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BETWEEN: POLICE - Appellant

AND : YI FU YU - Respondent

'A. Kefu S.C. for the Appellant  
W. Edwards for the Respondent

**JUDGMENT**

1. The Respondent was charged with murder. During the course of committal proceedings an application was made to the Magistrate pursuant to Section 118(6) of the Tonga Police Act for an order that the Respondent provide a body sample. The Magistrate refused the order. He ruled:

“To order a person to give a body sample that might be used against him in a trial is akin to compelling a witness to give evidence that may be used against him” [contrary to Section 137 of the Evidence Act – Cap 15].

This is an appeal against the Magistrate’s ruling.

2. Section 137 of the Evidence Act provides that (with exceptions not relevant in this appeal):

“A witness shall not be compelled to answer any question which would tend to expose the witness to a criminal charge or to a penalty or forfeiture”.

3. This provision is consistent with Clause 14 of the Constitution which reads:

“No one shall be intimidated into giving evidence against himself ...”.

4. In very helpful written submissions Mr Kefu referred to *Saunders v United Kingdom* (1997) 23 EHRR 313 and *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 in which both the European Court of Human Rights and the High Court of Australia distinguished between the protection against being forced to give oral evidence and the non-existence of a similar protection against the provision of materials including body samples or documents which have an existence independent of the will of the suspect.
5. These decisions were preceded by *Apicella* [1986] 82 Cr. App. R in which the English Court of Appeal held that there is no rule of law that the evidence of anything taken from a suspect, be it body fluid, a hair or an article hidden in an orifice of the body could not be admitted unless the suspect consented to the taking.

6. Mr Edwards very fairly conceded that in the light of authority the Magistrate's ruling could not be sustained. He however asked that the matter be remitted for further consideration of whether the circumstances were such that the making of an order could be justified (see Section 118(4)). Mr Kefu did not oppose this request.

Result:

1. The appeal is allowed. The ruling of the Magistrate refusing to make a Section 118(6)(b) order is set aside;
2. It is declared that Section 118(6)(b) of the Police Act does not breach either Section 137 of the Police Act nor Clause 14 of the Constitution;
3. The Application for an order is remitted to the Magistrate for re-consideration in the light of this ruling and any other submissions advanced by the parties;
4. Applications under Section 118(6)(b) should in future be heard inter-partes after reasonable notice given by the Applicant.



CHIEF JUSTICE

**DATED: 13 June 2014.**

N. Tu'uholoaki  
13/6/2014.