

IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'LOFA REGISTRY

NO. CR.285/99* 16 Oct/02
& CR.286/99

BETWEEN : REX : Prosecution;
AND : TEVITA TU'UTA FOTU : Accused;
[Case No. 285/99]
AND : MOSESE F. FALEAFA : Accused.
[Case No. 286/99]

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : Mr Semisi Tapueluelu for the Prosecution
: Mr Tu'utafaiva for the Applicants

Date of Hearing : 15th March, 1999
Date of Ruling : 17th March, 1999

RULING

These are two unrelated cases except that the charge in each case is murder and the accused in each has applied for bail.

The position with regard to bail is now covered by the terms of the Bail Act, 1990, as amended. In the case of an unconvicted person, section 3(1) provides the general rule that every person who is arrested or charged with a criminal offence shall be released on bail until the date he is next due to surrender to custody. The rule is subject to the remaining provisions of the Act and, of those, sections 4(1) and (2) deal with the manner in which this rule is to be applied where the offence is punishable with imprisonment.

Section 4(1) repeats the mandatory requirement to grant bail but sets out the grounds on which the court or a police officer may refuse it. Section 4(2) requires the court or police officer when making the decision under subsection (1) to have regard to all the relevant circumstances and makes specific reference to four such matters.

Section 3 (2) provides, however:

“(2) A person charged with murder or treason may be granted bail only by the Supreme Court or Court of Appeal.”

Counsel have addressed me on the meaning and scope of that provision.

Briefly, counsel for the defence suggests that the requirement that such cases may only be dealt with by the higher courts does not remove the mandatory requirements of section 4 (1) when making the decision. Counsel for the prosecution points out that section 3 (2) sets these two offences apart and suggests that excludes them from any mandatory terms in the following section. In support she points out that sections 4 (1) and (2) cover all offences punishable with imprisonment but, whilst these two offences are punishable in this way, they are the only offences in the criminal law which are also punishable by death.

Although there have been many applications for, and grants of, bail in cases of murder since the passing of the Bail Act, it appears this particular point has never been formally determined. The significance of the point is, of course, whether the basic mandatory requirement to grant bail as set out in section 3 (1) and 4 (1) also applies where the court is deciding an application in a case of murder or treason. In other words, does the court in such cases have to follow the position under the rest of the Act and say, "I must grant bail unless..." or is it entitled to say, "I will only exercise my discretion to grant bail if..."

The terms of the Act satisfy me that it was not the purpose of section 3(2) to limit to the higher courts the exercise of exactly the same power as that applied by all courts and the police in every other case. Neither can I see any purpose in such a provision. The general rule set out in section 3(1) states that a person "shall be released" on bail. Similarly, section 4 requires that a person "shall be granted bail unless". Section 3(2) uses the word "may" and it is clear the use of a different word in that subsection was deliberate.

Counsel's suggestion that these two offences carry the death penalty is a reflection only of the fact they are the two most serious offences under the criminal law. That is the reason the Act gives a wider discretion to grant or refuse bail. The court is not bound by the more rigid requirements of the Act as a whole but, because the offences are so serious, the exercise of the power is limited to the higher courts.

Having said that, no court will be blind to the general principles of the Act. As with every discretionary power, the court will only exercise it for a good reason and such reason should be stated. Those reasons may be different from and outside the strictures of the general provisions in the remainder of the Act but, as the liberty of an unconvicted person is involved, the court will always incline towards the grant of bail.

In the case of Fotu, the prosecution case is that he was drinking and was involved in an unprovoked attack on the deceased. Later he returned to the scene with a machete and struck more than one blow at the neck and shoulders of the deceased. He later admitted his part to the police. If that case is proved, the likely sentence the accused will receive is such that I think there is a very high chance he will not answer to his bail. Similarly, I share the concern of the police as stated by counsel for the prosecution, that such an incident leaves a serious risk of reprisal by the deceased's family. The public has a right to be protected from such a risk. The application for bail is refused.

In the case of Faleafa, the prosecution case is that the accused joined two friends who were attacking another by punching him. The victim eventually escaped but had received a stab wound to the neck that severed a vital blood vessel. The accused has denied using a weapon and prosecuting counsel tells the court his case against this accused is based on his participation as an accomplice to the murder.

In his case I consider he will answer to his bail and I see no reason why I should not grant it with strict terms. He will be released on his own recognisance of \$2000.00 and two sureties of \$1000.00 each only one of which may be a member of his immediate family. He will surrender any passport he possesses to the court and he will report to the Police station at Nukunuku every Friday and Saturday between 8.00 and 9.00pm.



Le Wand.

NUKU'ALOFA: 17th March 1999

CHIEF JUSTICE