IN THE SUPREME COURT OF TONGA
CRIMINAL LAW JURISDICTION
NUKU'ALOFA REGISTRY **CR NO. 1522/98**

REX

-V-

TU'UHEFOHE 'AHOKOVI

BEFORE THE HON. JUSTICE FINNIGAN

Counsel appearing : Mr Havea for Crown, Mrs Taufateau for Accused

Dates of Hearing : 30 September, 1 October 1999
Date of Judgment : 29 October, 1999

REASONS FOR VERDICT OF FINNIGAN, J

On 1 October 1999 after a trial lasting 2 days I acquitted the accused on three charges.

I said then that I would issue in written form the reasons I gave on that day. These are the reasons for that acquittal.

1. There was a voir dire. In the *voir dire* 2 police officers gave evidence. They were Uilisone Finau and Maile Latu. Their evidence was that the defendant had admitted being the offender, and that the statements were voluntarily made. No evidence was called at the *voir dire* to challenge their claim that the admissions made by the accused were voluntary. When it was put to them in cross- examination that the accused had been assaulted while in police custody, Finau had replied that he "refused to answer questions about the assault on the accused," and Latu answered that he had "no answer to that question". The police officers gave other evidence also, about the arrest and detention of the accused. The statements made to the police officers were admitted into evidence after the *voir dire*.

2. The evidence against the accused came from 5 witnesses. Two of them were the police officers. Apart from the statements put in evidence of the 2 police officers, the evidence of none of the witnesses, either by itself or taken with other evidence, positively identified the offender. The accused and his companion gave evidence which added doubt to any

circumstantial evidence that may have implicated the accused. The only evidence that the offender was in fact the accused was the written evidence of the statements said to have been made to the two police officers, and the oral evidence of the two police officers about their interviews with the accused.

3. Having heard the evidence of the police officers, the accused and his father about the circumstances of his arrest and detention I was unwilling to rely on the evidence of the 2 police officers Finau and Latu. I excluded it without hesitation under the proviso to s 22 of the Evidence Act cap 15. This was for two reasons. First, the charges had been drawn up and signed by a Magistrate even before he was taken formally into custody under the warrant of another Magistrate. However he was not charged, he was instead taken into custody for questioning. As well, the statements had been made and recorded without the special caution which is required after a police officer has made up his mind that he has sufficient evidence to charge (see *R –v- Vaiangina* [1990] Tonga Law Report 118). Second, when confronted in cross-examination with the evidence of the accused and his father, both officers were evasive, and both refused outright to answer the questions. I assumed that they were exercising a privilege against self-incrimination. It is clear on the balance of probabilities from the evidence that was put before me that after the summonses were issued in the Magistrates' Court the accused was taken into custody and assaulted while in custody by both police officers before the statements were made.

4. The evidence of the statements included evidence of certain clothing that was described and evidence of a knife. These items had been taken into police custody. All of these items were material to the Crown case, and relevant to evidence given by the other witnesses, some of which, about the clothes, was contradictory. None of them were produced in evidence by the police officers.

5. While the accused was in custody he was visited by his father, who gave evidence that upon seeing the condition of the accused he went to see the Minister of Police. He said he asked the Minister to release the accused for medical treatment, to which the Minister is said to have replied that the matter was not within his authority or power because the accused was under the authority of a Magistrate. The Minister's answer, as reported, brings into focus the part played in this matter by the Magistrate. It appears that the accused was arrested on Friday 6 November 1998 at about 8am. He was drunk. He was identified at that time by the complainant as being the offender, but he denied it. He was taken to and kept in a police cell where he slept, and next he was taken so that an order might be made that he be kept in custody. No need was shown before the Court why he should be in custody. No evidence was given about whether the Magistrate was given any reason. The Magistrate ordered that the police detain him for 24 hours. Some time during that Friday night the accused was questioned and denied the allegations. On the evidence before me, he was assaulted. His

statements were not recorded. During the morning of Saturday, 7 November 1998, he was again questioned, he continued to deny, and on the evidence before me he was assaulted. His denials were not recorded.

Later that day he was taken again to the Magistrate at his home. The only evidence about what occurred there is that of the accused. He said he remained in the police car. He said the 2 police officers spoke to the Magistrate after which the Magistrate called to him that he must return to the police station and remain there until Monday. He was kept that night in a cell and on the morning of the following day Sunday 8 November 1998 he was visited by a lawyer. That afternoon he was again questioned and he made the statements that the police officer Finau produced to the Court.

I am satisfied that the statements are unreliable. I am satisfied that the accused was assaulted in the police station while held under a warrant issued by a Magistrate. The Magistrate may or may not have been aware, but another Magistrate had issued summonses to the accused on the Friday, before the police applied for a warrant. The police were wrong to seek a warrant for a suspect when they already had enough evidence to obtain a summons. They were wrong to question him without making it clear to him that the summonses already issued made further questioning unnecessary and any statement unnecessary and entirely voluntary.

If a Magistrate is not given by the police a sound reason why the Magistrate should deprive the suspect of his liberty, and the Magistrate authorises the police to detain him, then the Magistrate may be liable in damages under S 92 of the Magistrates' Courts Act cap 11. Under the Bail Act 1990 and its amendments, the Magistrate must decline an application for custody unless he is satisfied of certain things that are stated there. Under clauses 1, 9 etc of the Constitution, the suspect is entitled to his liberty unless sound reason is shown to keep him in custody. The Magistrate is the protector of that liberty.

A similar situation occurred as late as June 1999, in a case of an 11 year old boy which the Court recently heard (*R v Sione Malupo*, CR 743/99). The Supreme Court had made these principles clear on more than one occasion well before November 1998 and June 1999. The principles are still being dishonoured, by some police officers and by some Magistrates. The Court has to set its face against abuses of fundamental liberties. The evidence of the accused and of his father in this case is to be transcribed and referred to the Attorney General for consideration of prosecutions of the two officers involved, if prosecution action has not already been commenced independently by the police or the complainant.

NUKU'ALOFA: 29 October, 1999

SUPREME COURT

JUDGE