IN THE COURT OF APPEAL OF TONGA

ON APPEAL FROM THE SUPREME COURT OF TONGA

NUKU'ALOFA REGISTRY APPEAL NO. AC 25 of 2010

BETWEEN: R E X

Appellant

AND : RAMSAY ROBERTSON DALGETY

Respondent

Coram: **Burchett J**
Salmon J
Moore J

Counsel: **Mr. Kefu for the Appellant**
Mr. Hirschfeld for the Respondent

DETERMINED ON WRITTEN SUBMISSIONS

Date of Judgment : 15 April, 2011

JUDGMENT OF THE COURT

[1] The Respondent was charged with perjury arising out of evidence given by him to the Royal Commission of Enquiry into the sinking of the M.V. Princess Ashika. He was arraigned before the then Chief Justice Ford on 23 April 2010 and pleaded not guilty to the charge.

[2] Counsel for the Respondent on 26 June 2010 filed a Notice of Motion for orders that no Indictment be presented on a number of grounds which at that stage did not include any suggestion as to deficiencies in the indictment. That issue was raised for the first time in a memorandum filed on 27 October 2010.

[3] The motion to quash the Indictment come on for hearing before Shuster J on 1 November 2010. The Judge elected to deal first with the issues relating to the validity of the indictment. Argument was heard on this issue and the Judge determined that the indictment was defective and should be quashed. That order was made following the hearing. On the 4th November 2010 the Judge issued a 17 page document entitled "Clarification of the Reasons for Quashing the Indictment in File Cr.64/2010"

[4] The Crown sought leave to appeal against the Order dismissing the Indictment and leave was granted by Chief Justice Scott in his capacity as President of the Court of Appeal on 8th December 2010. On the 11th January 2011 the Chief Justice directed, pursuant to s24 Court of Appeal Act, that the appeal should be determined without a hearing. The parties have now provided written submissions to this Court enabling us to proceed to a determination.

The Judge's Reasons

[5] In his reasons dated 4 November 2010, the Judge set out the chronology of the file which was originally in the care of the former Chief Justice Ford. In the chronology the Judge notes that there is no record of an indictment being filed on or after the 23 April 2010. He records that on 27 April the defendant appeared for arraignment. Later the Judge notes that when he examined the file he discovered an indictment written in the Tongan language but not one in English. He noted that the Tongan indictment was neither dated nor signed and was the only indictment on the file. He records a pre-trial conference on 29 September at which he was advised by counsel for the defendant that the Crown had supplied him with an indictment. The Judge records that this was the first time he had seen an English translation of the Tongan indictment. The Judge set out the provisions of clause 11 of the Constitution which is as follows:

> **11.** No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a written indictment (except in cases of impeachment or for offences within the jurisdiction of the magistrate or for contempt of court while the court is sitting). Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and to make his own statement regarding the charge preferred against him. But whoever shall be indicted for any offence if he shall so elect shall be tried by jury and this law shall never be repealed. And all claims for large amounts shall be decided by a jury and the Legislative Assembly shall determine what shall be the amount of claim that may be decided without a jury. *(Act 25 of 1942; Amended by Act 13 of 1982 and Act 9 of 2006)*

[6] The Judge recorded that a criminal trial cannot start until there is a valid indictment before the Court. He went on to say, relying on English authority, that if an indictment is invalid then all proceedings therein are a nullity. He noted that the Tongan indictment was not signed or date stamped but that an amended indictment had been received which was stamped as received on 12 October 2010.

[7] He recorded that although Crown counsel argued that the practice had always been in Tonga that indictments were neither signed nor dated that practice had now been challenged. He expressed the view that most legal documents will have no validity if not signed and dated, and gave as examples wills, affidavits, summonses, warrants and Court of Appeal judgments. He held that because the indictment of 23 April 2010 was not dated or signed it was a nullity and held that it could not be cured by the amended indictment.

Mr. Kefu's affidavit

[8] Mr. Kefu the Solicitor General filed an affidavit in support of an application for leave to appeal. In that affidavit he recorded that over a period of 15 years he had been involved in the drafting, filing and service of indictments. He said that in Tonga, so far as he was aware, indictments were never required under law or by the courts to be signed or dated by Crown counsel. He said that indictments were presented for filing in Court in both English and Tongan versions. The English version was on top and the Tongan version was stapled to it from the bottom. He said that once the Supreme Court staff receives an indictment for filing the Supreme Court file stamp is affixed to the English version only because that is the first page of the indictment. The staff then writes the date it was received for filing, the time and then initials that. The

Supreme Court's staff retains one copy for the Supreme Court file and returns two copies to the Crown Law staff. One of those copies is served on defence counsel or the accused.

[9] He confirms that in the present case on 23 April 2010 the Crown filed an indictment in the normal manner, that it was stamped and dated 23rd of April 2010 at 1320 hrs. and was signed by a Supreme Court staff member. He annexed a copy of that document to his affidavit. He said that the indictment was served on the respondent on the same day it was filed. On the 27th April 2010 the respondent appeared for arraignment and stated in court that he had read the indictment.

[10] On 17 September 2010 a request was received from counsel for the respondent for a copy of the indictment. A copy was sent with a letter recording that the indictment had been served on the accused around 23 April 2010 and that during the arraignment his counsel had the original copy.

[11] The affidavit then recorded that on 29 September 2010 at a pre-trial conference the Crown was directed to amend the indictment and file it within 10 days. This was done with the amendments directed by the Judge. The amended indictment was served at the office of defence counsel on 12 October.

[12] None of the statements of fact in Mr Kefu's affidavit have been challenged by the respondent other than by reference to the Judge's reasons. In particular there is no challenge to the facts recorded in para. [9] above.

Counsel's submissions

[13] The appellant's submissions largely repeat the material contained in Mr. Kefu's affidavit. There is the additional information that there is in fact a stamped and filed English language indictment dated 23rd of April 2010 on the Supreme Court file. We have inspected the file ourselves and can find only a copy of that indictment on the file. However we requested the Court staff to obtain an original from the Crown Law Office and we have inspected that. We accept as a fact that an English language indictment dated 23rd of April 2010 was filed and that it was stamped dated and initialled by court staff (as appeared on the face of the original obtained from the Crown Law Office) in accordance with the usual custom in the Tonga Supreme Court Registry. We accept that stapled below it was the Tongan language version. The two versions were separated at some stage but we have no way of knowing when this occurred.

[14] The submissions record that during the hearing in the court below the Judge did not make it clear that the undated indictment to which he was referring was the Tongan language version rather than the English language one. That was referred to for the first time in the reasons given later. Mr Kefu states that had he been informed at the time that the Judge was referring to a Tongan version of the indictment he would have proposed to the Judge that the hearing be adjourned to enable the English version to be located.

[15] Counsel submits that the practice direction relating to indictments made by the Chief Justice on 20th of October 2010 cannot have retroactive effect. Indeed the Judge acknowledged that this was so. That direction now requires indictments to be signed and dated by a

person nominated by the Solicitor General. The submissions request that the appeal be allowed and that costs be awarded in favour of the appellant. There is also a request for a direction from us that the Judge in the court below should not deal with this matter any further, and that the proceedings should be referred to another Judge of the Supreme Court. In our view this is a matter for direction by the Chief Justice rather than by us.

[16] The respondent's submissions refer to the legal position in England as described in *R v. Morais* [1988] 3 AII ER 161. At that time there was a mandatory statutory provision requiring indictments to be signed by a responsible officer of the court and dated. The position in England is discussed in more detail later in this judgment. Counsel for the respondent submits that the English procedure should be adopted in Tonga even though, as he accepts, English statutory provisions no longer form part of the law of Tonga. He puts forward two reasons for this proposition. The first is that a bill of indictment must be distinguished from an indictment proper to prevent potential abuse. The second is that rules of procedure may outlive their legislative existence to become, in effect, part of the procedural common law in Tonga. As will become apparent later in this judgment, we do not accept the second of these propositions and regard the first as of little weight. The submissions then go on to quote at length from the reasons of the Judge in the court below.

[17] The submissions note that on 29 September 2010 the Judge directed that if there was to be an amended indictment in this case it must be dated and signed prior to the trial date. An amended indictment was filed but it was not signed. Counsel criticizes this noncompliance

with the Judge's direction. When this matter was raised in Court on 1 November 2010 Mr. Kefu said he would sign the indictment in Court. Counsel for the respondent objected to this being done on the grounds that the indictment of 23 April was not dated or signed and was a nullity and the later one could not cure that deficiency. The Judge agreed with that submission.

[18] Counsel for the respondent submits that an English type approach to criminal procedure generally as opposed to an American or Australian approach is adopted in Tonga. The submissions then go on to quote further passages from the Judge's reasons relating to the facts found by him and conclude by submitting that the appeal should be dismissed and costs should be awarded to the respondent.

The position in England

[19] In England, the form and essential terms of an indictment have long been regulated by statute. The origins and operation of the statute, The Administration of Justice (Miscellaneous Provisions) Act 1933, were discussed in a recent decision of the House of Lords, *R v Clarke* [2008] UKHL 8. Section 2(1) of the Act provided that a bill of indictment could be preferred by any person before a court and that a proper officer of the court should sign the bill. However the bill was to be signed only after the proper officer had been satisfied that section 2(2) had been complied with. Section 2(2) contained conditions, in the alternative, that had to be satisfied before a bill of indictment could be preferred.

[20] The central issues before the House of Lords were whether an unsigned bill of indictment was a valid indictment and whether there could be a valid trial on indictment if there was no valid indictment. Their Lordships concluded that without a signature there was no valid indictment and without a valid indictment there could be no valid trial on indictment. The historical position was addressed in some detail in the speeches of Lord Bingham of Cornhill and Lord Carswell in particular. Both their Lordship noted that the 1933 Act was enacted as part of a move away from grand juries which had, historically, undertaken a preliminary assessment of whether there was a case against the accused. When undertaking that preliminary assessment, the grand jury had before it a bill of indictment setting out the charges which it was proposed would be prosecuted. If the grand jury thought the matter should go to trial, the foreman would endorse the bill by writing "true bill" on it. If it was not to go to trial the words "no true bill" were written on it.

[21] As Lord Carswell noted (at [33]), the bill was good even if it had not been signed by the foreman as long as it had been delivered in court and read in his presence. His Lordship cited Giuseppe Sidoli's case (1833) 1 Lewin 55 and Jane Denton's Case (1823) 1 Lewin 53.

[22] Since the decision of the House of Lords in *R v Clarke*, the 1933 Act has been amended by the Coroners and Justice Act 2009. A signature of the proper officer of the court is now no longer a condition precedent to a valid indictment: see Archbold, Criminal Pleading, Evidence and Practice (2011) at 1 – 191. It can be seen that the background to the situation as it was prior to 2009 is very different to that which has prevailed in Tonga.

Discussion

[23] As we have noted earlier, there is no doubt that the practice in Tonga has been that unsigned indictments are filed in the Supreme Court where they are stamped dated and initialled by court staff. That practice was followed in this case. We note that in New Zealand indictments are not required to be signed by a responsible officer of the court. So the practice of filing unsigned indictments is not without precedent. The position in England as appears from the discussion above has changed from that which earlier applied. The result of the 2009 Amendment is that it is not now mandatory to sign and date an indictment but it is regarded as good practice.

[24] The provisions of clause 11 of the Tongan Constitution are set out earlier in this judgment. Those provisions contain no requirement for the signing and dating of an indictment. Until the recent practice direction there was no provision in the rules of Tonga requiring the signing or dating of indictments. In this respect the situation was similar to that in New Zealand. In this regard clause 89 of the Constitution is relevant. It provides:

> "The judges shall have power to direct the form of indictments, to control the procedure of the lower Courts, and to make rules of procedure."

This provision is the source of the power exercised by the Chief Justice in making the practice direction earlier referred to. Thus it can be seen that the Constitution provides all that is needed in Tonga with respect to the form and content of indictments. We can see no need or justification for importing the English practice into Tongan law other than by enactment or practice direction.

[25] There are two further observations that should be made. The first is that even if the first indictment had been defective that defect was cured by the second one. There was no good reason for the Judge to prevent Mr Kefu from signing that indictment. The second point is that the recent practice direction concerns procedural matters. If there is a deficiency or irregularity in an indictment it would not in general make the indictment a nullity. It would be capable of correction.

Conclusion

[26] For the above reasons the appeal must be allowed and the indictment reinstated. Section 25(1) of the Court of Appeal Act prohibits the grant of costs in criminal appeals; therefore there will be no order for costs.

[27] The matter is referred back to the Supreme Court so that the remaining pre-trial matters can be heard and determined. The question of which Judge should undertake this further hearing is a matter for the Chief Justice.

……..……

Burchett J

……..……

Salmon J

……..……

Moore J