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IN THE SUPREME COURT OF TONGA **AM 12 of 2013**

APPELLATE JURISDICTION **[MC, CR 900/2013]**

NUKU'ALOFA REGISTRY

BETWEEN: KALISI FATAI - Appellant

AND : POLICE - Respondent

Mrs. P. Tupou for the Appellant

S. Sisifa for the Respondent

JUDGMENT

1. This is an appeal against a conviction entered against the Appellant in Fasi Magistrate's Court on 17 April 2004. The Appellant had been charged with obstruction of the road contrary to Sections 37(b) and 41 (2) of the Traffic Act (Cap 156).

2. The Appellant pleaded not guilty and a trial was held. At the conclusion of the prosecution's case, Mrs. Tupou advised the Magistrate:

> "I seek permission to make a motion and if my motion is rejected then I will call my witnesses."

As recorded, the submission was very brief:

> "I submit there is no case to answer because this is a criminal case and the prosecutor has not been able to prove his charge."

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In answer, the prosecutor was equally brief:

> "The prosecutor believes he has already done his job in proving the charge through the witnesses who have already [given] evidence this morning."

3. Given the very broad nature of these submissions, it is not altogether surprising that the magistrate, rather than rule on the no case submission proceeded to judgment. In taking that step he fell into error, conceded by Mr. Sisifa. This was a fatal procedural error and the appeal must be allowed.

4. It may be helpful to explain the place and purpose of a submission of " no case to answer" since no reference is made to such a submission either in section 24 (and especially section 24 (5)) of the Magistrate's Courts Act (Cap 11) or in the Tongan Magistrates' Bench Book (Part J defended hearings).

5. As provided in section 24 (4) and (5), after an accused has pleaded not guilty, the magistrate then proceeds to hear the evidence against the accused. What is not included in the statutory procedure is the right of an accused, at the close of the prosecution case, and before any evidence is called on his behalf, to submit that there is no case for him to answer.

6. When a submission of no case to answer is made, the accused, or when represented, his counsel, should explain in detail why the submission is being made. After hearing from the defence, the prosecution should be given an opportunity to answer.

7. In Practice Direction 3 March 1962 [1962] I W.L.R 227, the Lord Chief Justice of England and Wales explained that magistrates should be guided by the following considerations:

> "A submission that there is no case to answer may properly be made and upheld:
>
> (a) When there has been no evidence to prove an essential element in the alleged offence; or
>
> (b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
>
> Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

8. Where the magistrate finds either of these tests to be satisfied he will explain why in his ruling and then acquit. Where however he is not satisfied with the submission then he should simply rule against it, without giving reasons. All that should be said is "I find that there is a case for the accused to answer and reject the submission."

9. If a submission of no case to answer is upheld, that is the end of the case against the accused. Where, however, the submission is rejected, the accused should be given an opportunity to present his own evidence and the case proceeds to its conclusion and judgment as provided for in sections 24 (6) to (9) of the Act.

Result:

1. Appeal allowed.
2. Matter remitted for re-trial before a different magistrate.

DATED: 9 August 2013. **CHIEF JUSTICE**

E. Takataka
9/8/2013