section 89(a) relates to what is known as the doctrine of res gestae and, specifically, to the admission of statement/s that accompany or explain relevant acts that are in issue before the Court. To be admissible on this basis, the evidence in question must be either an integral part of the events or transaction in question, or, to be so connected with it as to be of value in determining its existence or true nature (*Phipson on Evidence* 13th ed at 7-04). Mrs. Tomasi's statement is clearly not of this nature.

[19] Section 89(f) does not apply in this case either. First, Mrs. Tomasi's written statement is not an 'official book, register or record', which I consider means public documents concerned with public matters and made for the purposes and information of government and/or the public who may require the information (*Lilley v Petit*[1946] KB 401). Secondly, for the purposes of the section, the maker of the statement is Mrs. Tomasi not the Police Officer her interviewed her. Mrs. Tomasi was under no legal duty to make her statement to the Police. I note, in this regard, that in *R v L* the Court of Appeal appeared to accept (at pg 252) that there may well be circumstances where the Police would be advised to "make it plain to a wife that she need not make a statement that implicates her husband." That is plainly inconsistent with the wife having any duty in law to make the statement.

Result

[20] Mrs. Tomasi's written statement to the Police is not admissible as evidence of Mr. Tomasi's possession of the firearms or ammunition.

O.G. Paulsen

NUKU'ALOFA: 25 June 2019. **LORD CHIEF JUSTICE**