IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION AC 19 of 2018
NUKU'ALOFA REGISTRY [AM 24 of 2018]

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BETWEEN : REX

Appellant

AND : TEVITA MATANGI 'ATOA

Respondent

Coram: Paulsen P
Handley J
Blanchard J
Randerson J

Counsel: Mr 'A Kefu SC for the Appellant
Mr 'Atoa in person

Hearing: 15 April 2019
Date of Ruling: 17 April 2019.

## JUDGMENT OF THE COURT

### The appeal

[1] In the early hours of the morning of 2 March 2018 Mr. 'Atoa, who had been drinking, went onto a town allotment looking for a friend who he mistakenly believed lived there. He pushed open the door of the residence and asked if his friend was there. The occupant of the house, a mother with a child, was concerned enough to ring the Police. Mr 'Atoa had no ill-intent but he was

arrested and charged in the Magistrate's Court with being on enclosed premises at night, contrary to s. 175(1) of the Criminal Offences Act, and also with trespass, contrary to s. 188(1) of the Criminal Offences Act.

[2] Mr. 'Atoa pleaded guilty to both charges. Senior Magistrate Langi discharged Mr 'Atoa without conviction on the first charge. The Senior Magistrate acquitted Mr. 'Atoa on the charge of trespass because she found that s. 188 applies only to trespass on a tax allotment and not a town allotment.

[3] The Crown appealed from the Senior Magistrate's decision as to the scope of s. 188. The appeal was heard by Niu J, who in a written ruling held:

> ...I find that the Magistrate was correct. S. 188(1) does not apply to town allotments. Accordingly, I order that the appeal is dismissed.

[4] The Crown now appeals from the decision of Niu J on a point of law under s. 74(2) of the Magistrate's Court Act. The Crown argues that Niu J was wrong to find that s. 188(1) does not apply to town allotments.

**Section 188**

[5] Section 188(1) provides:

> Every person who without lawful excuse enters upon the tax allotment, plantation, garden or other land belonging to or in the possession of another person shall be liable at the prosecution of such owner or occupier to a fine not exceeding $1,000 of which half shall be paid to such owner or occupier and the other half to the Government.

[6] The focus of this appeal is the words 'tax allotment, plantation, garden or other land...' and in particular whether the phrase 'or other land' includes a town allotment.

**The decision under appeal**

[7] Niu J applied the canon of construction known as the ejusdem generis rule. That is, that where general words follow particular and specific words the general words must be confined to things of the same kind specified. He

found that the words 'tax allotment, plantation and garden' are specific words, referring to places were crops are grown, and the general words following them, 'or other land', mean land other than a tax allotment on which crops are normally planted or grown but not a town allotment.

[8] He noted that an earlier offence of trespass (s. 457 of the Criminal Offences Act contained in 1903 Consolidated Laws of Tonga) had referred to anyone entering 'the allotment of another in town or in the bush'. Because of what he perceived would have been difficulties in proving such an offence in relation to town allotments, he concluded that town allotments had been deliberately omitted from the scope of s. 188(1).

[9] Supporting this conclusion, Niu J said that the Legislature did not 'do nothing' about town allotments altogether because it enacted the offences in s. 174 (unlawful entry into a dwelling house by night) and s. 175 (unlawfully being on enclosed premises at night in any town).

**Discussion**

[10] The ejusdem generis rule must be applied with caution. It will not be applied to limit the scope of a statutory provision where the legislative intent was to the contrary. In *Quazi v Quazi* [1979] 3 All ER 897 Lord Scarman said:

> If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis, so be it, the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfill the purpose of the statute. The rule like many other rules of statutory interpretation, is a useful servant but a bad master.

[11] Similarly, in Craies on Statute Law (7th Ed) at p 181 it states:

> The *ejusdem generis* rules is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the legislature. The modern tendency of the law, it is said, is to 'attenuate the application of the rule of *ejusdem generis*.'

[12] When Niu J found that the words 'tax allotment, plantation, garden' describe land where crops are grown he specifically had in mind food crops (see paragraph [15] of his ruling). However, those words do not constitute the single class of land normally used to grow food crops. The word 'garden' has a broader meaning referring to areas of land set aside for the cultivation, display and enjoyment of plants and other forms of nature. It was, in any event, a non sequitur for Niu J to conclude that land normally used to grow crops excludes town allotments. It is not uncommon for town allotments to be cultivated to grow plants, fruit and vegetables and also to create gardens for the display and enjoyment of plants.

[13] We do not accept Niu J's conclusion that the words 'town allotment' were deliberately omitted from s. 188(1) because of perceived evidential difficulties in proving the ownership and boundaries of town allotments. As the Judge's reference to the now repealed s. 457 shows, trespass on both town and tax allotments was recognised as a mischief for which criminal sanction was provided. It is inconceivable that difficulties of proof would be considered a basis for ceasing to treat trespass as an offence in relation to town land. To the contrary, the use of the words 'or other land' in s. 188(1) suggests otherwise and would avoid those evidential difficulties. On Niu J's interpretation however the words 'or other land' in s. 188(1) serve no useful purpose.

[14] It is not an adequate answer to these objections to the Judge's approach that the Legislature has provided for trespass on town allotments in ss. 174 and 175 of the Act. Both sections are limited in application because they do not prohibit trespass on town land except in specific circumstances. They prohibit specific activities (being in a building or an enclosed yard) and only during night time.

[15] Section 2(1) of the Interpretation Act provides that unless a contrary intention appears in an Act the word 'land' includes 'the hereditary estates of nobles and matapules, tax and town allotments, leaseholds and interests in lands of every description'. The words 'or other land' in s. 188(1) are plainly wide enough to

cover town allotments and we see nothing in the Act that leads us to conclude that the Legislature intended to exclude town allotments from its application.

[16] It follows that the appeal must be allowed. On the point of law referred to us we find that Niu J was wrong to conclude that s. 188(1) of the Criminal Offences Act does not apply to town allotments.

**Result**

[17] We grant the Crown leave to appeal the decision of Niu J under s. 74(2) of the Magistrate's Courts Act and the appeal is allowed.

[18] We hold that Niu J was wrong to find that s. 188(1) of the Criminal Offences Act does not apply to town allotments.

[19] The Crown accepts that Mr. 'Atoa should be discharged without conviction. The decision of Senior Magistrate Langi acquitting Mr. Atoa of the offence of trespass under s. 188(1) is set aside and in its place we discharge Mr. 'Atoa without conviction under s. 204 of the Criminal Offences Act.

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Paulsen P

COURT OF APPEAL TONGA

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Handley J

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Blanchard J

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Randerson J