

## Taufa v Ma'u

Supreme Court, Nuku'alofa

Ward CJ

Criminal Appeal 349/94

26 August, 5 September, 1994

*Appeal - transcript - inaccuracy - later reasons*

*Criminal law - self defence - onus*

*Practice & procedure - magistrates - record kept by clerk*

*Practice & procedure - magistrates - judgment - later reasons*

The appellant appealed against conviction on a charge of assault (brought as a private prosecution).

Held:

1. Self defence was raised; the prosecution had to disprove it; the magistrate did not mention self defence at all, in convicting the appellant.
2. The magistrate twelve days later wrote a judgment (3 days after the appeal was filed).
3. Such a procedure was wrong. The proceedings in a case finishes at the time sentence is passed. The finding of guilt is made at the time judgment is delivered, the magistrate then having the duty to briefly state the issues and his findings and determine the matter on the evidence.
4. A document written after the proceedings have been concluded should not be included in the transcript forwarded to the Supreme Court if an appeal is filed; if such a document is included it will not be considered on appeal.
5. If, on appeal inaccuracy of the transcript is suggested the appellant should supply affidavit evidence of the suggested inaccuracy.
6. A magistrate has a duty to ensure a record is properly and correctly kept by the clerk in his Court, and that all essential procedural matters, such as the taking of the oath by witnesses are included. Here there was no reference in the record to any witness having been sworn.
7. New trial ordered.

Statutes referred to : Magistrates' Court Act, ss.71, 77

Appellant in person

Counsel for respondent : Mr Kengike

### Judgment

On 16th February 1994, the appellant appeared before the Mu'a Magistrates' Court charged with assaulting 'One Ma'u. It was a private prosecution and he was charged with causing bodily harm contrary to section 107 and common assault contrary to section 112. (part of judgment as to other complaints against the Magistrate are omitted).

The original grounds of appeal related to the Magistrate's findings of fact. There was evidence on which he could make such findings and this Court will not interfere.

Two grounds remain:

- 60 1. The defence was self defence in this case and the Magistrate did not properly consider the defence or the burden on the prosecution to disprove it.
2. The record is defective in many respects and therefore does not fairly record events at the Court and omits any essential steps in the proceedings.
  1. The appellant did raise self defence in the lower court. As such, he was entitled to have it considered by the Magistrate. Once raised, the burden rests firmly on the prosecution to disprove it.

The record of the Magistrate's finding relates to the dispute whether or not a blow landed on the complainant's neck. It then concludes -

- 70 \*If the strike missed it will still be the same as a strike that landed and he would still be guilty. In summing up this case the court finds beyond reasonable doubt that the accused is guilty\*.

There is no mention there of self defence at all.

In accordance, this Court was told, with a practice of many years, the Magistrate subsequently wrote a judgment twelve days after the trial and three days after the appeal was filed.

I asked counsel for the respondent from where such a procedure was derived. He was unable to provide me with any such information. Clearly such a procedure is wrong and must cease immediately. The proceedings in the case finishes at the time sentence is passed. The finding of guilt is made at the time judgment is delivered. At that time, the Magistrate's duty is to determine the matter on the evidence. In order to do so, he must state, briefly, the issues and his findings at the time he makes the determination.

Section 77 of this Magistrates Court Act requires the clerk, once an appeal is filed, to forward to this Court a correct transcript of all proceedings in the case in the Magistrates Court. A document written after the proceedings have been concluded should not be included and, if it is, will not be considered by this Court on appeal.

- 90 2. The complaint against the record as stated in the grounds of appeal is that it is inaccurate. Where inaccuracy is suggested, the appellant should supply affidavit evidence of the suggested inaccuracy. Without it, this Court is unable to consider anything beyond the record itself.

However, at the hearing of the appeal the appellant raised a far more fundamental problem. Taking the record as it stands, there is no reference to any witness having been sworn. Section 71 of the Magistrates' Courts Act requires the evidence of every witness to be on oath. It is a mandatory requirement. The record of proceedings must show that such requirements have been complied with. The sole basis on which this Court can discover what happened in the lower Court is to read the record. If something is not there,

this Court can only assume it did not occur.

According to the record, it appears the correct procedures were not carried out. Mr Kengike tells this Court from the bar table the evidence was on oath but that is not evidence and it is not for the appellate court to fill in omissions by assuming the procedure in the lower court was correct.

The record is kept by the clerk but it is the Magistrate's duty to ensure it is properly and completely kept and, in particular, that all essential procedural matters are included.

110 This Court cannot be satisfied the case was properly conducted and the appeal must be allowed.

The orders of the Court below are quashed and the case is remitted to the Magistrates' Court for trial de novo on both charges before a different Magistrate.