IN THE SUPREME COURT OF TONGA CA.NO.102/99

CRIMINAL APPEAL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : STEVE BOURKE - **Appellant;**

AND : POLICE - **Respondent.**

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Laki Niu for the Appellant
Mrs Taumoepeau for the Respondent

Date of hearing : 27 May 1999
Date of judgment: 8 June 1999

JUDGMENT

During the night of 14 November 1998, Angahaki Valu was struck by a motor vehicle and killed. The appellant, Steve Bourke, was also injured as a result of the same accident and was admitted to hospital.

Police inquiries into the incident caused them to suspect that the appellant was the driver of the vehicle that struck Valu. He was asked by telephone to come to the police station for questioning in relation to the traffic incident and the death of Valu. He attended the police station in response to that request in the morning of 25 January 1999.

At 10.00am the police arrested him without warrant and charged him with manslaughter by negligence. Shortly after that the appellant was taken before a magistrate and the court was asked to remand him in custody for two days. The magistrate then remanded the appellant in custody until 10.00am on 27 January. Whilst the record of the proceeding is not clear, it appears to be common ground that the reason the police sought the remand in custody was to question the appellant further about the offence with which he had been charged.

That afternoon, at 3.30, a notice of appeal was filed against the order to remand in custody together with an application for bail pending the appeal. At the hearing, the prosecution asked for the remand to continue in the same terms. The record shows the magistrate replied to that request: "Yes, I believe the application by the prosecution is reasonable because the

offences caused death." When counsel for the appellant asked again for bail, the prosecutor objected on the same ground that "the offence caused death".

The magistrate then purported to recall his own earlier judgment. The record quotes him as saying:

"I order that the order that Steve Bourke is to be kept in custody until the Preliminary Inquiry on the 27 January is recalled. Steve was arrested at 9.00 hours today. After you have dealt with him within 24 hours he should be released and you can make an application to bail him out. That is what you should do and that is the application that you should make."

The appellant appeals against both decisions. There were, he says, no proper grounds upon which to remand him in custody and the magistrate had no power to recall his own decision.

There is no challenge to the right of the officer to arrest without a warrant in this case and it appears that was not an issue at the magistrates' court. The duty of the police, once such an arrest is made, is set out clearly in section 22 of the Police Act, Cap 35:

"22. (1) A police officer making an arrest without a warrant shall, without unnecessary delay and subject to any provisions under any Act as to bail or recognizance, take or send the person arrested before a magistrate there to be charged or before a police officer of the rank of a sergeant or above or before the officer in charge of the police station. (2) If it is not practicable to bring the person arrested before a magistrate having jurisdiction within 24 hours after he has been so taken into custody, the police officer of the rank of sergeant or above or the police officer in charge of the police station shall inquire into the case and shall grant or withhold bail in accordance with the Bail Act 1990"

The officer properly complied with the section and took the appellant to the magistrate very soon after the arrest and charge.

Section 22 has been described more than once in the Court of Appeal as a safeguard of the rights of a citizen by ensuring that, in any case where the citizen's right of liberty is impugned, it is only done in strict compliance with the law.

The magistrate is involved in the process in order to protect the citizen. Whenever a person is brought before a magistrate under the provisions of section 22, the magistrate's duty is to ensure that he is properly arrested and then to consider whether any application to hold that person in custody is made on proper grounds. Those grounds must accord with the terms of the Bail Act.

Under that Act, every person who is arrested for or charged with a criminal offence shall be released on bail subject only to the provisions of the Act.

Section 4 provides that, where the offence is punishable with imprisonment the court or the police officer can only refuse bail if it or he is satisfied that:

> "(i) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will.
>
> (a) fail to surrender to custody;

(b) commit an offence while on bail; or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(ii) he should be kept in custody for his own protection or welfare;

(iii) the case has been adjourned for inquiries which it would be impracticable to make unless the defendant is kept in custody;

(iv) he is already in custody pursuant to a sentence of a court; or

(v) he has already been released on bail in connection with the present proceedings and has been arrested pursuant to section 9 of this Act."

In the case of Fifita and Edwards v Fakafanua, Appeal 6/98, the Court of Appeal dealt with section 22 in relation to the requirement that the person be taken before a magistrate without unnecessary delay. In the present case, as I have already stated, the police observed those requirements properly. What is deeply disturbing is that, once the case was before the magistrate, instead of dealing with the person arrested in accordance with the Bail Act, he chose to deprive the appellant of his liberty on some ground apparently dreamed up simply to allow the police to hold the appellant for questioning. In so doing he not only failed to follow the Act but he clearly had no regard for the true reason why section 22 required the person to be brought before him in the first place. Far from safeguarding the citizen's rights, he appears to have seen his role simply to confirm a request by the police to hold the appellant unlawfully.

Counsel for the respondent suggested that the Court of Appeal in Fifita's case had cited with approval the comment by the Royal Commission on Criminal Procedure in England and Wales that "arrest for the purpose of using the period of detention to dispel or confirm reasonable suspicion by questioning the suspect or seeking further evidence with his assistance is well established as one of the primary purposes of detention upon arrest". That passage forms part of the comments of Lord Diplock in the English case of Holgate-Mohammed v Duke (1984) 1 All ER 1054 quoted by the learned judges of appeal but they did not accept that such a suggestion applied here.

They pointed to the cases of Soakai v Taulua and others, Appeal 6/93, and Kingdom of Tonga v Finau, in 1993, which show that section 22(1) gives the police no right to delay taking the person arrested to the magistrate in order to continue questioning him. In Fifita's case they state:

> "What section 22 insists must be done "without unnecessary delay" is not the interrogation of an arrested suspect, but his taking before a magistrate. There is no warrant for reading the provision as if it referred to the practicability of interrogation. Delay caused by a desire to ask questions is not authorized by the section; indeed, the bringing of the person arrested before a magistrate as soon as practicable is the safeguard for the citizen the legislature has chosen to provide.

> In our opinion, it is not right to say that no questions may be asked by police about the offence of which an arrested person is suspected. A few simple questions may resolve some doubt and even lead to the immediate release of the suspect. But the safeguard requiring that the arrested person be brought before a magistrate without unnecessary delay is primary, and must be fully observed".

As I have said, the police complied with the requirements of the section but then, it appears, asked for the detention of the appellant for improper reasons. I do not suggest that was done with any intention to ignore the law. Cases such as this have been coming before this Court far too frequently and the police officer was following what appears to have become a common procedure. The magistrate should have refused his request. Instead he allowed it and, in so doing, failed to carry out the duty placed on him by the Act.

As recently as March this year, Finnigan J in the case of R v Soakai, 29/99 warned:

> "It is quite wrong for either the police or a magistrate to consider the role of a magistrate as permitting the police to hold citizens in custody for the sole purpose of permitting the police to carry out "routine moves". There must be a reason shown by the police for the need to detain a suspect during their enquiries. It is grossly wrong for the police to be authorised by a magistrate to hold a suspect ... for interview without special reason being shown for that."

I respectfully agree and would only add that the reasons the police claim as make detention of an arrested person necessary must accord with the provisions of the Bail Act.

At the subsequent hearing of the application for bail pending appeal, the magistrate took an even more extraordinary step. He refused the application but then, apparently on his own motion, purported to recall his own decision and halve the period of detention.

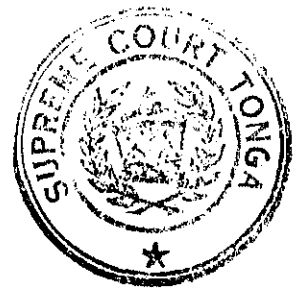
Not only was this wrong but it was done for no apparent reason other than that a notice of appeal had been filed. The police were asking for the original order to be maintained. The appellant was asking for his immediate release pending appeal. Nobody was asking for the period to be halved and no reasons were given by the magistrate for his action.

The result of this has been that the accused was held overnight when he should not have been. Having looked to the magistrate to protect his rights, he found the magistrate ignoring them and making an order that permitted the police to act outside the provisions of the Bail Act.

With the possible exception of calling back a case during the same session in order to correct an error, once a court has pronounced a decision, it is functus officio and has no right to alter it. Correction on alteration is for an appellate court.

By the time this appeal came before the court, the appellant had been released. Counsel for the appellant asked to continue with the appeal because he felt that an important principle was involved. He was right so to do. The purported recall by the magistrate of his decision would, otherwise, have ensured the first order he had made would escape the scrutiny of this Court.

The appeal is allowed. No order is sought or, indeed, is necessary. The appeal was to correct the decision of the magistrate for the reasons I have just stated. In the circumstances, I feel the appellant should also have his costs.



NUKU'ALOFA, 8 June, 1999. **CHIEF JUSTICE**