

- s. 12 Magistrate Court Act - election of trial by jury under
- clause 11, 99 Constitution
- election only at Supreme Court.

IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

APPEAL NO.10/00

BETWEEN : **CHRISTOPHER ANTONE THOMAS PEDRAS**

- **Appellant**

AND : **REX**

- **Respondent**

Coram : Ward CJ
 : Tompkins J
 : Beaumont J

Counsel : Mr Niu for appellant
 : Mr Pouono for respondent

Date of hearing : 11 July 2000.

Date of judgment: 21st July 2000.

Judgment of the Court

The appellant has been charged with four indictable offences, contrary to provisions of the Criminal Offences and Immigration Acts. He was committed for trial in the Supreme Court by the Nuku'alofa magistrate on 19 April 2000. At that hearing, the magistrate in accordance with the requirements of section 12 of the Magistrates' Courts Act, asked whether he wished to be tried by a judge of the Supreme Court alone or by a judge and jury. His counsel indicated that the trial would be by judge alone.

By the time the appellant appeared in the Supreme Court for his arraignment on 31 May 2000, he was represented by different counsel. The appellant entered a plea of not guilty to all counts and sought to change his election to trial by judge and jury. The trial Judge refused the application on the ground that the election had already been exercised in the Magistrates' Court and that he had been represented by counsel at that time.

This appeal is against that refusal.

At the hearing of the appeal, counsel for the respondent did not seek to oppose the appeal and, having heard Mr Niu for the appellant, we stated the appeal would be allowed and we would give brief written reasons later. We now do so.

It is clear from a note written by the Judge and included in the appeal file that he accepted he had jurisdiction to hear an application to change the election but refused it on the basis that it had already been exercised. He did not accept the election could be changed at that stage as of right. The main thrust of Mr Niu's case is that the right to elect the mode of trial, in fact, only arises in the Supreme Court.

The right to elect trial by jury is set out in clauses 11 and 99 of the Constitution.

Clause 11 provides that no person shall be tried for an indictable offence unless he has first received an indictment and continues:

"But whoever shall be indicted for any offence if he shall so elect shall be tried by jury..."

Clause 99 states:

"Any person committed for trial before the Supreme Court.... shall if he shall so elect be tried by jury..."

We consider that both those clauses intend the election should take place in the Supreme Court. The use of the past tense in the reference to any person "committed" in clause 99 and the requirement, in clause 11, for an indictment which would not be preferred until after committal, point to such an intention.

The Constitution is the supreme law and section 12 of the Magistrates' Courts Act must be read subject to it. In those circumstances we consider that the requirement that the committing magistrate should ask whether the accused elects trial by judge or judge and jury is purely advisory. The actual right of election arises only once the accused appears before the Supreme Court.

The appeal is allowed. The order of the Judge made on 31 May 2000 is quashed and the case remitted to the Supreme Court with a direction that the accused be asked to elect.

G. Ward

.....
WARD CJ



R. A. P.
.....
TOMPkins J

T. A. P.
.....
BEAUMONT J