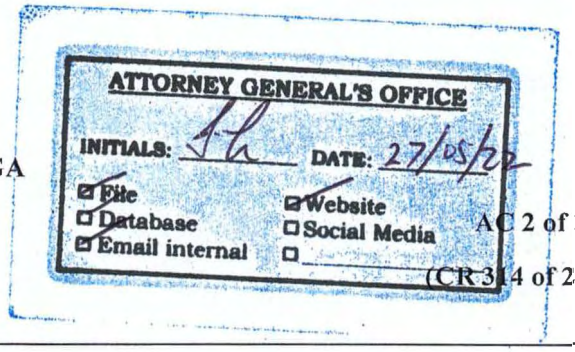

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 2 of 2022
(CR 314 of 2020)

BETWEEN	**ATTORNEY-GENERAL**
	Appellant
AND	**SIAOSI BROWN**
	Respondent

Court:	Whitten P Randerson J Hansen J
Counsel:	Mr J. Lutui DPP with Mr J. Fifita for the Appellant Mr D. Corbett for Respondent
Hearing:	17 May 2022
Judgment:	19 May 2022

JUDGMENT OF THE COURT

Introduction

[1] The Attorney-General has been granted leave to appeal a pre-trial ruling by former Acting Lord Chief Justice 'Afeaki holding that an admission made in a police interview by the respondent, Mr Brown, was inadmissible by reason of inducements offered by the police.

[2] In brief, the police carried out a search on 26 April 2020 of a house owned by Mr Brown's uncle, Mr Ngaue. It is not in dispute that Mr Ngaue occupied one bedroom in the property and another was occupied by Mr Brown and his partner, Ms Ramsay. The police

located 222gms of cannabis in the bedroom occupied by Mr Brown and Ms Ramsay and a small quantity of cannabis was also found in Mr Ngaue's bedroom. He claimed all of the cannabis in the house was his.

[3] Both Mr Brown and Ms Ramsay were arrested and held in police custody from the date of the search until Mr Brown was interviewed three days later on 29 April. During that interview, the police case is that Mr Brown made an admission in respect of the cannabis found despite having denied it was his at the time of his arrest.

[4] At a voir dire hearing to determine the admissibility of Crown evidence, Mr Brown alleged that inducements offered by the police on two separate occasions led to his making the confession. He argued through counsel that the admission was not voluntary and ought to be excluded from evidence at trial. The substance of the alleged inducement was that Ms Ramsay would be released if Mr Brown admitted to possession of the cannabis. Ms Ramsay was seven months pregnant at the time of the arrests.

[5] After Mr Brown was interviewed, Ms Ramsay was interviewed the following day on 30 April. She was then taken to Court and released on bail. The Police have not proceeded with any charge against her. We were informed that the DPP, not the Police, took this decision.

Grounds for appeal

[6] The Attorney-General challenges the ruling made by the Acting Lord Chief Justice on three grounds:

(a) Failing to take into consideration breaches by the respondent of the rule in *Browne v Dunn;*[1]

(b) Departing from the central issues and taking into consideration irrelevant evidence; and

(c) Making findings that were contrary to the evidence.

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1 *Browne v Dunn* (1894) The Reports 67 HL.

[7] The essence of the Attorney General's argument on the first ground is that counsel for Mr Brown did not properly put to the relevant police officers the details of the inducement alleged. To explain this a little further, Mr Brown alleged there were inducements offered by the police on two separate occasions. First, he alleged that the officer in charge, Detective Inspector Malolo Vi offered the inducement around the time of the arrest that if Mr Brown confessed to possession of the cannabis, Ms Ramsay would not be charged. Second, that Detective Hakolo offered the inducement at the commencement of his formal interview on 29 April that Ms Ramsay would be released if he confessed to possession of the cannabis.

The ruling under appeal

[8] The Acting Lord Chief Justice had two issues before him. The first related to the lawfulness of the search undertaken and the second related to the admissibility of Mr Brown's admission in his police interview. On the first issue, it was held that a determination should be made at trial and we are not concerned with that issue.

[9] The voir dire was conducted over nearly four and a half days. The Crown called seven police witnesses including the impugned officers while Mr Brown and Ms Ramsay gave evidence themselves along with another person who had also been detained at the Central Police Station at the same time. A substantial focus of the defence evidence was that Ms Ramsay claimed to have been subjected to an attempted sexual assault by another prisoner in a bathroom associated with the cells at the police station.

[10] The police officers against whom the inducement allegations were made all denied the allegations. Officer 'Otuhouma, who kept a handwritten police diary of actions relating to events at the time of the arrest, said her diary did not refer to any inducement. She accepted however that it might have been said and she did not hear it. There was no evidence to support the account given by Mr Brown and Ms Ramsay nor any record kept by the police of any complaint about that matter.

[11] The Judge recorded that Mr Brown's evidence was that Officer Vi first offered the inducement to him as the police were taking them from their home to the Central Police Station cells although this does not accord with our reading of the transcript.[2] The details of how this

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[2] At [51].

allegation was put to Officer Vi are central to the Attorney General's first ground of appeal and are discussed further below. The Judge also recorded Mr Brown's evidence that he was told by Detective Hakolo at the commencement of the interview on 29 April that Ms Ramsay would be set free if he confessed.[3] The Acting Lord Chief Justice also noted that Detective Hakolo and Detective Vainikolo (who was also present) both denied the allegation and that there was no record of any such remarks in the handwritten notes made at the time.

[12] A principal focus of the Judge's concerns seems to have been his view that there was a failure by the Police to offer special or proper care to Ms Ramsay as a pregnant woman despite Mr Brown's evidence that he was assured she would receive special care. Much of this part of the judgment[4] is a catalogue of concerns expressed by the Judge about the way in which Ms Ramsay was treated in the period of several days after the arrest and before the formal interview of Mr Brown on 29 April. These concerns ranged from cell doors being left open, both male and female prisoners occupying an open lockup area and common toilets and bathrooms, and the lack of even basic medical attention for Ms Ramsay. The Judge went into some detail about the allegation by Ms Ramsay that she was subjected to a form of attempted sexual assault while she was seated on a toilet in a cubicle. Our review of the evidence does not suggest there was any physical contact but there was a degree of corroboration of this allegation from the detainee who was present in the cell block and heard the commotion at the time. The Judge found that the lack of care was unacceptable.[5] The Judge also noted that Mr Brown had complained to duty officers in the cell block but he claimed nothing had been done about the complaints.

[13] The Judge made inquiries about the availability of surveillance video footage but was informed that, by the time of the voir dire, any such footage was no longer available. The Judge also made inquiries about the existence of police diaries held at Central Police Station. While the CPS prison cell block diary was produced, a second diary known as the CPS prison station diary for the relevant period could not be located by the police. The Judge was highly critical of this situation which he regarded as "unacceptable conduct" by the police.[6]

[14] The Acting Lord Chief Justice then recorded his findings to this point in these terms:

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3 At [84].
4 At [52] et seq.
5 At [62].
6 At [72].

[75] The Court can find nothing commendable about the Police's treatment of Ms Ramsay.

[76] The Court finds it suspicious that important official records of the relevant time cannot be located such as the CPS Prison Station Diary. The inference reasonably drawn by the Court is that in these circumstances exists evidence of purposefully Police-generated pressure on this couple over a series of days in increasingly worrisome conditions, especially for Ms Ramsay, which supports the allegation of their inducement of Mr Brown to confess to possessing the cannabis in return for their arranging the release of his partner.

[77] When asked why it took three days until firstly Mr Brown was formally interviewed on 29 April and subsequently the next day being four days until Ms Ramsey was formally interviewed on 30 April, the police witness response was that they were busy with their work. The Court is not satisfied with that explanation especially given Ms Ramsey's advanced pregnancy and the risks associated with her being imprisoned. The combined effect of this evidence places serious doubt upon the overall credibility of the Police conduct, their procedures in the search operation, their treatment of the accused and his partner and in particular provides a significant question about the integrity of Mr Brown's admission as being voluntary in the circumstances.

[78] The police as the enforcement arm of the executive have the entire resource of the State behind them and must use that privilege properly in all ways, at all times. They have a duty to uphold not only the law but also the highest standards of professionalism, honesty, and dignity of processes which affect all citizens of our beloved Tonga.

[15] The Judge then went on to discuss ss 21 and 22 of the *Evidence Act* and relevant authorities. He held[7] that the Crown needed to prove beyond reasonable doubt that any confession obtained from an accused person was given voluntarily and not as a result of an inducement, threat or promise relating to the charge. As well, the Court had a general discretion to exclude any confession made to a police officer while that accused person was in custody. In that respect, the Judge noted that Mr Brown and Ms Ramsay had been held in custody for four days.

[16] The Judge then recorded his findings in these terms:

[84] As a result, the Court must be satisfied beyond a reasonable doubt that the confession is voluntary. Given the circumstances provided in evidence

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7 At [81].

> when applied to sections 21 and 22 of the Evidence Act and consideration of principles enunciated by case law, the Court finds that Mr Brown's admission was not voluntary and was induced by the Police promises that they would arrange to set free his heavily pregnant partner, which they in fact did the day after. The Court finds that his confession is therefore unsafe and inadmissible.
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> [85] The Court also finds that even had the Police statements not been excluded under section 21 of the Evidence Act they would have been disallowed pursuant to the proviso to section 22 of that Act.

First ground of appeal

[17] It is submitted for the Attorney General that the respondent breached the rule in *Browne v Dunn* by:

(a) not putting to Officer Vi that he had offered an inducement to the respondent while his bedroom was being searched; and

(b) Failing to ask Detective Hakalo whether he had prior knowledge about the conditions of the prison cells, Ms Ramsay's pregnancy and the alleged sexual assault while in custody.

[18] We have reviewed the transcript to the extent it is relevant to both these grounds of appeal. Dealing with the inducement said to have been made by Detective Vi, there can be no doubt that the instructions given by Mr Brown to his counsel shifted during the course of the hearing. Mr Corbett, on Mr Brown's behalf, opened in the Court below by saying the inducement made by Officer Vi occurred just before Mr Brown and Ms Ramsay were taken to the cells. But in their evidence, both Mr Brown and Ms Ramsay said they were told at the house that the only way for Ms Ramsay to be released was if Mr Brown admitted the cannabis was his. Officer Vi denied throughout that any such inducement of the kind alleged had been made but, as we discuss below, he gave an account that may have been misunderstood by Mr Brown. It was put to the officer in cross-examination that the alleged inducement was made at the end of the search and before Mr Brown and Ms Ramsay were taken into custody. It was also put to Officer Vi that Mr Brown and Ms Ramsay were not in the bedroom where the drugs were found when the search of the room was conducted. The officer denied these suggestions.

[19] The ground shifted somewhat when Officer 'Otuhouma gave evidence. As noted earlier, she maintained a police diary relating to events at the time of the search. Her diary did not record any reference to an inducement of the kind alleged and she maintained she did not hear any such inducement. For the first time, it was put to Officer 'Otuhouma that the inducement was not made at the end of the search (as put to Officer Vi) but rather when the bedroom occupied by Mr Brown and Ms Ramsay was searched. It was put to Officer 'Otuhouma that she was present in the bedroom recording exhibits and that both Mr Brown and Ms Ramsay were also present at the time.

[20] Counsel for the Police raised an objection based on *Browne v Dunn*. While the Court indicated that Officer Vi might have to be recalled, no application was made and the officer was not recalled at any stage.

[21] Having reviewed the transcript on this point, our assessment is that the Crown was not materially prejudiced by the way in which Mr Brown's allegations were put to Officer Vi. He was very clear in his evidence from the outset that he did not at any time make any inducement of the kind alleged. Rather, his consistent evidence was that Mr Brown had raised with him Ms Ramsay's pregnancy and asked if she could be saved if he (Mr Brown) admitted the drugs belonged to him. The officer's evidence was that he responded that this was entirely a matter for Mr Brown but both he and Ms Ramsay would have to be brought to the police station. He repeated evidence to that effect in cross-examination, adding that he told Mr Brown that both of them would have to be charged and they would both be remanded.

[22] While it was not put to Officer Vi that the inducement was offered in the bedroom while the search was being undertaken (but instead had happened after the two were arrested), in our view, it was most unlikely that the officer's evidence denying the alleged inducement would have been any different. We observe, as well, that the Crown could have applied to recall Officer Vi if the point was thought to be material, but did not do so. The more important point is the Acting Lord Chief Justice's approach to the evidence overall including the striking absence of any explicit credibility findings on the inducement issue or any explanation about why he apparently accepted the evidence of Mr Brown and Ms Ramsay in preference to that of the Police officers. We deal with this in more detail below.

[23] The second alleged inducement at the police station at the commencement of the interview with Mr Brown, on 29 April, was firmly denied in evidence by both Detective Hakolo and Detective Sergeant Vainikolo who was also present when the interview was conducted. Detective Hakolo also stated that he had no prior knowledge of either Mr Brown or Ms Ramsay and that, during the interview, he was unaware of her pregnancy or any alleged attempted sexual assault. He said the first he was aware of that allegation was when Mr Brown referred to it as part of his handwritten notes made at the end of the interview after he had made his admission.

[24] The Attorney General submitted that it was incumbent on Mr Brown to put to Detective Hakolo the conditions and circumstances under which Mr Brown and Ms Ramsay had been remanded in custody "in order for the inducement to be operative within the mind of Hakolo prior to the record of interview". It was argued that none of this was put to Detective Hakolo. Given that the Acting Lord Chief Justice premised his findings[8] on Mr Brown's evidence that was not put to the officer during cross-examination, counsel submitted that the failure to put these matters to the officer was a further breach of the rule in *Browne v Dunn.*

[25] We are not persuaded there was any material breach of the rule in *Browne v Dunn* in relation to the respondent's questioning of Detective Hakolo. The essence of the allegation of inducement, and when it was made, was plainly put, and in the light of the detective's evidence that he was not aware of any of the circumstances under which Mr Brown and Ms Ramsay had been held in custody, he could not have provided any further assistance to the Court on that issue.

[26] We conclude that the first ground of appeal based on alleged breaches of the rule in *Browne v Dunn* must be rejected.

Taking into consideration irrelevant matters

[27] The Attorney General submitted that the Acting Lord Chief Justice had departed from the central issue of the alleged inducement and had instead considered at great length and taken into account evidence of Ms Ramsay's condition, the alleged attempted sexual assault, the conditions in the cells and the missing police station diary, that had no bearing on the primary

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[8] At [59].

issue. It was said that consideration of these issues had resulted in the Judge's erroneous conclusion[9] that:

> The inference reasonably drawn by the Court is that in these circumstances exists evidence of purposefully Police-generated pressure on this couple over a series of days in increasingly worrisome conditions, especially for Ms Ramsay, which supports the allegation of their inducement of Mr Brown to confess to possessing the cannabis in return for their arranging the release of his partner.

[28] There can be little doubt that the concerns expressed by the Judge were genuinely and legitimately raised. The fact that there was a delay of three days before Mr Brown was interviewed was unfortunate and was only explained by evidence that the Police were busy at the time. However, the central task of the Judge was to reach conclusions on the application of ss 21 and 22 of the *Evidence Act*, which provide:

> **Confession caused by inducement etc.; not admissible.**
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> **21**. No evidence shall be given of any confession in any criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise relating to the charge, and proceeding either from the prosecutor or from some other person having authority over the accused person and sufficient in the opinion of the Court to afford the accused person reasonable grounds for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in regard to the proceeding against him:
>
> Provided that where any fact has been discovered as the result of information contained in any such confession evidence may be given of such fact and of so much of the confession as strictly relates to such fact.
>
> **When confessions are admissible.**
>
> **22.** It shall be no objection to the admissibility in evidence of a confession that it was made-
>
> *(a)* under a promise of secrecy; or
>
> *(b)* in consequence of a deception practised on the accused person for the purpose of obtaining such confession; or
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> *(c)* when the person making it was drunk; or
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> *(d)* in answer to questions which the person making the confession need not have answered; or

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9 At [76].

> *(e)* without any warning having been given to the person making it that he was not bound to make such a confession and that evidence of it might be given against him:
>
> Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession.

[29] In the circumstances of this case, the key questions arising for determination were:

(a) whether, in terms of s 21 of the *Evidence Act*, either or both the impugned officers made the inducement alleged;

(b) whether the confession was caused by any such inducement and was sufficient in the opinion of the Court to afford Mr Brown reasonable grounds for supposing that by making the confession, he would gain any advantage or avoid any temporal evil in regard to the proceeding against him; and

(c) whether, in terms of the proviso to s 22, there were grounds upon which the Court might exercise its discretion to refuse to admit the confession.

[30] It is not in dispute that it is for the Crown to show beyond reasonable doubt that the confession was voluntary.[10] Our assessment is that the Judge's concerns about the custodial treatment of Ms Ramsay and the adequacy of Police procedures and record keeping, while genuine and proper, led him to place undue weight on the circumstances and events during the period while the two were in custody, with the result that he failed to focus on the real issues for determination as we have defined them. Of course, the issues during the custodial period could only have been relevant to the second alleged inducement and not to the prior events at the time of arrest and the inducement said to have been made then.

[31] At issue was whether Mr Brown's statement was made on a voluntary basis. There is nothing to suggest that the circumstances in which Mr Brown was held in custody had any bearing on that issue. While we accept that Mr Brown may well have been influenced by concerns about Ms Ramsay's condition and the allegation of an attempted sexual assault, the

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[10] *R v Lolohea* [2004] Tonga LR 50; *Police v Anthony Latu* [2016] TOSC 26 and *R v McGuin* [1982] 1 NZLR 13 at 19–22.

real question was whether an inducement was made in terms of s 21 of the Evidence Act. We now turn to that issue.

Rulings contrary to the evidence

[32] As the argument was developed before us, Mr Lutui for the Attorney General accepted that the issue was whether, in the face of a direct conflict of evidence, the Court below was obliged to make a clear finding of credibility for the purpose of determining whether the alleged inducement was made either at the time of the arrest or subsequently at the time of Mr Brown's interview.

[33] We have concluded that it was essential for the Court below to make clear findings of credibility as between the relevant police officers and Mr Brown and Ms Ramsay and to explain the reasons for the findings. Regrettably, there are no direct findings of credibility expressed in the judgment of the Court below nor any explanation by the Judge about why he seems implicitly to have preferred the evidence of Mr Brown and Ms Ramsay. Certainly, there was a finding[11] that Mr Brown's admission was not voluntary and was induced by the Police promises that they would arrange to set free his heavily pregnant partner and a finding that the confession was unsafe and inadmissible, but these findings are essentially conclusory and fall well short of the obligation to make clear findings on the evidence supported by reasons for those findings.

[34] It was necessary first for the Judge to decide whether he believed the evidence of Detective Vi or that of Mr Brown and Ms Ramsay about what was said at the time of arrest at the house. The judgment below does not reveal any consideration on this point, including the detective's evidence that the issue of Ms Ramsay's position was raised, but not in the terms Mr Brown referred to in his evidence. There was a genuine issue here about whether Mr Brown may have misinterpreted the detective's advice that whether he chose to admit the cannabis was his was entirely a matter for him. This important evidence is not mentioned in the judgment.

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[11] At [84].

[35] As to the second alleged inducement, there was a plain conflict of evidence between the two detectives conducting the interview and Mr Brown's evidence. Again, a clear finding of credibility with reasons was required, but is not expressed in the judgment below.

[36] We add that it was not sufficient for the Court below to harbour suspicions about matters such as missing police records or to base its conclusions on perceived shortcomings in police processes unless they bore materially on the inducement issue or could have been relevant to the proviso under s 22. Further, we are unable to accept there was any proper basis for the Court to infer the existence of evidence of deliberately generated pressure by the Police on Mr Brown and Ms Ramsay, or any basis, other than the inducement if found, to exclude the evidence under the proviso to s 22. We note too that there was no allegation of duress.

Result

[37] We allow the appeal and set aside the ruling under appeal. The proceeding is remitted to the Court below. It will be a matter for the Respondent to decide whether to pursue the admissibility issue.

Whitten P

Randerson J

Hansen J

COURT OF APPEAL TONGA