IN THE SUPREME COURT OF TONGA

REVISIONAL JURISDICTION CV 44 of 2012

BETWEEN : 1. MINISTRY OF PRISONS
2. KINGDOM OF TONGA - Applicants

AND : TELEFONI FINAU - Respondent

BEFORE THE LORD CHIEF JUSTICE

'A. Kefu (Solicitor General) for the Applicants
S. Tu'utafaiva for the Respondent

JUDGMENT

[1] The Respondent is a Prison Officer Class III employed by the Applicants.

[2] On 19 November 2011 the Respondent was charged with four counts of unprofessional and discreditable conduct contrary to section 99 (d) of the Prisons Act 2010 (the Act).

[3] On 21 November 2011 the Respondent appeared before his officer in charge who, pursuant to section 106 of the Act, decided to refer the charges to the Commissioner of Prisons in view of their seriousness.

[4] On 22 November and 6 December 2011 a hearing was held by the Commissioner who found 3 of the 4 charges to have been proved. A penalty of dismissal was imposed pursuant to section 107(3)(f) of the Act.

[5] The Respondent appealed against the findings of guilt and the penalty to the Prisons Appeal Tribunal established under section 108 of the Act. The 8 grounds of appeal are listed in Exhibit B to an affidavit of Billy Gefferies Tofavaha sworn on 27 June 2012.

[6] The record of the proceeding before the Appeals Tribunal is Exhibit F to the same affidavit. Although the record has been translated into English it falls some way short of exactly revealing what occurred before the Tribunal. Doing the best that I can, however, it appears reasonably clear that grounds 1, 2, 3, 4, 5, 7 & 8, if proceeded with, did not find favour with the Tribunal which did not mention them in its Ruling allowing the appeal, dated 28 March 2012.

[7] The remaining ground, ground 6, reads as follows:

> "there is no sufficient evidence established to support the witnesses at a stage for the Court to prove allegation beyond reasonable doubt" (sic).

[8] The Tribunal allowed the Respondent's appeal on this ground stating:

> ".....on the basis that there is no sufficient evidence as established as all the accomplice witnesses were not corroborated"

[9] There is reference in the Respondent's appeal to the Tribunal to the case of *Davies-v-DPP* [1974] AC 378 and in the Statement of Defence filed herein the Respondent pleaded that the Tribunal:

> "was correct in law to apply section 126 of the Evidence Act because, among other things, the allegations against the Defendant are serious criminal allegations against a civil servant".

In fact, neither *Davies* nor section 126 was specifically referred to by the Tribunal.

[10] Following grant of leave on 29 June 2012, the Applicants now move for Judicial Review of the Tribunal's decision to allow the appeal on the ground that the Tribunal erred in a holding that either the Evidence Act or common law requires the evidence of an accomplice to be corroborated in disciplinary proceedings brought pursuant to the provisions of part VII division II of the Prisons Act.

[11] The Evidence Act (Cap 15) dates back to August 1926 and is stated to be "an Act to declare the law of evidence". As will be seen it deals with both criminal and civil law; therefore, the wording of each

particular section must carefully be considered to ascertain whether it applies to both.

[12] Section 126 reads as follows:

> "An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence".

This prohibition is slightly different from the rule that it is the duty of a judge in a criminal trial to warn the jury that although they may convict on the evidence of an accomplice, it is dangerous so to do unless the evidence is corroborated (see *Davies-v-DPP* [1954] AC378 and *R-v-Baskerville* [1916] 2 KB 658). Whereas section 126 prohibits conviction without corroboration, the rule in *Davies* only requires the Court to warn the jury, or itself when sitting alone, of the danger of convicting without corroboration.

[13] In my opinion there can be no doubt that both section 126 and the rule in *Davies* only apply to criminal proceedings i.e proceedings which, if resolved against the accused, will result in a criminal conviction being recorded against him.

[14] Section 100 of the Act provides that:

> "1) the Commissioner of Prisons shall immediately inform the Police Commissioner of any instance where a

prison officer is *alleged* to have committed a criminal offence;

2) Proceedings against a prison officer *alleged* to have committed a criminal offence shall be instituted by the police" (emphasis added)

In my view this section does not curtail the right of the Commissioner of Prisons to elect to treat misconduct which is prima facie both disciplinary and criminal as merely disciplinary. If the Commissioner, having examined all the circumstances, comes to the conclusion that the misconduct ought to be treated as being merely disciplinary, then it is open to him not to "allege" that the misconduct was criminal. If he does not allege criminality then the misconduct does not have to be referred to the Police.

[15] In my view the procedure followed by the officer in charge and by the Commissioner was beyond reproach. The proceedings before them were disciplinary and not criminal and accordingly section 126 did not apply. Further confirmation for this view is to be found in section 102(a) of the Act which provides that the officer in charge (and by application of section 107 (1) – the Commissioner):

> "shall not be bound by the rules of evidence but may, subject to any regulation, inform himself about the matter in a way that the officer thinks fit".

[16] The standard of proof in disciplinary proceedings before a domestic tribunal is the civil standard of proof on the balance of probabilities (*R-v-Hampshire County Council Ex p. Ellerton* [1985] 1 WLR 749).

The degree of a probability that must be established will however vary from case to case. Where the allegations are serious and dismissal is likely if they are proved, than a degree of probability is required that is commensurate with the occasion (see e.g. *Blyth v Blyth* [1996] 1 All ER 524). Where the evidence of a person who should be considered an accomplice is relied on then the officer in charge or Commissioner should warn himself of the dangers of acting on that evidence unless it is corroborated. This is particularly the case where the witness might have a purpose of his own to serve. If satisfied, however, that the evidence is reliable, then there is nothing to prevent a finding of guilty being reached.

[17] The Prison Appeals Tribunal erred in applying section 126 of the Evidence Act to the disciplinary proceedings against the Respondent. The decision of the Tribunal is quashed and the matter referred back to a differently constituted Tribunal for reconsideration in the light of this judgment.

DATED: 31 January 2012

M.D. Scott
CHIEF JUSTICE

T.Piei
29/1/2013