

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

AM 05 of 2012

BETWEEN : POLICE - Appellant

AND : MAMANA LEHA'ULI - Respondent

BEFORE THE HON. JUSTICE CATO

**Mr Sisifa for the appellant
Mr Pouono for the respondent**

J U D G M E N T

This is an unusual appeal.

The respondent had been charged with reckless driving contrary to s 25(1) of the Traffic Act, and also drunken driving contrary to section 25(2) (b) of the Traffic Act

On the 29th February 2012 he appeared in person (unrepresented in the Magistrates Court and pleaded not guilty to both offences. The allegation was that at about 9pm on the 26th October 2011, he had left a drinking party and collided with another vehicle whilst driving home. He did not stop his vehicle but continued home. He was located a few minutes later by the police at his residence where he was arrested and taken to Central Police Station where he was breath tested. He was then charged.

On the same days as he appear and pleaded not guilty a summary hearing was held. The appellant called a police officer as a witness for the prosecution. At the close of the prosecution case, the respondent gave sworn evidence. Having

APPELLATE JURISDICTION

NUKU'ALOFA REGISTRY

considered the evidence, the magistrate convicted the respondent on criminal summons 56/12 but acquitted him on 57/12 because in his view;

1. There was insufficient evidence to prove the charge beyond a reasonable doubt.
2. The prosecution failed to prove beyond a reasonable doubt the time and place where the collision took place.
3. The prosecution failed to prove beyond a reasonable doubt when the Accused was arrested from his residence.

The appellant contended that the Magistrate had failed to consider the whole of the prosecution case and in particular had dismissed the charge on the wrong basis. There was contended evidence as to the time and place where the collision took place; there was evidence as to the time when the respondent was arrested and there was evidence that he was drunk whilst driving the vehicle.

In particular the Crown contends that certain documentary evidence adduced in evidence were central to the prosecution. These were the record of interview, the statement of charges and the breathalyser record. Taken together, there was ample evidence to support the charge of drunken driving.

The prosecution had to contend with an incomplete record. The available transcript recorded only that PC Manu read out prosecution documents, there is no specific reference as to what they were nor details of what the witness read out.

The transcript was the subject of a supplementary affidavit from the police prosecutor that he had got Constable Manu to read out the documents, and also these were duly tendered as exhibits by the prosecution.

The Crown cited the judgment of Ward CJ in *Taufa- v- Ma'u* [1994] Tonga LR 97 to the effect that where an 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.

Having tendered a supplementary affidavit the Crown contended that the Magistrate completely overlooked central aspects of the prosecution case as contained within the documentary evidence. As such the Magistrate had dismissed the charge upon a completely wrong assessment of the evidence.

At the commencement of the hearing Mr Pouono initially objected to the supplementary material. I indicated that I intended to follow the approach taken by the Chief Justice in *Taufa*. I suggested to him that if his client did not accept the content of the supplementary affidavit, then the correct approach was to have a hearing on this issue first. That would require Mr Pouono to tender any affidavit in opposition that his client wanted to tender and also adjourn the case to enable deponents to be called. Mr Pouono then said he would not challenge the evidence and that he could not then object to the appeal being upheld and the matter remitted back to the Magistrate with a direction that he determines the charge on the basis of all the available evidence which included the documents.

In my view, this was an appropriate approach for Mr Pouono to take. Having seen copies of the various documents I formed the view that there was ample evidence supporting a conviction for drunken driving.

I gave some thought to determining the matter myself under s 80 of the Magistrates Court Act. However, I consider that the matter should be determined by the Magistrate by way of a rehearing of this matter where the original exhibits were. However, I indicated to both parties that in the event of a conviction I did not think in view of the way that the matter had proceeded that any further monetary penalty should be ordered, because in a sense the respondent having been acquitted albeit incorrectly it would seem none the less has been exposed to a further hearing in this Court and a second trial.

It was my view that the public interest would be sufficiently served if after hearing all the evidence the Magistrate should decide to convict, a conviction was entered without further monetary penalty being imposed. There is in a sense an element of double jeopardy about Crown appeals especially from acquittals.

IN THE SUPREME COURT OF TONGA

AM 05 of 2012

APPELLATE JURISDICTION

NUKU'ALOFA REGISTRY

Mr Sisifa indicated that whereas the Crown does not ordinarily appeal acquittals, it did so in this case because drunken driving is a matter the public has a special interest in and because there was so obviously evidence to support a conviction including the respondents' admission to this effect. I indicated I agreed with the Crown's approach.

I therefore remit the case under s 80 of the Magistrates Court Act, for consideration by way of a rehearing on the whole of the evidence including any documentary evidence tendered by the prosecution.

I further order that in the event of a conviction being entered for drunken driving no further monetary penalty should be imposed.



[Handwritten signature]

JUDGE

DATED: 29 JUNE 2012