

1 Crown  
**IN THE SUPREME COURT OF TONGA**  
**APPELLANT JURISDICTION**  
**NUKU'ALOFA REGISTRY**

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AM 39 of 2013

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02/04/14

**BETWEEN: XIAN YIN HUANG - Appellant**

**AND: POLICE - Respondent**

**BEFORE THE HON. JUSTICE CATO**

Mr. Pouono for the Appellant  
Ms. Moa for the Respondent

**J U D G M E N T**

[1] The appellant pleaded not guilty to reckless driving causing bodily injury contrary to section 25(1) of the Traffic Act, 1988. He was convicted after a short trial in which the complainant and two other witnesses were called by the prosecution. He did not cross-examine any of the witnesses and nor did he give evidence or call evidence. Compensation was ordered of \$3000 to be paid within one month or to serve in default three months imprisonment.

[2] The evidence briefly was that the appellant had been driving along the Taufa'ahau road north when, according to the complainant, who was an elderly man riding a bicycle, the appellant turned to the left in front of him into Vaha'akolo Road. According to the complainant, he was hit and forced off his bike. He was taken to hospital where he had remained he said until the hearing. He was unable to stand or now go to the

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bush. The appellant, in a record of interview, had said to the police that he denied doing any wrong. He had said he had stopped to allow a car moving south to turn right into Vaha'akolo road and had done so because he was headed to Pahu. He then saw, in the mirror, that a man had fallen on the road so he turned and stopped on the roadside. He said the man, when he had passed him, was on the road side not on the crossroad.

[3] I was informed the appellant, who was unrepresented at trial, is Chinese and does not understand Tonga very well. There was I am advised, however, by Mr Pouono, a Chinese interpreter available in Court. His objection to the conviction is that the appellant was denied due process. Mr Pouono submitted that;

- i. the Magistrate had not explained to the defendant in Chinese, before the trial, the procedure for trial that would take place.
- ii. he had not explained to the defendant that he was entitled to cross-examine prosecution witnesses and given an opportunity to do so.
- iii. he could elect to give evidence and call evidence or remain silent or make an unsworn statement, at the end of the prosecution case.
- iv. he had not asked whether the defendant consented to a doctor's report being admitted into evidence before it was admitted; nor did

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he ask the defendant whether he wanted to challenge any aspect of it.

[4] Mr Pouono contended that these were all important matters that should have been explained to an unrepresented defendant. Ms Moa for the Crown, in her submissions, accepted essentially that these submissions were correct.

[5] I have examined the record and there is no indication from the translation that any of the matters referred to by Mr Pouono were explained to the defendant. The only question asked of the complainant was one by the Magistrate himself as to whether the complainant had been hit by the defendant to which he had replied "it hit me because I overtook him, and I fell down as he passed away from me. He came and apologised for what he had done." This seems at variance with what the defendant had said in his record of interview, but it formed part of the reasoning of the Magistrate that the driver had turned left and collided with the bicycle that the complainant was riding causing him to fall down.

[6] It is fundamentally important for a fair trial that unrepresented defendants are given explanations as to the following;

v. The procedure of trial;

vi. The opportunity to cross-examine prosecution witnesses;

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- vii. The election to testify or not on oath and call witnesses, and or give an unsworn statement.
- viii. Whether evidence that would otherwise be a hearsay document could be admitted by consent, or whether there is anything that the defendant wishes to challenge in the document. It follows that any document the defendant does not understand would also have to be translated for the defendant's understanding before it could be admitted into evidence.

[7] If these procedures are not carried out, as appeared to be the case here, then a trial cannot be said to be a fair trial. Where a legal aid scheme is not in existence, as is the case in Tonga, many defendants have no basic knowledge of trial procedure. It is, accordingly, incumbent on Magistrates to ensure that these procedures are clearly explained and that the defendant understands before a trial commences. This must mean also that in a trial where the defendant is not Tongan that the Magistrate is satisfied that the defendant sufficiently understands Tongan so as to be able to meaningfully engage in his or her trial before the trial commences. Otherwise, that trial should be adjourned until an appropriate interpreter is available.

[8] In this case, having read the transcript, I consider that the defendant was not afforded any or sufficient

explanation, and so the trial miscarried. I accordingly quash the conviction and remit the matter for a new trial to be held in the Magistrate's Court.

- [9] I also note that the Magistrate imposed compensation of \$3000.00. Both counsel agreed that under section 34 of the Traffic Act, the maximum that could be ordered by way of compensation for an offence under section 24 and 25 of the Traffic Act was \$500.00.

**DATED: 1 APRIL 2014**



*[Handwritten signature]*  
**JUDGE**