

2. The facts are that on 27 August 2012 the respondent was driving in an easterly direction on Wellington Road, Kolomotu'a. Wellington Road and Vaha'akolo Road meet at a cross intersection. While the respondent was crossing the intersection a vehicle being driven by another motorist (who I shall for convenience refer to as 'the complainant') travelling in a southerly direction along Vaha'akolo Road collided with the left side of the respondent's vehicle. The vehicles were damaged in the collision.
3. It is agreed that the intersection should have been controlled by a stop sign requiring motorists on Wellington Road to stop and give way. The traffic signs had either been removed or were obscured so that they could not be seen. There were no relevant road markings.
4. The respondent was charged with an offence under Section 25(1) of the Traffic Act which at the relevant time provided as follows:¹

'Every person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for the

¹ The section was amended by the Traffic (Amendment) Act 2012 which took effect from 21 November 2012 after the events giving rise to the laying of the complaint.

persons using the road is guilty of an offence against this Act.....'

5. The respondent defended the charge and there was a hearing. At the hearing evidence was given by the complainant and Ms. Melita Havea who was working for the Traffic Department and attended the accident. The respondent did not give evidence or call any witnesses.
6. At the conclusion of the hearing the Magistrate dismissed the complaint. The Police have appealed that decision. At the hearing before me I heard submissions for Mr. Kefu SC for the Police and also from Mr. Fakahua for the respondent.

The Court's approach to appeals

7. The hearing of this appeal proceeded on the evidence forwarded by the Clerk of the Magistrate's Court. Appeals from the Magistrate are to be decided upon their merits. I am not bound by the findings of fact of the Magistrate. I note however that I am sitting as a court of appeal and in an appeal function I must recognize that the onus is

upon the appellant to satisfy me that the decision below is wrong. I also recognise that the Magistrate had the benefit that I do not have of seeing and hearing the witnesses give their evidence. I should not readily depart from the Magistrate's findings of fact unless he has '*gone off the tracks*'.

The merits of the appeal

8. The thrust of Mr. Kefu's submissions before me was that the Magistrate was wrong to find that the respondent was not at fault when she did not stop at the intersection because there was no stop sign at the intersection. What the Magistrate said was:

'There was no road sign and I take into account counsel's submission. The Act clearly points out that there must be a road sign to indicate to the drivers on the road to exercise due care and attention.'

9. I understood Mr. Kefu to acknowledge that regulation 20(4)(a) of the Traffic Regulations would suggest at first glance that the respondent had the right of way. He submitted, correctly in my view, that that did not relieve the respondent of the obligation to be attentive, take due

care and exercise reasonable consideration for other road users when entering the intersection.

10. Mr. Kefu referred me to *Takatau v Masoe* [2001] Tonga LR 116 which was a civil case arising out of a traffic accident. The case has some similarities to this case to the extent that stop signs had been removed from an intersection and the defendant, who ostensibly had right of way, was found to have caused the accident by not taking due care. Ford J said at page 118:

'The pole standing on its own should have alerted the defendant to the fact that it was a controlled crossing and, had he looked, the defendant would have seen the reverse side of the compulsory stop sign across the road and he should have been able to instantly work out that he was required to stop before entering theintersection'

11. While *Takatu* is a civil case where a different standard of proof applied and facts that are not on all fours with this case I think it illustrates the point that Mr. Kefu was making. The Magistrate's comment that "*The Act clearly points out that there must be a road*

sign to indicate to the drivers on the road to exercise due care and attention” is clearly wrong in my view. The Magistrate had to consider whether in fact the respondent took due care and it appears from the decision that he failed to do so. Regulation 20(4) is just one factor, albeit an important one, that is relevant to that enquiry.

12. While that in my view is enough to deal with the appeal I note some further matters that have confirmed in my mind that the appeal must be allowed. It appears that the Magistrate may have proceeded on the mistaken belief that the charge was driving in a reckless manner which is a different and more serious offence under Section 25(2) of Act. There is no analysis of the requirements of Section 25(1) in the decision but the Magistrate does conclude *‘That the accused was reckless is not true’*. The concept of recklessness relates to Section 25(2) not Section 25(1).
13. There are also some unexplained contradictory findings of fact in the decision. By way of example the Magistrate says in relation to the complainant that *‘she exercised due care and attention’* but later *‘It is clear that you did not exercise your due care’*.

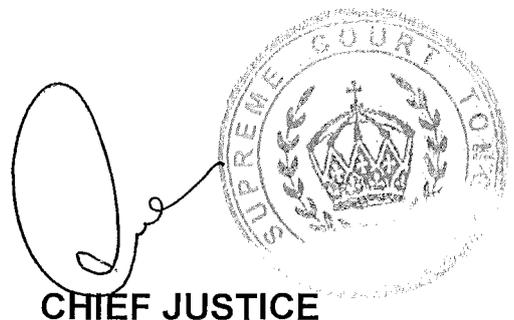
14. Surprising was the Magistrate's acceptance of the respondent's statement to the Police that she did not stop at the intersection. She did not give evidence and the evidence of the respondent was to the contrary. Whether the Magistrate was entitled to accept the respondent's statement as evidence on this issue is a matter of some legal complexity that I need not decide. However, one would have expected some explanation for the Magistrate's categorical acceptance of the statement on such a pivotal matter.
15. Mr. Fakahua submitted that that complaint was not proved as the record of interview, charge form (which I take to mean the summons) and notice of intention to prosecute were not tendered in evidence. I do not accept that the prosecution is required to always tender the record of interview into evidence and Mr. Fakahua referred me to no authority for that. In any event the transcript shows that the record of interview was put into evidence.
16. As to the summons and notice of intention to prosecute I understand Mr. Fakahua argues that no conviction could be entered against the respondent as there was no evidence of compliance with Sections 28(1), (2) or (3) of the Traffic Act. The short answer to that

submission is found in Section 28(3)(b) which provides that the requirements of the section '*shall, in every case be deemed to have been complied with unless and until the contrary is proved*'. In this case the respondent called no evidence of non-compliance. I reject this argument.

The Result

17. The appeal is dismissed.
18. Mr. Kefu submitted that the case should be remitted for rehearing in the Magistrate's Court and I consider that is the appropriate course. The rehearing should be before a different Magistrate.

Dated: 6 February 2015.



CHIEF JUSTICE

The image shows a handwritten signature in black ink, which is a stylized, cursive representation of the name 'W. G. O. Ombija'. To the right of the signature is a circular official seal. The seal features a central emblem with a crown and a cross, surrounded by a wreath. The words 'SUPREME COURT KENYA' are inscribed around the perimeter of the seal.

b. Paragraph 17 should read 'The appeal is allowed'.

Dated: 10 February 2015.


CHIEF JUSTICE

The seal of the Supreme Court of Tonga is circular. It features a central shield with a crown on top, surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal.