



He was found to have 1,460 micrograms of alcohol in his blood. He was notified he would be prosecuted for it.

- [3] On 6 July 2021, a summons was issued charging him with being in charge of a motor vehicle whilst having 1460 micrograms of alcohol in his blood and required him to attend in the Magistrate's Court at 10:00 am 19 July 2021. He was not served until the morning of 20 July 2021 and was required to attend the Court that same morning. He attended in Court and was charged and he pleaded guilty. He told the Court he did not want a lawyer.
- [4] After the police outlined the above facts to the Court, the accused was asked what he wanted to say and he said that he was sorry for having breached the law.
- [5] The Court stated that the amount of alcohol he had consumed was grossly far in excess of that allowed by law, and that the penalty for such offence had been increased, so that in accordance with the scales set for such sentences, the fine for 200 – 400 micrograms was \$500 and that for every 100 after that there was another \$100. In respect of the amount the accused had, the correct fine was \$1,700 but in view of his guilty plea and for having no previous conviction \$300 was deducted. He was sentenced to pay a fine of \$1,400 by no later than 4:30 pm on 22 July 2021 or serve 2 months imprisonment in default.
- [6] He did not pay the fine as ordered but he filed this appeal on 27 July 2021.

### **Grounds of appeal**

- [7] The grounds of appeal are that –
- (a) there was a breach of natural justice in that the appellant did not have sufficient time to consider the charge or seek legal advice because he was only served the morning of the trial, and
  - (b) the fine imposed upon him was excessive.

[8] As to having the trial held on the same day the summons was served, Mr. Fili relied upon the requirements of the proviso to S.14 of the Magistrate's Court Act which provides (as relevant) as follows:

"Provided that if it appears at the hearing that the summons has not been served on the accused more than 24 hours before the time and date shown in the summons ... the case shall not proceed without the express consent of the accused, which consent shall be recorded in the record of the proceedings."

[9] Ms. Fakatou responded that there was no miscarriage of justice in the present case because the accused was notified he would be charged with this offence for sometimes during which he was to prepare to be charged and tried, and that when he was served, he duly attended and informed the Court that he did not want a lawyer to represent him and that he wanted to plead guilty.

[10] I agreed with Ms. Fakatou, and although the proviso required the Court not to proceed with the matter unless there was express consent of the accused to proceed with the matter despite not having been served for more than 24 hours, and despite the fact that no such express consent of the accused was recorded, as required by the proviso, there was no miscarriage of justice because the accused was well aware of the charge for many months and that he came to the Court prepared to plead guilty. I am satisfied that despite the apparent breach of the requirement of the proviso, there was no miscarriage of justice in that respect.

[11] As to the fine being excessive, Mr. Fili said that the accused only worked as a group worker (kautaha ngaue) for wages and for his own crops, and only earned between \$50 to \$100 per week, and that he is married and has a 9 year old daughter from his first marriage. He had no house or vehicle or any asset of any value. He said that the appellant had gone overseas for fruit picking but has not been able to do so because of this present offence. He submitted that the appellant be given a suspended imprisonment sentence instead rather than a fine.

[12] Ms. Fakatou submitted that the sentence was appropriate and was in line with sentences imposed in other cases and she referred to **R v Ngaluafe** (CR113/2016) where the accused there had 620 micrograms and he was fined \$1000 and to pay it the same day or 2 months imprisonment in default. She said the grossly excessive quantity of alcohol in the accused deserved no less than \$1,400, after allowing for his guilty plea and having no previous record.

[13] Again, I agreed with Ms. Fakatou, but I was concerned however that the Court did not inquire of the prosecutor or of the accused as to his, the accused's, circumstances, to ascertain whether or not he could pay such fine of \$1,400 in 2 days. It is now clear that he could not and cannot so pay it in such a short time.

[14] I therefore asked Mr. Fili to ask the appellant whether or not with the help of his family, he would be able to have it paid in 2 months, if given the chance. After speaking with the appellant, Mr. Fili said that the appellant said he would be able to do so.

[15] I asked Ms. Fakatou if she had any objection to having the fine payable in 2 months instead and she said no.

### **Order**

[16] Accordingly, I ordered that the appeal be allowed and that the sentence of the Magistrate's Court be varied and to be as follows:

"The accused shall pay a fine of \$1,400 by no later than the 28<sup>th</sup> day of November 2021 in default of which he shall serve 2 months imprisonment."



Niu J

**J U D G E**

**NUKU'ALOFA: 28 September 2021.**