

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 007 OF 2014

BETWEEN : FOOD PACIFIC LIMITED

APPELLANT

AND : LAMI TOWN COUNCIL

RESPONDENT

COUNSEL : Mr V Maharaj for the Appellant
Ms S Nayacalevu for Respondent

Date of Hearing : 19/09/2014

Date of Judgment : 08/12/2014

JUDGMENT

[01] Food Pacific Limited (hereinafter “the appellant”) was charged in the Magistrate Court of Suva with the following offences:

COUNT ONE

Statement of Offence

Failure to cease operating storage of containers from Toti Park: Contrary to Section 7(7) (b) of the Town Planning Act, Cap 139.

Particulars of Offence (a)

Foods (Pacific) Limited on or about 26th day of July 2008 at Lami in the Central Division contravened or failed to comply with the conditions of Lami Town Council, subject to which a temporary approval for ten days, from 17th July 2008 – 26th July 2008, was granted by Lami Town Council to Foods (Pacific) Limited to use Toti Park for the Purpose of storing containers. However, Foods (Pacific) Limited failed to cease their operations from Toti Park after the said ten days of temporary approval had lapsed.

COUNT TWO

Statement of Offence

Obstruction of Street: Contrary to Section 115 (1) (f) of the local Government Act, Cap 125.

Particulars of Offence (b)

Foods (Pacific) Limited from the 26th day of July 2008 at Lami in the Central Division without proper authority placed their containers on Toti Street thereby causing obstruction on Toti Street.

COUNT THREE

Statement of Offence

Interfering with Authorised use of Public-Park: contrary to regulation 19 (1) (f) of the Lami Town By laws, Local Government Act, Cap 125 and regulation 54 of the Lami Town By laws, Local Government Act, Cap 125.

Particulars of Offence

Foods (Pacific) Limited from the 26th day of July 2008 at Lami in the Central Division wilfully interfered with the authorized use of Toti Park by using it as a storage space for its containers and depriving the people of Lami Town from its use as a park thereby causing prejudice to the people of Lami Town.

COUNT FOUR

Statement of Offence

Causing injuries to Street: contrary to Section 115 (1) (g) of the Local Government Act, Cap 125.

Particulars of Offence

Foods (Pacific) Limited between the 26th day of July 2008 and 1st March 2009, at Lami in the Central Division caused injuries to Toti Street and Wailada Road at four different locations being:-

- i. Opposite Lot 24 Toti Street, adjacent to Lot 51 (Toti Park) as the corner of Toti Street and Wailada Road;
- ii. Adjacent to Lot 51 (Toti Park) opposite Lot 32 Wailada Road;
- iii. Adjacent to Lot 51 (Toti Park) opposite Lot 4 at the corner of Wailada Road, and Toti Street on the intersection;
- iv. Adjacent to Lot 30 and 31 Wailada Road and adjacent to Lot 25 Wailada Road;

[02] On 14th October 2013 the Appellant was convicted after trial on counts 1, 2 and 3 but was acquitted on count 4 by the Suva Magistrate Court.

[03] On 25/11/2013 the Appellant was sentenced on the three counts as follows:

- i) Count 1 maximum 1 penalty unit if (\$100.00)
- ii) Count 2 the Appellant was fined 10 penalty units of (\$1000.00)
- iii) Count 3 the Appellant was fined for maximum 2 penalty units of (\$200.00)

[04] The total fine of \$1300.00 was to be paid in one month and in default the Appellant would be subjected to the process of execution for the payment of the same.

[05] Being dissatisfied with the said decision of the Learned Magistrate the Appellant on 18th of December 2013 filed the following appeal grounds against its conviction and the sentence:

GROUNDS OF APPEAL

1. The Learned Magistrate erred in law and in fact in holding that the powers under the provisions of the Town Planning Act was exercisable by the Respondent because exercise of such powers was not subject to the type of tenure over the respective lots;
 - a) Overlooks the clear provisions of S: 12 of the Native Land Trust Act which prohibits any dealing of Native Land and is also unconstitutional.
 - b) Overlooked clear evidence that the land had not been legally vested in the Respondent which is contrary to S: 12 of the Town Planning Act Cap 139 and also contrary to S: 94 of the Local Government Act Cap 125.
 - c) The learned Magistrate finding is contrary to the evidence given by the Director of Town and Country Planning and the respondent in relation to Lot 51.
 - d) The legal validity of the initial approval given by the Respondent to the appellant.
2. (A) The learned Magistrate erred in law and in fact in failing to consider or apply the provision of S: 34 (1) of the Crimes Decree 2009 in light of undisputed evidence that the Native Land Trust Board had granted consent to the appellant to use Lot 51 which was capable of creating a bonafide belief in the appellant that it could use the said lot and therefore not criminally responsible.

(B) Alternatively the consent given by Native Land Trust Board was capable of creating a doubt whether the appellant was criminally liable and that doubt ought to have been exercised in favour of the appellant and acquitted of the charge.
3. The learned Magistrate erred in law and in fact in giving narrow and restricted meaning of the word 'obstruction' which is inconsistent and inappropriate in the circumstances of the case given the appellant's physical location in an industrial area which admittedly failed to keep pace with the developments in the area and thereby wrongly convicted the appellant on Count 2.

Appeal Grounds 01 and 02

- [06] The Appellant submits that the learned Magistrate erred in stating that “exercise of such power was not subject to type of tenure over the respective lots”.
- [07] According to PW2 the Director of Town and Country Planning, Lot 51 Toti Park still belonged to the Traditional Land and Owing Unit and any dealings had to go through the Native Land Trust Board (now the TLTB) and their consent is required. It is not in dispute that no consent was ever obtained by the Minister of Lands nor was Lot 51 ever vested and/ or transferred to Lami Town Council as required by Section 12 (1) of Town Planning Act Cap 139. According to PW2 her Department does not have any knowledge whether Lot 51 was transferred.
- [08] Section 12 (1) of the Native Land Trust Act Cap 134 it states:
- “except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this act alienate or deal with the land comprised in his lease any part thereof by sale, transfer or sublease in any other manner whatsoever, without the consent of the Board as lessor or head lessor first had obtained...”*
- [09] According to PW2 if Lot 51 has not been transferred to Lami Town Council, the said lot is still belonging to NLTB (now TLTB). Therefore Lami Town Council could not claim ownership of Lot 51. Further Lot-51 to be transferred as a re-creational reserve-the Department of Town and Country Planning is not involved in the transfer and it does not have any knowledge whether Lot 51 was transferred.
- [10] As per D6 and D7 the officials from Lami Town Council and NLTB after meeting confirmed that the Lot 51 still remains with NLTB. Therefore, NLTB is the proper authority to commence any legal action against the Appellant. In the circumstances the initial approval given by Lami Town Council becomes illegal as they have not acquired the land to Lami Town Council.
- [11] Defence Exhibit DC (3) clearly confirms that the Lami Town Council had issued the temporary permit to the Appellant without the consent or knowledge of NLTB. By

letter dated 19th November 2008, the NLTB had given its approval for Lot 51 to be leased out to Food Pacific Limited. The two letters mentioned above clearly establishes that the proper authority to deal with Lot 51 is the NLTB and not Lami Town Council. When the Criminal Action No: 356 of 2009 was instituted in the Suva Magistrates' Court, the Lami Town Council was not the proper authority to institute the action against the Appellant.

- [12] In the case of **Nadi Township Board v Sukhraj and Native Land Trust Board** [1971] Supreme Court, 30th March and 13th April 1971 Justice Mammet of the Supreme Court (now High Court) ruled that a local government authority may not institute action to acquire lands for a town planning scheme without prior consent from the Minister to commence proceedings.
- [13] As such, the Appellant succeed his 1st and 2nd grounds of appeal as the initial approval given by Lami Town Council to the Appellant is not legal as no consent was given by NLTB (now TLTB). Therefore the Respondents actions with regards to Toti Park have been invalid.

Appeal ground 03

- [14] The prosecution failed to adduce any evidence from Business houses who allegedly complained about the obstruction to give evidence to support the allegation of Obstruction of Street. The Appellant's factory is built in an industrial area where loading and off-loading of goods happens regularly. Further witnesses called by the prosecution confirmed the other companies to do the same but Appellant's company trucks only obstruct in the process of unloading. According to witness No: 3 the other vehicles still could pass on the road - people could still have access. But no complaints received from the public. In light of above evidence I accept the Appellant's argument that the obstruction is only a "temporary obstruction" and is done out of necessity. Therefore, the Appellant succeed in his 3rd ground of appeal as prosecution failed to prove that the Appellant caused Obstruction of Street.

[15] Therefore, the Appeal against the conviction and sentence is allowed. The sentence in respect of 1-3 counts is set aside. The fines be refunded to the Appellant forthwith.

[16] 30 days to appeal.



P Kumararatnam

JUDGE

At Suva
08/12/2014