

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

AC 20 of 2018
[CR 107 of 2018]

BETWEEN : REX

- Appellant

AND : ANDY FUKOFUKA

- Respondent

Coram : Handley J
Blanchard J
Randerson J

Counsel : Mr. 'A. Kefu SC and Ms T. Kafa for Appellant
Mr. S. Tu'utafaiva for Respondent (granted leave to withdraw)

Hearing : 11 April 2019

Date of Judgment : 17 April 2019

JUDGMENT OF THE COURT

Introduction

- [1] This appeal by the Attorney-General is brought under s 17D of the Court of Appeal Act following a judgment of Niu J in the Supreme Court on 13 November 2018 in which two criminal charges against the accused Mr Fukofuka were dismissed.
- [2] The accused was facing two charges in the Supreme Court indictment that, on 20 March 2018 at Fo'ui he:
 - (a) Was in possession of a .22 semi-automatic rifle without a licence contrary to ss 4(1) and 4(2)(b) of the Arms and Ammunition Act.
 - (b) Did interfere with the course of justice by throwing away to hide the .22 rifle that was used to shoot Paula Nivinoa Vakaahi contrary to s 65 of the Criminal Offences Act.
- [3] The charges arose from an incident in which Mr Vakaahi brought a .22 rifle to Mr Fukofuka's home with a view to Mr Fukofuka purchasing the rifle. According to a statement Mr Fukofuka made to the Police, the rifle was discharged resulting in an injury to Mr Vakaahi. He was then taken to hospital by Mr Fukofuka.
- [4] The rifle was never recovered. Mr Fukofuka told the Police in a later interview that he had thrown it into a bush area between Fo'ui and Masilamea when he was taking Mr Vakaahi to the hospital. Mr Fukofuka said that he and others had searched for the rifle but could not find it. There was evidence that the Police had searched for the rifle as well but were unsuccessful. It was not in dispute that at the time of these events Mr Fukofuka did not have a firearms licence.

The issues on appeal

- [5] The Supreme Court dismissed the charges against Mr Fukofuka essentially because the Judge found the charges preferred in the Supreme Court were different from those upon which the accused had been committed for trial from the Magistrates Court. A secondary ground for the dismissal of the first charge arose from a discrepancy between the English and Tongan versions of the first charge in the particulars thereof.
- [6] The formal questions of law for determination are:
- (1) When there is a difference in the translation of the particulars of the offences charged in an indictment, which version of the indictment prevails, the Tongan or the English version of the indictment?
 - (2) Does the Attorney General have an inherent legal discretion to lay criminal charges against an accused in the Supreme Court by way of indictment, which is different from the criminal charges that were committed against the accused person from the Magistrates Court?
 - (3) Was the charge under count 1 of the indictment for possession of an arm without a license, a different offence from the offence charged under criminal summons number 132/18 and committed from the Magistrates Court to the Supreme Court for trial? If so, was there any prejudice caused to the Accused in laying a different charge in count 1 of the indictment from the criminal charge in criminal summons 132/18 that was committed from the Magistrates Court?
 - (4) Was Niu J correct to dismiss count 1 of the indictment because it was not a charge that was committed from the Magistrates Court to be tried in the Supreme Court?
 - (5) Was the charge under count 2 of the indictment for interference with the course of justice under section 65 of the Criminal Offences Act, a different offence from the offence of tampering with evidence in a crime scene, contrary to section 138(b) of the Tonga Police Act? If so, was there any prejudice caused to the Accused in laying a different charge in count 2 from the criminal charge that was committed from the Magistrates Court?

- (6) Was Niu J correct to dismiss count 2 of the indictment because it was not a charge that was committed from the Magistrates Court to be tried in the Supreme Court.

The differences in the charges

Summons CR 132/2018

- [7] Initially, Mr Fukofuka was charged in the Magistrates Court with possession of a “silencer” without a licence contrary to s 4(2)(b) of the Arms and Ammunition Act. He was committed for trial in the Supreme Court on that charge.
- [8] When the indictment was presented in the Supreme Court, Mr Fukofuka was charged with possession of a .22 semi-automatic rifle (as in the English version of the charge) or a .22 rifle (as in the Tongan version), contrary to the same provision of the Arms and Ammunition Act.

Summons CR 133/2018

- [9] Mr Fukofuka was charged initially with tampering with evidence at the crime scene by throwing a .22 rifle into the bush to cause it to be lost but which was evidence, contrary to s 138(b) of the Tonga Police Act 2010. He was committed for trial in the Supreme Court on that charge.
- [10] When the indictment was presented in the Supreme Court, Mr Fukofuka was charged with interference with the course of justice under s 65 of the Criminal Offences Act instead, but with the same particulars, namely, by throwing away the .22 rifle into the bush to hide it. There is no dispute that the available penalties under the Criminal Offences Act are more severe than those available under the charge originally laid under the Tonga Police Act.
- [11] The precise terms of the indictment were:

Andy Fukofuka is charged with the following offences:

Statement of Offences

Possession of Arm Without a License, contrary to section 4(1) and (2)(b) of the Arms and Ammunition Act.

(Count 2)

Interference with Course of Justice, contrary to section 65 of the Criminal Offences Act.

Particulars of the Offences

(Count 1)

Andy Fukofuka of Fo'ui, on or about 20 March 2018, at Fo'ui, you were in possession of a .22 semi-automatic rifle without a license for such arm.

(Count 2)

Andy Fukofuka of Fo'ui, on or about 20 March 2018, at Fo'ui, you did interfere with the course of justice by throwing away to hide it, the .22 rifle that was used to shoot Paula Nivinoa Vakaahi.

The Supreme Court judgment

[12] In the Supreme Court, Niu J referred to clause 103 of the Constitution which provides:

103. 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.

[13] The Judge noted the mandatory nature of the words “shall be committed” and said the Supreme Court had no jurisdiction over a case within its jurisdiction unless it was committed from the Magistrates Court. He held that the charge brought by the Crown in the indictment in the Supreme Court must be the same charge that was committed from the Magistrates Court. He considered that to do otherwise would remove the constitutional safeguard and protection afforded to accused persons.

[14] Niu J also referred to clause 13 of the Constitution which states that, with prescribed exceptions:

13. No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial ...

[15] The Judge held that count 1 was a different offence from that upon which Mr Fukofuka was committed from the Magistrates Court. The offence committed from the Magistrates Court was for possession of a silencer without a licence. The undisputed fact that a component of a firearm fell within the definition of an “arm” under s 2 of the Arms and Ammunitions Act could not justify the substitution of the charge. The Judge considered a silencer was not a gun, reasoning that it was not capable of propelling any bullet and was perfectly harmless on its own. It was a very different thing than a .22 rifle. The case presented was more serious than the mere possession of a silencer on its own.

[16] As to count 2, the Judge decided for similar reasons that it must be dismissed. It was a different and more serious charge than that brought in the Magistrate’s Court and the Supreme Court had no jurisdiction to try a case on that count.

[17] The second issue identified in the Supreme Court related to a difference in the English and Tongan versions of count 1. In the English version the rifle was described as a .22 semi-automatic rifle while in the Tongan version it was described as a .22 rifle. The Judge accepted that Mr Fukofuka’s counsel had run the defence on the basis of the English version (semi-automatic .22 rifle). However, it does not appear that any difference in this respect was material to the outcome since the Judge considered there was no jurisdiction irrespective of which version of the indictment was treated as applicable.

Questions (2) (4) and (6) – Must the offences in the indictment be the same as those upon which the accused was committed for trial?

[18] It is convenient to deal with this issue first. Mr Kefu SC submitted that Niu J erred in his approach to clause 103 of the Constitution. We accept counsel's submission that this clause empowers the legislature to enact laws determining the time and place for holding the courts; limiting the powers of Magistrates in their civil and criminal jurisdiction; and determining the cases that shall be committed for trial in the Supreme Court. Clause 103 does not itself determine the jurisdiction of the Courts. That is the function of other clauses of the Constitution and separate legislation.

[19] Clause 84(1) of the Constitution provides that:

The judicial power of the Kingdom shall be vested in the superior Courts of the Kingdom (namely the Court of Appeal, the Supreme Court, and the Land Court) and a subordinate Court namely the Magistrates Court.

[20] Other legislation also defines the jurisdiction of the Courts. The Magistrates Court jurisdiction is defined by section 11 of the Magistrates Court Act. In general terms, the Magistrates' Court has jurisdiction to hear and determine criminal cases where the maximum punishment provided by law does not exceed three years imprisonment or a fine of \$10,000. In contrast, the Supreme Court has jurisdiction under section 4 of the Supreme Court Act to hear any proceedings (whether civil or criminal) except those excluded by the Constitution or which, by law are within the exclusive jurisdiction of another court or tribunal.

[21] Section 196(1) of the Criminal Offences Act confirms the separate jurisdictions of the courts in criminal cases:

S.196(1) Prosecutions for offences against this Act or any other Act shall be heard and determined as follows –

(a) offences within the jurisdiction of a Magistrate as defined in the Magistrates Court Act : In a Magistrates Court;

- (b) all other offences : In the Supreme Court with or without a jury according to the accused's election.

[22] Our analysis of the Constitution and related legislation supports the conclusion that clause 103 of the Constitution does not bear the meaning attributed to it in the Supreme Court. Rather, the jurisdiction of the courts and the cases that may be determined in each are defined by the separate legislation we have analysed. It is also evident that the Supreme Court has a wide jurisdiction in both criminal and civil cases, in contrast to the limited jurisdiction of the Magistrates Court.

[23] Where a criminal charge is laid in the Magistrates Court in respect of an offence beyond the jurisdiction of that Court, the committal process in Part III of the Magistrates' Court Act must be invoked and a preliminary inquiry held by a Magistrate : section 32 (1) of the Magistrates Court Act. Statutory amendments have streamlined the committal process by allowing a Magistrate to make a determination on the papers. The process is further prescribed in section 32. In terms of s.32(4)(c) if the Magistrate considers the documents presented disclose "that a sufficient case has been made out to put the accused upon his trial before the Supreme Court" the Magistrate must commit him for trial accordingly. If the Magistrate is not so satisfied the accused must be discharged : section 32(4)(d). It is significant that section 34 places no express limit or restriction upon the offence or offences upon which the accused may be tried in the Supreme Court.

[24] Once the committal has been made, the Attorney-General as the responsible law officer of the Crown has the authority to present an indictment. Clause 31 A (b) of the Constitution relevantly provides:

- (1) The King in Privy Council, after receiving advice from the Judicial Appointment and Discipline Panel, shall appoint an Attorney General, who shall:

...

- (c) be the principal legal advisor to Cabinet and Government;

- (d) be in charge of all criminal proceedings on behalf of the Crown; and
- (e) perform any other functions and duties required under law.

- (2) The Attorney General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority.

[25] Section 197 of the Criminal Offences Act provides that all prosecutions under the Act may be brought by the Attorney-General or by the person aggrieved. The Attorney-General has a wide discretion to determine the charges contained in the indictment that are appropriate in the circumstances of the alleged offending. These need not be confined to the charge or charges upon which the accused has been committed from the Magistrates Court but should arise from the same circumstances. The charges included in the indictment may be more or less serious than those upon which the accused has been committed.

[26] The discretion available to the Attorney-General is subject to any specific enactment and the terms of the Constitution. Reference was made in the Supreme Court to clause 13 of the Constitution restricting the alteration of charges but we are satisfied this restriction only has effect after arraignment which marks the commencement of the trial. Clause 13 provides:

13 Charge cannot be altered

No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial: Save and except that-

- (a) where the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit that offence the accused may be convicted of this attempt and punished accordingly; and
- (b) where an attempt to commit an offence is charged but the evidence establishes the commission of the full offence the accused may be convicted of the attempt; and

(c) on the trial of any person for embezzlement or fraudulent conversion the jury shall be at liberty to find such person not guilty of embezzlement or fraudulent conversion but guilty of theft and on the trial of any person for theft the jury shall be at liberty to find such person guilty of embezzlement or fraudulent conversion.

(d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances.”

[27] This provision must be read with clause 89 of the Constitution which confers upon judges the power to direct the form of indictments. This provision, supplemented by the inherent jurisdiction of the Supreme Court to control its processes to ensure the proper administration of justice, enables the trial judge to direct the amendment of an indictment appropriately so long as any such amendment does not conflict with the Constitution or any enactment.

[28] So, for example, the judge may direct an amendment of the charge to conform to the proof established by the evidence; to amend the indictment in all or any of the ways set out in Clause 13 of the Constitution; or as permitted by section 196(2) of the Criminal Offences Act in relation to alternate charges. It should also be noted that section 42 of the Criminal Offences Act deals with the substitution of lesser charges in murder trials and with the circumstances in which an accused may be convicted of included charges.

[29] All these provisions demonstrate that, subject to the identified restrictions in the Constitution or by statute, there are extensive powers to present and amend an indictment in the Supreme Court and that the charges presented are not confined to those upon which the accused is committed for trial. This conclusion is consistent with the proper administration of justice in the criminal jurisdiction.

Summarising to this point

[30] (a) The Attorney-General has a wide discretion to present criminal charges in an indictment;

- (b) The charges that may be included in the indictment are not confined to the charge or charges upon which the accused is committed for trial from the Magistrates Court but must arise from the same circumstances;
- (c) The charges that may be included in the indictment may be more or less serious than the offences upon which the accused was committed for trial;
- (d) Once the accused is arraigned the indictment may still be amended, subject to any specific restrictions in the Constitution or by statute. In particular, a more serious charge cannot be included in the indictment after that point.

Questions (3) and (5):

Were the offences in the indictment different from those upon which the accused was committed for trial?

[31] We do not consider that the charge of unlawful possession of a weapon (a silencer) at the committal stage differed in substance from the charge in Count 1 (unlawful possession of a semi-automatic .22 rifle (or a .22 rifle in the Tongan version). In both cases, the offences were under the same provisions of the Arms and Ammunition Act. As well, the definition of “arms” in section 2 of the Act includes a component of a weapon such as a silencer. Even if Count 1 in the indictment were a different offence, it was permissible to include it in the indictment since it arose from the same circumstances.

[32] In respect of Count 2 we consider the offence of interfering with the course of justice under s.65 of the Criminal Offences Act was a different offence and carried heavier penalties than the offence of tampering with evidence in a crime scene contrary to s 138(b) of the Tonga Police Act. However, it was permissible to include the more serious charge in the indictment since it also arose from the same circumstances.

Question (1) : The differences in the English and Tongan versions of Count 1 of the indictment.

[33] As noted, when the indictment was presented in the Supreme Court there was a difference in the English and Tongan versions of the firearms charge in Count 1 (semi-automatic rifle” in English and “.22 rifle” in Tongan). Mr. Fukofuka pleaded to the Tongan version when the charge was read to him but his counsel ran the case on the basis of the English version.

[34] Mr. Kefu submitted there was no conflict because both versions were “arms” for the purpose of the offence. He also submitted that if there were a conflict the Tongan version should prevail in a case where an accused had pleaded in that language.

[35] We are reluctant to lay down any hard and fast rule on this issue given the many different circumstances that may arise. The Tongan language version will not necessarily prevail in all cases. As a guideline only, where a charge is read and understood in the Tongan language by the accused, that should generally prevail. In our view however, the touchstone should be whether an accused has understood the charge in whatever language it may be read. Particularly where an accused is represented by counsel, it is unlikely any prejudice to an accused will arise.

[36] Obviously enough, the police and prosecutors should take care to avoid any such conflicts of language and judges must be alert to ensure misunderstandings do not arise, particularly with unrepresented accused.

Result:

[37] In formal terms we determine the questions of law in these items:

Question 1 : Neither language necessarily prevails.

Question 2 : The Attorney-General does have discretion to present different charges in the indictment from the charges upon which the accused was committed for trial.

Question 3 : The charge in Count 1 was not different in substance from the offence charged in summons 132/18.

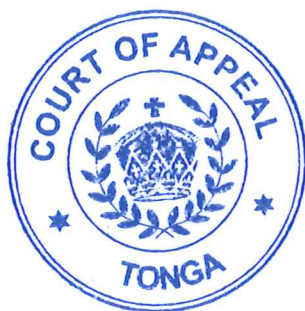
Question 4 : The Supreme Court erred in dismissing Count 1.

Question 5 : The charge in count 2 was different from the offence of tampering with evidence contrary to s 138(b) of the Tongan Police Act.

Question 6 : The Supreme Court erred in dismissing Count 2.

[38] For a fuller answer to the questions posed for determination, the terms of this judgment should be consulted.

[39] Although we have found that the Supreme Court was wrong to dismiss the charges against Mr. Fukofuka, our determinations do not in any way affect or invalidate the acquittals entered in the Supreme Court : section 17D(5) of the Court of Appeal Act.



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