IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 22088

BETWEEN: **TAEI AUKUSO**, Bus Driver of Malie

Appellant

A N D: **THE POLICE**

Respondent

Counsel: H Schuster for appellant
G Latu for respondent

Hearing: 29 October 1997

Judgment: 5 November 1997

JUDGMENT OF SAPOLU, CJ

This is an appeal from the Magistrates Court against conviction. The appeal has been brought under the provisions of section 138 of the Criminal Procedure Act 1972.

The appellant was charged in the Magistrates Court with two counts of overloading under the provisions of sections 38 and 72(2)of the Road Traffic Ordinance 1960. The two charges may be set out as follows :

(1) That at Toamua on the 27th day of May 1997 the defendant (the appellant in these proceedings) of Malie, being the driver of a motor vehicle, namely, a bus number M/O 10185, did permit a greater number of passengers, namely, 24 persons to be carried in a public service vehicle than the number which the vehicle is licensed to carry.

Sections 38 and 72(2) Road Traffic Ordinance 1960

(2) That at Toamua on the 27th day of March 1997 the defendant (the appellant in these proceedings) of Malie, being the driver of a motor vehicle, namely, a bus number M/O 10185, did permit a greater number of passengers, namely, 25 persons to be carried in a public service vehicle than the number which the vehicle is licensed to carry.

Sections 38 and 72(2) Road Traffic Ordinance 1960

The charges against the appellant were set down for hearing in the Magistrates Court on 18 September 1997. When the charges were called for hearing on that day the appellant did not appear. The learned Magistrate before whom the appellant's case was called then dealt with the charges under section 42(b) of the Criminal Procedure Act 1972 as he was entitled to do. Section 42(b) provides :

"In any case where a summons has been served on the defendant a reasonable time "before the trial, or the defendant has been released on bail to attend personally at the "trial, and the informant but not the defendant appears at the trial the following "provisions shall apply :

"(a) .....

"(b) If the offence charged is one in respect of which the maximum penalty is a fine or "not more than 3 months imprisonment, the Court may proceed with the trial and (if

"the defendant is convicted) may pass sentence, or may issue such a warrant to arrest the "defendant and bring him before the Court, or may adjourn the trial to such time on "such conditions as the Court thinks fit".

Pursuant to that provision the learned Magistrate proceeded to hear the evidence from the prosecution in the absence of the appellant. He then convicted the appellant on each of the two charges and sentenced him to one month imprisonment on each of the charges. The sentences were to be served concurrently.

The appellant has now appealed against his convictions. At the commencement of the hearing of the appeal counsel for the respondent raised some preliminary issues with which the Court has had to deal before hearing the remainder of the appeal. I will deal with those preliminary issues now.

The first issue raised by counsel for the respondent is that the appeal was filed out of time. Under section 139(1) of the Criminal Procedure Act 1972, a notice of appeal against conviction or sentence is to be filed within 14 days after the date of sentence. The appellant was convicted and sentenced on 18 September but his appeal was only lodged with the Court registry on 8 October. So the appeal was 6 days out of time. Counsel for the ~~respondent~~ appellant, on the other hand, told the Court that the appellant was not represented by counsel at the lower Court. When he was instructed to act for the appellant after the appellant had been convicted he needed time to look for and obtained the relevant Court file on this case. He also submitted that the defendant has a valid defence of alibi and therefore the appellant should be granted an extension of time to file his appeal. Reference was then made to section 139(3) of the Criminal Procedure Act 1972 which provides :

"The time within which notice of appeal may be given may be extended at any time by "the Supreme Court where the Court is satisfied that there were reasonable grounds for "the delay and that in the interests of justice such extension ought to be granted".

It would be helpful to refer to the principal New Zealand authorities where the Courts in that country had to consider the question of extending time to file an appeal where the statutory time limit to appeal has expired. The first of these authorities is the case of ***R v Jeffries [1949] NZLR 595***. In that case the appellant was convicted of robbery with violence and car conversion. He was sentenced on 5 August 1948. He did not sign his notice of appeal asking for leave to appeal against conviction and sentence until 5 April 1948. So there was about an 8 months delay in filing the notice of appeal from the time sentence had been passed. The appellant asked the Court of Appeal for an extension of the time to file his appeal. At p.600 of its judgment, the Court of Appeal said :

"[Special] and substantial reasons must be advanced before an extension will be "granted, and, of course, if it were shown that there had been a miscarriage of justice, "or that good grounds of appeal were shown, then the extension should be granted".

The Court then went on to consider the grounds and merits of the appeal and came to the conclusion that even if the appeal was within time it could not succeed. The application for an extension of time to appeal was therefore dismissed.

In the next case of ***Farrell v R [1954] NZLR 1029*** the appellant was convicted of breaking and entering and was sentenced to 2 years imprisonment with hard labour on 18 February 1954. It was not until 21 June 1954 that the appellant sought leave to appeal out of time. The ground of the appeal was that the evidence adduced by the prosecution at the

trial did not establish the guilt of the appellant on the required standard of proof. At p.1031 Finlay J who delivered the judgment of the Court of Appeal said :

> "Notice of the application for leave to appeal filed by this appellant is more than three "months late. It must, however, be conceded that the statutory rule has not always "been strictly enforced, and, while we do not wish to suggest that there is any "limitation to the power of extension conferred by s.7(2) of the Criminal Appeal Act "1945, yet we consider that it is desirable that a proper regard should be had to the "existence of the statutory limitation. We are of opinion that it may well be desirable "for this Court in future to adhere more closely to the practice of the Court of Criminal "Appeal in England which functions on similar legislation. The practice of that Court "is, we think, accurately summarised in ***Archbold's Criminal Pleading, Evidence and "Practice***, 32nd ed.295, where the statement appears :
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> " 'Substantial grounds must be given for the delay before the Court will exercise
> " 'its power to extend the time'.
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> "In view, however, of the past practice of this Court and the special features of this "case, we are of opinion that it would be unfair to refuse leave to this appellant".

The Court then considered the appellant's ground of appeal and came to the conclusion that the evidence did not establish the guilt of the accused on the required standard. The appeal was therefore allowed and the conviction was quashed.

In the case of ***R v Wotten [1961] NZLR 621*** the appellant applied for leave to appeal against conviction out of time after a delay of three months. In delivering the judgment of the Court of Appeal, Gresson P said at p.621 that the Court is not bound in every case to allow the appeal to proceed on the merits before it can determine whether the delay is such as can be excused. The Court of Appeal then went on to consider the summing up of the trial Judge and the complaint by the appellant against that summing. The Court then came to the conclusion that it had not been shown that there were substantial merits to warrant an extension of time. The application to appeal out of time was therefore dismissed.

In ***R v Ingram [1961] NZLR 777*** the appellant was convicted of housebreaking and theft and was sentenced to two years imprisonment. He then appealed against conviction and that appeal was dismissed. About three months after his appeal against conviction was dismissed, the appellant decided to appeal against his sentence. This appeal against sentence was out of time. In delivering the judgment of the Court of Appeal Gresson P said at p.778 :

> "We desire therefore to state quite plainly that this Court will insist on strict "compliance with the Rules, and whether the appeal, which it is sought to obtain leave "to bring is against conviction or against sentence, leave will not be granted except "where it would be unjust to refuse leave or where there are special and substantial "reasons justifying the delay".

The Court then went on to say than in its opinion the sentence in that case was not excessive and there were no special reasons to warrant granting leave to appeal out of time. Leave to appeal was therefore refused and the application to appeal out of time was dismissed.

All those New Zealand authorities are mentioned and discussed in ***Adams On Criminal Law*** (1992) CA 388.05.01 and CA 388.05.02. At CA 388.05.02 the learned editors of that book state :

> "From the foregoing authorities, it seems clear that the Court, in dealing with an "application for extension, does not usually limit its consideration to the question of "excuse for the delay, but usually has regard also to the merits of the proposed appeal, "the ultimate decision depending on the justice of the case when all factors are taken "into account".

It is clear from section 139(3) of our Criminal Procedure Act 1972 that the Supreme Court has the power to extend the time to appeal after the expiry of the time limit of 14 days provided in section 139(1). Such extension may only be granted where there are reasonable

grounds for the delay and the interests of justice require that an extension ought to be granted. In substance the requirements of section 139(3) are similar to the approach applied in the New Zealand cases I have referred to.

Turning now to the circumstances of this appeal, counsel for the appellant submitted that the appellant has a valid defence of alibi and therefore the interests of justice require that time should be extended for the appellant to appeal out of time. The relevant circumstances if I may reiterate them are these. The appellant was convicted on 18 September 1997 on two charges of overloading under sections 38 and 72(2) of the Road Traffic Ordinance 1960 and was sentenced on the same day to one month imprisonment on each charge. The sentences were made to run concurrently. The charges were dealt with in the absence of the appellant pursuant to section 42(b) of the Criminal Procedure Act 1972. On 8 October 1997 the appellant through his counsel filed a notice of general appeal against conviction. That means the appeal was filed six days outside of the time limit of 14 days prescribed in section 139(1) of the 1972 Act. The notice of appeal was accompanied by two sworn affidavits, one by the appellant and the other by the driver who shares with the appellant the driving of the bus M/O 10185.

In his sworn affidavit the appellant says that he had mistakenly believed that the charges with which he was convicted were to be heard on 19 September together with other charges against him. When he appeared in the Magistrates on 19 September, he was told about the charges with which he had been convicted and sentenced to prison the previous day, 18 September. He also says that he could not have committed the offences with which he had been charged and convicted on 18 September because those offences related to incidents of overloading which occurred on 27 March 1997. But he was not driving the bus number

M/O 10185 on that day. It was his fellow driver Tala Taase who shares the driving of the bus M/O 10185 with him who was driving the bus that day. The charges against him allege that on 27 March 1997, he was driving bus number M/O 10185 while carrying excess passengers.

In his sworn affidavit, Tala Taase says that he and the appellant share in the driving of bus M/O 10185. He also says that on 27 March 1997 it was him and not the appellant who was driving the bus M/O 10185. On that day the said bus was involved in a traffic accident which occurred at Toamua at about 1.00pm. The bus was then taken to the house of the owner and was no longer used until 14 April 1997 after repairs were completed. The driver of the other vehicle which was involved in the said accident had been charged by the police and his case had been scheduled for hearing on 16 October 1997. So Tala Taase says that the appellant could not have been driving the bus M/O 10185 on 27 March particularly in the afternoon of that day.

The evidence that was given for the prosecution at the lower Court was that on 27 March 1997, the appellant was found driving bus M/O 10185 at Savalalo at about 2.00pm. At that time the bus was carrying 24 excess passengers. Then after 3.00pm the same afternoon, the appellant was again found driving the same bus at Fugalei. At that time the bus was carrying 25 excess passengers.

It would appear that if what the appellant and Tala Taase have stated in their sworn affidavits is true then the appellant has a valid defence. Having read those affidavits, I cannot dismiss off-hand what they say as far-fetched or obviously false. However, that evidence was not placed before the lower Court because the appellant did not appear at the hearing of the case against him. It would appear that on the merits of the appeal it would be just to extend

time to appeal. That should be so notwithstanding that there was a delay of six days in filing the appeal. Accordingly leave is granted to bring this appeal out of time and the time for filing the appeal is extended to 8 October 1997 which was the date on which this appeal was lodged with the Court registry.

The second preliminary issue raised by counsel for the respondent is to seek an amendment to the two informations on which the appellant was convicted. The amendment is to substitute the words "a white bus with the words 'Don't Tell Mum' on the side" for the words "a bus number M/O 10185" used in both informations. Counsel for the respondent also submitted that this is a general appeal in terms of section 138(4) of the Criminal Procedure Act 1972 and that section 142(1) provides that all general appeals shall be by way of rehearing. The proviso to section 142(2), as far as relevant, then provides that the Supreme Court may in its discretion rehear the whole or any part of the evidence. Section 142(3), as far as relevant, then provides that the Supreme Court shall have the same jurisdiction as the Magistrates Court, including powers as to amendment, and shall have full discretionary power to hear and receive further evidence, if that further evidence could not in the circumstances have reasonably been adduced at the hearing.

If I understood counsel for the respondent correctly, he is saying that this Court should rehear this case. I accept what counsel for the respondent says that this Court on a general appeal from the Magistrates Court has jurisdiction to rehear the whole or part of the evidence that was adduced at a hearing in the Magistrates Court and to hear and receive further evidence. But that jurisdiction is discretionary. Given the present workload of this Court and the current waiting period for hearing set fixtures, I am, with due respect to counsel for the

respondent and his submission, reluctant to adopt the course of action he has suggested in this appeal.

I can see that if this Court embarks on a rehearing of the whole case, then I will have the power to amend the informations as requested by counsel for the respondent by virtue of the provisions of section 142(3). That seems to be part of the reason why counsel for the respondent desires this appeal to proceed to a rehearing before this Court. For the reasons I have given, I am of the view that if this appeal ends up in a retrial, then in the interests of an early resolution of this matter, the best forum to deal with this matter would be the Magistrates Court where the waiting period is not lengthy. At a retrial the Magistrates Court would have the power to consider and determine the respondent's application for an amendment to the informations.

Counsel for the appellant did object to the amendment sought for the respondent. He said that to amend the informations by substituting the words "a white bus with the words 'Don't Tell Mum' on the side" for the words "a bus number M/O 10185" is not supported by the evidence adduced by the prosecution in the lower Court. It would also be in direct conflict with that evidence because the evidence given by the prosecution at the lower Court was that the bus the appellant was driving at the material times was the bus number M/O 10185. As I have already said, if this appeal were to proceed to a rehearing of the whole case before this Court I would have the power to entertain the respondent's application. But I have decided against a rehearing in this Court.

The third preliminary issue raised by counsel for the respondent is that where alibi is raised as a defence as the appellant in this case has done, this Court should adopt a practice

which is consistent with the requirements of section 367 A of the New Zealand Crimes Act 1961. Section 367 A(1) of the New Zealand Crimes Act 1961 provides :

> "On the trial of any accused person who has been committed for trial, he shall not "without the leave of the Court adduce evidence in support of an alibi unless, before "the expiry of 14 days after the date on which he is so committed, he has given notice "of particulars of the alibi".

Section 367 A(2) then specifies the kind of information that the accused person has to provide in relation to any witness he intends to call to give evidence in support of an alibi. The doubtful question with section 367 A of the New Zealand Crimes Act 1961 is whether it is compatible with Article 9(5) of the Constitution which provides :

> "No person accused of any offence shall be compelled to be a witness against "himself".

It was not argued whether to adopt a requirement in our law which is similar to the requirements of section 367 A of the New Zealand Crimes Act 1961 would stand in view of Article 9(5) of the Constitution. I would prefer to leave the point open for another case because in this case the appellant has, in any event, voluntarily produced detailed affidavits from Tala Taase and himself in support of his alleged alibi. No doubt the appellant has done that for the purpose of persuading this Court that he has a valid defence.

In all then, the Court has answered the preliminary issues raised for the respondent.

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CHIEF JUSTICE

Solicitors:
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