**IN THE NIUE COURT OF APPEAL**

**CR2022-00038**

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| **UNDER** | Rule 2, High Court Rules Amendment Act No. 2 |
| **BETWEEN** | AC ELKAN FOTUGA HARDING<br>**Appellant** |
| **AND** | NIUE POLICE<br>**Respondent** |

**Date:** 10 April 2024 (NZT)

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**DECISION OF CHIEF JUDGE C T COXHEAD**

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***This is an oral decision and as such I am permitted to tidy up the decision once the minutes are typed back, but the content and the substance of the decision will not change. I have made appropriate typo and grammar amendments to this written version of my oral decision.***

## Introduction

[1] Thank you all for reconvening. I repeat the statements that I made this morning about thanking both Counsel for their assistance in providing your submission and also providing the attachments that went with your submission. They were certainly very helpful for this appeal.

[2] Thank you for agreeing to hold this appeal by Zoom given we were unable to hear it the last time I was in Niue.

## High Court Rules Amendment No. 2

[3] Clearly in accordance with the High Court Rules Amendment No. 2, I do have the jurisdiction to hear the matter. The Rules provide that when a Commissioner and in this case a Commissioner and two Justices of the Peace make a decision in a criminal matter it can be appealed for a High Court Judge to hear it. Part of that reasoning, as I understand it, would be that allows for a two-step appeal process where a Judge of the High Court can hear the appeal and then that also allows for another appeal to the Court of Appeal.

**Niue Act 1966**

[4] I asked this morning as to what I can or cannot do in terms of a decision. I have had a look and in terms of the Niue Act 1966, s 87 provides for a re-hearing of criminal proceeding. It doesn't actually specifically say whether I can quash a conviction, but it does give, I think some interpretation of what can be done with this appeal.

**Grounds for Appeal**

*The Court did not follow due process during the various Court sittings leading up to the trial and during the actual trial. Without due process there was no chance for defence.*

[5] The Appeal that we have is with regards to Mr Harding.

[6] According to the grounds of appeal filed with the Notice of Intention to Appeal, that was discussed this morning, the first ground is that the Court did not follow due process during the various Court sittings leading up to the trial and during the actual trial. Without due process there was no chance for defence.

[7] I discussed this morning, as I saw it, there were two very clear matters. Firstly, was the delay in leading up to the trial and then second, the processes with regards to that delay.

[8] In terms of what the Court, needs to look for, and Ms Hekau has mentioned this briefly, is as to whether the processes in the hearings, or in the sentencing have led to a miscarriage of justice. Not all unfair processes will lead to a miscarriage of justice and so what the Court does need to assess is whether there has been errors, irregularities or occurrences in or relation to or affecting the trial. We can have processes that aren't quite perfect but that may not affect the outcome of the hearing. The real question is, has an error, irregularity or occurrences in or relation to or affecting the trial created a real risk that the outcomes of the trial was affected or has this resulted in an unfair trial or a trial that was a nullity.

[9] The first question in terms of delay. There have been delays leading up to the trial. There have been a number of requests for adjournments and adjournments granted. In my view those delays in themselves have not caused prejudice in the way that the trial has occurred or there hasn't been a miscarriage of justice which has created a real risk so the outcome of the trial has been affected. In my view the delays themselves have not resulted in that happening.

[10] The second part is the process in the trial itself. Now, the trial itself I think was affected and the key issue here, is that there was a witness, who defence wished to call, and have them attend by Zoom. Now, the decision makers being the Commissioner and two Justices of the Peace declined to allow the witness to attend by Zoom. I am not sure why that was declined. No reasons are given. Clearly not being able to have, as the appellant says, a key witness appear to provide evidence and to have their evidence tested, I think has created a real risk as to the outcome of the trial.

[11] There are other matters that I also want to address as well.

*The decision of the Court was based on hearsay evidence*

[12] The second ground for appeal is that the decision of the Court was based on hearsay evidence. It is clear that the decision makers, they say it in their decision, considered all the evidence. From that, I take it that they have considered the hearsay evidence.

[13] What weight they have given to that hearsay evidence is not so clear.

[14] There is no prohibition on the Court considering that hearsay evidence. Niue law certainly allows for it. Section 289 clearly allows a discretion for the Court to be allowed to submit the evidence that they see as being helpful.

[15] Section 289 states:

> **289 Discretionary power to admit or reject evidence**
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> (1) Subject to this Act, a Court may in any proceedings admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether that evidence is or is not admissible or sufficient at common law.
>
> (2) A Court may in any proceedings refuse to receive any evidence, whether admissible or not at common law, which it considers irrelevant, or needless, or unsatisfactory as being hearsay or other secondary evidence.

[16] I do note 289(2) does give warning as to some caution should be taken when accepting hearsay evidence.

[17] The thing here is it is unclear to me as to what influence the hearsay evidence had with regards to the decision. I can't say that the decision makers weighed up the hearsay evidence

and it had a determinative influence on the decision. I can't say that it had no influence on the decision.

[18] In that regard the ground of appeal that hearsay evidence was used, it is clear that yes it was used, because the Commissioner and Justices of the Peace themselves say it was used when they say they considered all evidence. What influence it had in terms of an error, irregularity that created a real risk to the outcome of the trial? I don't think it can be said with any certainty that it did have an influence or no influence.

[19] Clearly, the preferred approach would have been that the people who made the statements that the Police did submit as exhibits were called before the Court and their evidence was tested through cross-examination.

[20] My final point on the hearsay issue is that hearsay was allowed to be admitted. I am unable to determine whether hearsay evidence that was admitted was a major factor in the decision that was made. It may have been or it may not have been. I don't think that the Commissioner and Justices of the Peace considering the evidence can be said to have created a risk in terms of the decision of the trial when they considered that evidence.

*The decision of the Court provided no judicial reasoning*

[21] The next issue is to do with the reasoning. The Commissioner and Justices of the Peace did provide reasoning. It was brief. It would have been helpful if it was more detailed around their reasoning in terms of the conviction itself.

[22] I don't think there is anything irregular or in error to be of concern as to their reasoning in their decision. As I say it was brief, and it would have been preferable if there was more detail but that in itself does not create a miscarriage of justice in this case.

[23] Where I think that no reasoning has been made, is with regards to excluding the defence's witness by not allowing them to attend by Zoom. Zoom provides the ability for people to attend hearings who are at a distance. While there is discussion in the case on appeal as to the Commissioner and Justices of the Peace receiving some advice as to whether they could or could not allow a witness to attend by Zoom, there are no reasons given as to why or an explanation as to why that witness was excluded.

[24] The Police have said that they would not have opposed a witness attendance by Zoom.

[25] I think that the exclusion of a witness with no reasons given as to why or an explanation as to why that witness was excluded has led to a real risk in the outcome of the hearing.

*There was no sentencing hearing*

[26] I approached this appeal on the basis that this is an appeal against the conviction and against the sentence. I am of the view that processes in terms of excluding a witness by not allowing them to attend by Zoom and not giving reasons as to why they were excluded and the defence not being able to call their witness has affected the outcome of the hearing. Therefore, the appeal is successful on that basis in terms of the conviction. Given this, the matter should be reheard.

[27] The second part is this is an appeal against the sentence. There are different factors which are considered when dealing with appeals on sentence to those matters considered for an appeal against conviction.

[28] In this situation, I think it dangerous and it would be good if Commissioners and Justices of the Peace were given some training or given notification that it is dangerous to combine hearings when a person pleads not guilty and sentencing into one type of decision.

[29] It is fine if a person pleads guilty to have the entering of the plea decision and sentencing in one decision.

[30] But in this case the Commissioner and Justices of the Peace had two separate decisions to make. One was, is the person guilty or not guilty. If the person is guilty then what sentence should be imposed. Here there seems to be a combination of the two. I say it is dangerous because it gives a perception that in seeking closings submissions, and also sentence submissions at the same time - it gives a perception that it is fait accompli and a decision as to conviction has been made.

[31] When there is a not a guilty plea entered, the two steps need to be kept quite separate.

[32] In this situation, I think it is clear that the appellant has not had the opportunity to make submissions as to sentencing. That clearly is not appropriate and they should have been afforded that opportunity to be heard as to sentencing once they knew what the decision was with regards to the charges.

[33] There does not need to be a long time gap between the hearing and the sentencing but there certainly does need to be some separation. It maybe that the hearing happens in the morning, and the decision is arrived at and then if a person is found guilty, sentencing is in the afternoon. But to have them combined in the way that was done here is not good process.

[34] The other thing that I would say is that the decisions template that the Commissioners and Justice of the Peace use, does need to be updated so that there is a clear differentiation between the conviction part and the sentencing part. This morning, Ms Hekau made the point that when she read "aggravating factors" there is no heading which says sentencing and so it could be read as just being all amalgamated into one. It would help if there was now that distinction in the template.

[35] With the appellant not having the opportunity to be heard as to sentencing, I would allow the appeal as to sentencing.

**Decision**

[36] The appeal is successful.

[37] Section 87 of the Niue Act 1966 allows for a rehearing of criminal proceedings.

> **87. Rehearing of criminal proceedings** –
>
> (1) Where on the hearing of any information the accused has been convicted, the High Court may, if it thinks fit, grant a rehearing of the information, either as to the whole matter or only as to the sentence, upon such terms as the Court thinks fit.
>
> (2) When a rehearing has been granted, the conviction or, as the case may be, the sentence only shall immediately cease to have effect.
>
> …

[38] I grant a rehearing.

[39] That means that the convictions are quashed and the matter is to be reheard in full.

[40] I would direct that it be reheard by a different Commissioner and Justices of the Peace to who heard this matter previously. For obvious reasons.

[41] There are some pointers there too for whoever is to hear this matter. Those are that the Commissioner and Justices of the Peace:

(a) Should allow people to attend the Court hearing by Zoom unless there is some very good reason why that cannot occur;

(b) Should make it clear as to what evidence is being relied on; and

(c) Should give clear reasons as to how they have come to their decision.

Dated at Rotorua, Aotearoa/New Zealand this 10th day of April 2024.

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C T Coxhead
**CHIEF JUSTICE**