To C.J.

IN THE SUPREME COURT OF TONGA
CRIMINAL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY **Cr. App. 12/2000**

BETWEEN : KALISI TUKUAFU : ***Appellant;***

A N D : POLICE : ***Respondent:***

BEFORE THE HON MR JUSTICE FORD

COUNSEL : Mr Kengike for the Appellant
Mr Tapueluelu for the Respondent

Date of Hearing : 27 October, 2000
Date of Judgment : 9 November, 2000

JUDGMENT

The appellant, Kalisi Tukuafu, was convicted in the Magistrates Court at 'Eua on 24 May 2000 on charges of being drunk in a public place and of abusive language in a public place. He appeals against conviction.

As part of his appeal, the appellant applied for leave to call fresh evidence from a Mr Anitoni Vailea. The appellant had subpoenaed Mr Vailea to attend the Magistrates Court when the case was called but he had not been served with the subpoena and so he did not turn up for the hearing.

The application was opposed by the Crown and I heard submissions from both counsel. The appellant's argument was that when the subpoena was issued on 22 May the police prosecutor had kept the subpoena himself rather than hand it over to one of his colleagues to serve on the witness and that he (the prosecutor) had intentionally not served the subpoena on Mr Vailea because he had not wanted him to be available as a witness for the appellant in the case the police were bringing against him on 24 May.

The Crown opposed the application principally upon the ground that the record shows that at the hearing, when counsel for the appellant told the learned Magistrate that he had subpoenaed another witness who had not turned up, the Magistrate offered counsel the opportunity to have the case adjourned but counsel declined the opportunity and advised the Court that he elected to close his case.

While the Court is always reluctant to admit fresh evidence of a witness when counsel has made a deliberate decision not to call him, the present case does not quite fall into that category. Here the appellant says that he would have called Mr Vailea and the only reason he did not do so was because the police prosecutor had not served the subpoena upon him and so he was unavailable to be called.

Section 79 of the Magistrates' Courts Act allows the Supreme Court in its discretion to admit fresh evidence on the hearing of an appeal if good cause is shown.

After hearing the submissions I concluded that, given the serious nature of the appellant's unproven allegations against the police, it was expedient, in the interests of justice, that I should hear the fresh evidence from Mr Vailea and I made an order accordingly.

The police case against the appellant is that he was drunk and using abusive language in a street in downtown Ohonua in the early hours of the morning. He was, therefore, arrested and handcuffed to a power pole outside the TCF store.

The appellant gave evidence and he denied he was drunk and he denied that he had used abusive language in the street. The appellant's case is that after finishing his work as DJ at a local disco at about 3a.m. he attended a kava party in the local hall. He says that he had consumed only one cup of kava and he and one, Toio Lauteau, were sitting together at the kava party when Constable Latiu came into the hall and, without giving any reasons, handcuffed the appellant and Latiu together. After a period the Constable released Toio but he took the appellant over and handcuffed him to the power pole outside the TCF store.

The appellant called a witness who had noticed him hand-cuffed to the power pole on his way to work that morning and he (the witness)had gone to the Police Station to get the police to come and unlock the appellant. He called another witness who had been working with the appellant at the disco and he said employees were prohibited from drinking on duty and the appellant was not drunk when he had finished work at about 3 a.m. that morning.

Toio Lauteau was called as a witness by the police. He confirmed Constable Latiu's evidence. He said that the appellant was very drunk; that he had 100 cups to drink and that he was using abusive language to the police.

Clearly there was a major credibility issue for the Magistrate to determine. Both sides could not be right. The learned Magistrate seemed to be fully aware of the significance of Toio's evidence. In his decision, he concluded:

"Toio proved that the Accused was drunk and also was using insulting words and the Court believed him."

Normally, that would be the end of the matter on the issue of credibility. The Court has said many times that it will not interfere when a magistrate has made a finding on the facts unless it is clearly unsound. The principle is well summed up in the following extract from the head-note to the report of the speeches of the House of Lords in Watt or Thomas v. Thomas [1947] A. C. 484.

> *"When a question of fact has been tried by a judge without a jury and it is not suggested that he had misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound."*

That brings us to the fresh evidence of Mr Vailea.

One of the claims made by the appellant was that he was sitting at the kava party alongside Toio when Constable Latiu came in and, for no reason, handcuffed the two of them together. He handcuffed one of the appellant's hands and one of Toio's hands. That proposition was put to Toio in cross-examination, however, and he denied it. He said that he was not locked to the appellant. He said he was never locked together with the appellant. The Magistrate obviously believed that statement.

Mr Vailea's fresh evidence was directly relevant to this aspect of the case. He said that he was playing music at the kava party which finished about 4 a.m. and he can remember Constable Latiu coming in and handcuffing one of the appellant's hands and one of Toio's hands and he said that the appellant had not done anything before the officer handcuffed him. Mr Vailea said that Constable Latiu then released Toio but left the appellant handcuffed and then he (Constable Latiu) left the hall. After that, Mr Vailea left the kava party and went home. He did not see how the appellant came to be handcuffed to the power pole.

I formed the view that Mr Vailea's evidence was relevant and credible and that it should have been before the learned Magistrate when the case against the appellant was heard.

The appellant had advanced other grounds of appeal but in my judgment, none of them established any error of law or material irregularity on the part of the learned Magistrate.

In all the circumstances, however, I am satisfied that it is in the interests of justice to order a [illegible] Court. Accordingly, the appeal [illegible] the appellant in the Court below on 24 May 2000 are quashed and the case is remitted to the Magistrate' Court for trial *de novo* on both charges. Every

effort should be made to h case heard at the next session of the Magistrates' Court at 'Eua commencing on 20 November, 2000 when I understand a different Mag strate will be presiding. I also make an order that the prosecution of the re-trial be handled by someone other than the original police prosecutor.

I make no order as to costs.

NUKU'ALOFA: 9 November, 2000

J.

JUDGE