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

AM 4 of 2015

BETWEEN: POLICE - Appellant

AND: ANTHONY LATU - Respondent

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Aho for the Crown
Mr Niu for the Respondent

JUDGMENT ON APPEAL

[1] This was a Crown appeal brought against the determination of Senior Magistrate Mafi in his enhanced jurisdiction dismissing charges against the respondent for possession of drugs namely cannabis and one charge of cultivation contrary to the Illicit Drugs Control Act. The Appeal raised some interesting issues.

[2] At the conclusion of the case, counsel for the appellant, Mr Niu SC, submitted there was no case to answer because the prosecutor, Mr Aho, had not tendered in evidence an analyst's certificate confirming that the material located and forming the basis of the charges was cannabis. In a helpful memorandum filed on appeal, Mr Aho conceded that he had inadvertently omitted to file the certificate but relied on well-known authority to the effect that a prima facie case can be established from admission made by the accused in a record of interview so long as there is a foundation for a court to find that the defendant had

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personal knowledge that the material or substance was an illicit or prohibited drug. Mr Aho, in a comprehensive and well-crafted memorandum, cited inter alia Archbold (2004 edition) at para 26-23 to 26-24 as well as a large number of supporting cases from other jurisdictions, including one I was familiar with Police v Coward [1976] 2 NZLR 86 per Roper J.; also R v Cruse [1989] 2 NZLR 279 (NZ, CA)

- [3] Mr Niu SC also filed a memorandum in which he contended that the record of interview had been the subject of a challenge as to its voluntariness. I asked Counsel to comment upon this before turning to the issue of the validity of Mr Aho's point, namely that the record of interview contained telling admissions that the material located by police was cannabis with which the defendant was concerned. Mr Aho acknowledged that Mr Niu had cross-examined a witness on the issue of voluntariness, but the record of interview he said had been tendered first without objection. Where there is questioning on an issue of voluntariness, at any stage in a trial, a judge or magistrate should be satisfied that the record of interview is voluntary and that the Prosecution has negatived any complaint of duress, threat or unlawful inducement beyond a reasonable doubt. This is because a document containing a confession is such an important aspect of a criminal trial that its integrity must be assured to a very high standard. See R v McGuin [1982] 1 NZLR 13, and the illuminating discussion of McMullin J at 19-22 preferring the English approach of the criminal standard rather than the civil standard of proof that is applied in Australia. Although Mr Niu SC may not have formally objected to the admissibility of the record of interview, this being a Judge alone case, the nature of his questioning had the effect of putting this in issue. As such the record of interview became only conditionally admissible, and in the light of the questioning by defence counsel, a ruling by Senior Magistrate Mafi was required on the admissibility of the document. MacPherson v The Queen (1981) 147 CLR 512 at 523,

per Gibbs CJ and Wilson J (High Court of Australia); also R v Wallbank [1996] 1 Qd R 78 McPherson concerned an unrepresented defendant, but I see no difference in principle where a defendant is represented. The Court must be satisfied beyond a reasonable doubt that the confession is voluntary, no matter when that arises at trial. I inquired and was told that there had been no ruling on this issue. As a consequence of this irregularity, I am unable to rule on the issue upon which Mr Aho invites me to rule, namely whether admissions in the record of information are sufficient to establish a prima facie case.

[4] After discussion, both counsel sensibly agreed that the best course in the circumstances was to allow the appeal and direct a new trial. That will have to be before Senior Magistrate Mafi since the case is in the enhanced jurisdiction.

[5] Accordingly, I uphold the appeal and direct that the case is to be placed before Senior Magistrate Mafi for a retrial. The next appearance is on the 2nd August at 10 am in Courtroom 3 for a date to be fixed for trial. Bail is extended. There is no order for costs.

DATED: 21 JULY 2016



A handwritten signature in black ink, appearing to read "C. B. Cato".

**C. B. Cato
JUDGE**