IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.306/99

BETWEEN : *PAMINI FINAU TAUFA* - *Plaintiff;*

AND : 1. *POLICE DEPARTMENT* - *Defendants.*
2. *LOPAUKAMEA MAGISTRATE*

BEFORE HON JUSTICE FINNIGAN

Counsel: Mr Fifita for applicant, Mr Kefu for respondent.

Date of Hearing: 12 April 2000.

Date of Judgment: 28 April 2000.

JUDGMENT OF FINNIGAN, J

The applicant has filed an application for leave to bring a claim against a Magistrate and against the Ministry of Police. Against those defendants he claims four separate prerogative remedies and damages. He claims also a declaration that s 16 of the Magistrates' Courts Act cap 11 is unconstitutional and a further declaration that the clerks in the Magistrates' Courts are not validly appointed. It must be said that these extensive claims are not well drafted.

Mr Fifita referred me also to *Bradbury v Enfield London B.C.* [1967] WLR 1311, particularly a comment by Lord Denning M.R. at 1324. The statement of the law there reinforces the role of the Court in enforcing statutory obligations. But those obligations themselves are first subject to interpretation, and the case before me is not so much about enforcing the summons procedure as about interpreting it.

The primary claim is that a number of summonses issued against the applicant are void because they are unfair and uncertain. This is said to be so for the reason that they each allege a separate offence without a specific date. Each claims only that the offence charged was committed in 1997. These summonses were issued in October 1998.

On 4 February 1999 I heard and dismissed an appeal against conviction on the charge laid in one of those summonses (CrApp1480/98, oral judgment 4 February 1999). It seemed on the face of the appeal to be a test case. Although not so stated in the notice of appeal, the primary ground of the appeal was that the summons was void for uncertainty. I dismissed the appeal, with reasons.

The record of my reasons is not on the file of that appeal so I shall state them briefly here. I held that the requirement in s 14 of cap 11 for stating "concisely the offence with which the defendant is charged and the time and place at which it was committed" was a requirement for conciseness, not precision. On the authority of *Severo Dossi* [1918] 13 Cr App R 158, a judgment of the Court of Criminal Appeal upon which the Crown had relied, I stated that the precise date is not necessarily a precondition for validity of a summons or a charge. The offence alleged in the case before the magistrate had been alleged to have been committed some time, any time, in the previous year. That was sufficient in my view for putting the defendant on his trial, so long as the summons alleged one specific offence. Amendment in respect of the date and adjournment of the hearing had been possible if the evidence had supplied more or different information. But if it had not, then conviction for the offence was not invalidated by the fact that the summons alleged, and the evidence proved, only a broad period of time during which the alleged offence occurred. Had a certain date been specified in the summons and had the evidence shown another date or an uncertain date, then a conviction could still have been entered.

The secondary ground of that appeal was that the summons had been prepared by a police officer and not by a clerk in the court as set out in s 14 of cap 11. I rejected that ground, for the reason that it is a requirement of administrative practice. I said that the courts have never required precise compliance with procedures such as the identity of a person who performed one subordinate action in a chain of actions when there was otherwise prima facie a valid chain of actions. In the present case, Crown Counsel has referred me to s 9 of the Interpretation Act cap 1. That was not a provision to which I turned my mind during the appeal hearing. Above all it is a provision creating powers, but it seems to me to lay the statutory basis in Tonga for my ruling. Counsel for the applicant cited to me *R v Siaosi Palanite*, Cr 126/93, unrep 28 April 1993. He provided a copy, which is appreciated. In this judgment, at point 5 (p4) the Court approved the police preparation of summonses. It said that the police prosecutors are the agents of the Crown Law office in undertaking prosecutions, which included preparation of the summonses. The Court spoke of standardising the wording of the more common offences, for accuracy. This seems reasonable in respect of prosecutions by the police, who decide what charge to lay. It does not override the procedure in ss 13 and 14 of cap 11.

From these rulings there was no appeal. Instead, the present application was filed for a variety of administrative remedies. Counsel has placed some fine distinctions before me to justify re-litigating the subject matter of the appeal and for avoiding the effect of that appeal on the other similar summonses.

I have not found anything new in the argument which would justify accepting counsel's invitation to rehear the matters that I have already decided. Those are the decisions of the Court on those two issues. I could only re-state them in the present case as the decisions of the Court and I must refuse leave for the application, insofar as it relates to the two issues I decided in the appeal.

Those are not the only issues raised however. I move to the claim that s 16 of the Magistrates' Courts Act cap 11 is contrary to the Constitution cap 2. Counsel relied on *R v Palanite*, (above). The argument is that the Magistrate, by being required to sign a summons and then to adjudicate upon it, becomes judge in his own cause. So the Court said in that case. I take a different view,

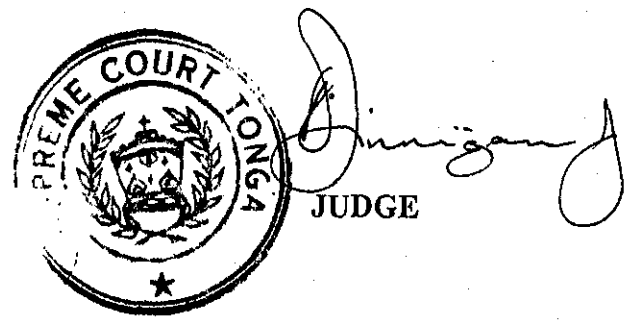
and am satisfied that the magistrate's signature is an administrative act by which the Magistrates' Court issues the summons.

I turn now to the claim that the Magistrates' Court clerks are not validly appointed. This claim rests on evidence, some in affidavit form and some viva voce. The statutory provision is in s 95 of cap 11. The clerks are to be fit persons appointed by the Prime Minister with the consent of Cabinet. I accept it as established that the Prime Minister takes no direct singular role in the assessment of whoever may be fit and the selection of such persons, but the requirement in s.95 is for proper *appointment* of the persons who have been selected. Suffice it to say that I find no ground for holding that the procedures presently used for appointing clerks in the Magistrates' Court do not comply with s 95.

I turn to the claim that the applicant was arrested unlawfully. The claim, if I understand the submission correctly, is that the summonses were invalid *ab initio* and gave no grounds for arrest. I have rejected the submission that the summonses were invalid. The power of arrest in any event rests on the existence of other grounds, such as those in s 21 of the Police Act cap 35. The affidavit evidence of the applicant does not state the events clearly. It is clear that he was arrested and was charged with one offence. His claim is that after being arrested and released in respect of the first alleged offence, he was again arrested "for the same offence and put in police custody where I was questioned on other matters which led to my being charged with all the other charges against me....". His evidence is not specific about the grounds for his second arrest and I can find no reason for holding that he was arrested without authority.

There is one other claim. During his submissions, Mr Fifita counsel for the applicant produced a copy of the transcript of the lower court proceedings in the first charge, i.e. the one from which an appeal was brought. This transcript, both in Tongan and in translation, was before the Court at the hearing of the appeal in February 1999. He submitted that the transcript contains no record that the witnesses were sworn before they gave their evidence, which is true. He relied on *R v Fakatele Taufa*. In that earlier case where there was no record whether the oath had been administered to the witnesses, this Court remitted the matter for rehearing. He submitted that the same course should be followed here. I reject that submission. First, it is too late to introduce that ground of appeal now. Second, it was Mr Fifita who was representing the applicant in those proceedings, and the record shows that from the outset he vigorously raised objections, including some of the arguments that he has subsequently pursued in this court. Had the witnesses been giving their evidence unsworn, I am certain that matter would have been raised before now.

Leave therefore must be refused for the other aspects of the application as well. Costs will follow the event and are awarded to the defendants, to be agreed or taxed.



NUKU'ALOFA, 28 April 2000 **JUDGE**