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15/08/14

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

AM 35 of 2013

BETWEEN: DIRECTOR OF PUBLIC PROSECUTIONS

- Appellant

AND: PAULA FALEVAI

- Respondent

J. Lutui for the Appellant
S. Fa'otusia for the Respondent

JUDGMENT

[1] In this matter the DPP appeals against a Magistrate's decision to allow two prosecution witnesses to be recalled for further cross examination at the request of the defence after the close of the prosecution's case.

[2] The procedure for the examination, cross examination and re-examination of witnesses is laid down in Section 138 et seq. of the Evidence Act (Cap 15). As is clear from these provisions the normal rule is that once a party has closed its case further evidence on behalf of that party is excluded. Section 142 however allows the Court to

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permit a witness to be recalled for further questioning. The point for decision is what principles are to be followed before permitting such a recall.

[3] As pointed out by Hewart LCJ in *R v Liddle* (1928) 21 Cr. App. R3, 13 an enquiry will "wander on indefinitely" if the power to order recall is exercised too liberally. It is for this reason that the Courts have held that it should only be exercised where something has arisen during the course of the trial that could not have been forseen, something usually described as having risen ex *improviso*.

[4] In my opinion, in all the circumstances found in the Islands this principle is too narrow. It is not unknown for misunderstandings by counsel or client to lead to relevant questions not being put. This cannot be in the interests of justice.

[5] The decision to allow a witness to be recalled is a discretion which must be correctly applied. If having heard the application to recall and any objections thereto, the Magistrate is of the opinion that it is in the interests of justice that the recall be allowed, reasons for the decision should be recorded.

[6] In the present case the application was made, apparently without any explanation being offered in support, was objected to by the Crown and was peremptorily allowed.

[7] In my opinion the Magistrate erred by allowing the recall without beforehand hearing argument and giving his reasons for allowing the application.

Result:

The appeal is allowed. The matter is transferred back to the Magistrate's Court for the application to be re-heard and for the continuation and completion of the trial as soon as possible.

DATED: 25 July 2014.

CHIEF JUSTICE

N. Tu'uholoaki
25/7/2014.