

Act to elect to be tried summarily or that his case be remitted to the Supreme Court.

3. That even if he was informed of his rights under section 15, he neither understood nor appreciated his right and the consequences thereof to proceed on any instructions or directions to the Magistrate.
 4. There was an abuse of authority by the police in that they failed to properly follow prosecution procedures in dealing with his case in the Magistrate's Court;
 5. The Appellant was not informed properly of the reason for his presence in the Magistrate's Court on the day of his hearing when he was convicted and sentenced. In fact, the police lied to him and his mother that they were bringing the appellant to the police station to get a parcel.
 6. He was never asked whether he pleaded guilty or not guilty before being sentenced.
3. On the 24th October, 2017, I granted leave to appeal out of time because it seemed to me the grounds required an answer by the Respondent and raised a number of issues of public importance in relation to the prosecution of juveniles and whether there may have been a miscarriage of justice which required correction. I made a number of consequent orders to ensure that, in so far as it were possible, information was brought before this Court so that the issue could be fully ventilated. After several adjournments, the matter came before me on the 1st June, 2018 and, having heard counsel, I allowed the appeal, quashed the conviction and did not order any retrial. I said I would record my reasons at a later date, as soon as I was able.

4. Ms Macomber for the Respondent and Ms Kuli for the Appellant both filed written submissions and I am grateful for their assistance. Ms Macomber was candid in her approach to the case having obtained affidavits from relevant witnesses. She concluded that neither Sgt Finau, who was the senior officer, or Senior Constable Halapua, who were present when the Appellant was dealt with and sentenced on the 19th April, 2017 by the Magistrate, recalled the Magistrate explaining the procedures of the Court to the Accused. She also noted that there were no court transcripts for the Crown to confirm or deny that the Appellant had been given an explanation of court procedure. She said that the Respondent had made responses to the Appellant's submission as best it could without vital documents such as the police file and court transcripts. Indeed, it quickly became plain to me that there was such a deficiency in the record of what had transpired in the Magistrates Court on the 12th and 19th April, 2017 that the Respondent was unable to refute two aspects of procedural inadequacy. If the Appellant had pleaded guilty before the Magistrate dealt with him, either on the 12th or 19th April 2017, there is no record of such a plea being entered. Nor is there either a record of the Magistrate complying with the provisions of section 35 of the Magistrates Court Act on election to summary jurisdiction before he proceeded to deal with the case. I shall say more about this shortly. As a result, I allowed the appeal and vacated his conviction. Because the Appellant had completed his sentence, I did not remit the matter to the Magistrates' Court for a retrial.

5. This case illustrates the importance of Magistrates carefully recording procedural steps and the Court preserving those records. All the record of the 19th April 2017 shows is;

"Ct ordered all the people to leave the room except for the Accused and his guardian.

Told off the usher for the method in which he carried out the work according to the report which was provided from Probation. Your sentence;

1. Probation
2. To community services for forty hours.

The case management file records the reason for the adjournment on the 12th April 2017 was whether to transfer to the Youth court or whether papers will be served at Mu'a since accused is only 15 years old. This does not assist me, either to resolve the matters in issue relating to plea and advice under section 35.

6. According to Sgt Finau, who swore an affidavit in the proceedings, the accused was charged with serious indecent assault and this appears from the nature of the case and the seriousness of the allegation to have been entirely appropriate. In order, however, to proceed with this case summarily under section 35 (2) of the Magistrates Court Act, the Magistrate was required to inform the Appellant that he may be dealt with summarily instead of being tried by a Judge of the Supreme Court or by a jury if he were so to elect and the Magistrate was required to explain to him what is meant by being tried summarily. There is no evidence that before proceeding to a summary disposal of the case, the Magistrate did this. Nor could Sgt Finau recall the charge being read out to the appellant or he putting in a plea of guilty as the Appellant claims he did not in his affidavit of the 25th September, 2017. There is no record of any earlier plea being advanced when the defendant appeared before the same Magistrate on the 12th April 2017 after he had been arrested on warrant. I find that, as a result of the absence of official record of the proceedings of the 12th April 2017 and the 19th April 2017, I have no reliable basis or foundation to refute the Appellant's assertion that he was not procedurally advised of

the nature of the charge and required to enter a plea before being sentenced on the 19th April 2017. Nor can I assume that the procedure of election for the summary jurisdiction was explained to him, as his counsel submitted was necessary before the Magistrate could deal with him, in this way.

14. There are other aspects of this case that were unsatisfactory. First, the Appellant, aged 15, was remanded in custody by a Magistrate for a couple of days initially so that further work on the case could proceed. It was the concern of the prosecution that, because he lived near the complainant, that the investigation might be impeded if he were admitted to bail. Whilst the police may have had concerns that he would not impede their inquiry by being granted bail, as a 15 year old, in my view, he should have been granted bail on appropriate conditions by the Magistrate that would prevent his impeding any investigation such as being placed on curfew or being required to live with a relative for an appropriate period, elsewhere. Further, he was remanded in custody after he had appeared on warrant on the 12th April to the 19th April, 2017. He had been admitted to bail earlier and, although arrested on bench warrant, no good reason was given why bail was not afforded to him as a 15 year old, with appropriate conditions. It would seem, as is discussed below, that, in any event, his failure to appear causing a bench warrant to issue was the result of confusion as to which Court he was to appear in, the Magistrates Court or the Youth Court. I emphasise that it is unsafe to remand juveniles in custody where they may encounter adult prisoners without very good reason. When this is necessary, juveniles should be separated and protected in custody from contact with adult prisoners.
15. Another unsatisfactory aspect of this case is that the case was adjourned earlier for the matter to be dealt with in the Youth Court. It seems according to Sgt Finau that the Appellant's file was transferred to the Youth Court in Nuku'alofa on the 10th

November 2016 and was then adjourned to the 10th February 2017. However, the case was called before the Magistrate's court in Mu'a in March and April 2017. Because there was no appearance of the Appellant on 5th April 2017, the Magistrate issued a bench warrant at the request of the Crown for the Appellant to appear. This led to his being arrested and brought before the Magistrate in Mu'a on the 12th April, 2017. It is not clear why the proceedings initiated by the prosecution to have the case resolved in the Youth Court did not proceed in the Youth Court as the police intended and the Court had according to Sgt Finau given its approval. It would on these facts seem likely that the Appellant was unaware that proceedings were to continue in the Magistrates Court after the Magistrate had earlier given approval for it to be transferred to the Youth Court and this confusion may have led to his eventual arrest on warrant and remand in custody for a number of days.

16. The appellant contended that he should have been afforded legal representation as a juvenile. Whilst I have every sympathy for this submission, it would be beyond my jurisdiction and amounting to judicial legislation to elevate this to a legal obligation. I had cited to me the observations of Ward CJ in Tone v Police [2004] TLR 20 concerning Article 37 of the Rights of the Child, but I do not think that any observations of the Chief Justice concerning juveniles and their treatment in the courts, would allow me to go so far as to require legal representation to be mandatory in the case of juveniles in Tonga. That is an issue of considerable public importance which merits wider consideration of policy issues for the administration of criminal justice in Tonga that are beyond the province of this Court.
17. Finally, certain criticism was made by the Appellant in his grounds of appeal concerning the police's conduct before trial. I have considered these matters but I do not think that their

conduct was inappropriate or unfair in all the circumstances and did not to my mind afford the Appellant a ground of appeal.

18. This appeal is, however, allowed for reasons I have given. No new trial is ordered.

DATED: 1 JUNE 2018



C. B. Cato
JUDGE