

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

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CR 29 of 2015

*Inform all Crown prosecutors
to read & note.*

[Signature]
14/03/16.

BETWEEN: R E X - Prosecution

AND: MALOLO 'INIA - Defendant

BEFORE THE HON. JUSTICE CATO

RULING AS TO THE ADMISSIBILITY OF EVIDENTIAL BREATH

TEST RESULTS

[1] At the accused's trial for causing death and bodily injury whilst driving under the influence of alcohol contrary to section 26 A of the Traffic Act (3 Counts), the Crown at the conclusion of its evidence sought to have admitted the evidence given by Sgt Likiliki as to the evidential breath test readings. The readings given were considerably in excess of the lawful limit of 250 micrograms of alcohol per litre of breath, namely test one; 480 and test 2; 500 giving a final result of 480 micrograms of alcohol per litre of breath.

[2] There was evidence given that on the 1st January 2015 in the early afternoon, the accused had driven his car north along the Bypass Road from Ma'ufanga and had collided with two pedestrians both of whom were injured before colliding with another person standing near a building inflicting injuries from

*recd 14/03/16
AKC*

which she died. The car came to rest off the road in the vicinity of a building adjacent to the road.

[3] Mr Clive Edwards for the accused at the end of the Crown evidence submitted that the breath alcohol evidence should not be admitted. The reason he submitted was because a breath screening test had not been undergone by the accused before an evidential breath test was administered to him by Sgt Likiliki at the Police station. Ms Moa for the Crown resisted these submissions and I adjourned the trial at midday until this morning for a ruling on what is now an essential aspect of this prosecution.

[4] There was evidence which is accepted that after the collision two police officers Constables Ha'apai and Manu travelled to the scene and, shortly after locating the accused at a Chinese shop across the road from where the accident took place. He was arrested by Manu for reckless driving and the accused and Ha'apai travelled back to the central police station whilst Manu remained at the scene. The accused was not asked to undergo a breath screening test, although one was available. On this point, Constable Ha'apai gave evidence that when they arrived at the scene, he remained in the vehicle whilst Manu had tried to stop youth who were trying to smash or damage the vehicle. Constable Manu had come with the driver and placed him inside the vehicle and had arrested him for reckless driving. PC Manu had also shouted to him to take the accused into custody because the youth were attacking him. The accused was also said by Ha'apai to have told by him in the car that the youth had attacked him. Constable Ha'apai said that was the reason why he had made the decision to quickly take the accused from the scene to the police station was because it was more safe or secure because there were drunk people at the neighbours. He, after taking the accused to the police, then returned to the scene

to tow the accused's vehicle away because there were lots of youth who wanted to smash the vehicle.

[5] He said that after doing that they returned to the station where they were informed by Sgt Likiliki that the driver was intoxicated. Sgt Likiliki had asked them why they did not administer a breath screening test at the roadside and Manu had told him that the reason was because the driver was being attacked by the youth on the side of the road. Under cross-examination, he said there were a lot of people standing with the accused. Some of the youth were cursing him as Manu approached him. He said that he thought Sgt Likiliki would conduct a breath screening test at the station and he had informed him that he could not conduct it at the accident scene.

[6] Constable Manu also gave evidence. He had been in the police for 9 years. He said they saw the car smashed into the house when they arrived at the scene. He said when they got there an older man pointed out the driver. People, he said, were shouting out to hit the driver. He told Ha'apai to drive by so they could take the driver away. He thought this was the safest way. He was the one who placed him in the van and charged him with reckless driving. He said he stayed at the scene because there were a lot of youth who were trying to smash the car. He said they he did have an alcohol breath device but he had not used this. He said that we were going to use the device to conduct the test but we thought it was safer to take the driver to the station because were attacking him and tried to hit him. He said they were attacking him in the car. He thought it was better to get him out of there. Mr Edwards had no cross-examination of this witness.

[7] Sgt Likiliki gave evidence that he had been a supervising officer in the traffic unit for 9 years. He said he has spoken with the

accused when he had been brought into the station and he had asked him about the alcohol he was consuming and he had said about 6 beers. He said he had redness in his eyes, and smelled of alcohol. He said that the passive and the breath screening tests referred to in the first page of the Breath alcohol schedule exhibited in evidence had not been filled in because they had not been carried out at the road side. He said the test was supposed to be carried out by the officers at the scene but there were fights going on people attacking one another. He said he understood the accused had been taken to the station for reckless driving – then said careless driving. He explained there were two devices used on the street and one in the station. The passive test states whether there is alcohol in the system and the breath screening gives three outcomes, pass alert and fail; alert being 150-250 micrograms of alcohol level, the fail being a clear need to bring the person into the station for further procedures to be carried out and possibly kept in custody. He was asked by me this question;

“So you say that you are entitled to go ahead and administer an evidential breath test even though these officers hadn’t taken out the test at the scene because he is in custody and you yourself suspected that he consumed alcohol, is that right?”

[8] His Answer was; “I was initially informed sir by the two officers who brought the accused from the scene explaining I have written in my observation in the earlier part of the document the accused was attacked at the scene by a number of persons it would be safer for the driver if they could secure the driver and brought him to the station.

[9] Later, he confirmed to Mr Edwards that he had been told they could not conduct the test at the scene because the driver was attacked at the scene and it would be safer for the driver to be

taken to the office. Mr Edwards continued to cross-examine Sgt Likiliki suggesting in answer to a question he gave concerning his failure to administer a breath test, 'The breath screening test was not needed to be conducted because I had already asked the driver if he had drunk alcohol and he said yes', that his answers were inconsistent. Mr Edwards suggested that he had said before he had not conducted a breath test because the two officers said they could not conduct it because the driver was being attacked. Now, he said it was because he had asked him if he had drunk alcohol. To this the witness responded;

"I told you before the reason why the test was not able to be done because it should have been done at the road side and the driver was being abused. When I asked him if he drank alcohol that is something different."

[10] Likiliki maintained a breath test could have been carried out at the station adding that he had the equipment at the station to do it. He said he had discretion to administer the breath screening test if drunk drivers were brought into custody by other members of the department of the police station not the traffic division. He emphasized in other questioning that the breath screening test was important in order to be able to arrest the driver from the roadside and bring them into custody but here there was already an offence committed for which the driver had been arrested. He maintained that he had chosen not to give the accused a breath screening test because of the information given by the two officers at the scene.

[11] Mr Edwards submitted that procedures under the legislation governing the taking of evidential breath specimens for the purpose of prosecution under the provisions of the Traffic (Amendment Act, 2010) relating to charges of driving a motor vehicle under influence of drink (section 26), and causing bodily

injury or death whilst driving under the influence of alcohol (section 26A) had to be followed strictly. He cited the Court of Appeal's observations to his effect in *Tuputupu v Rex* (CA) [2014] Tonga LR, at p 70.

[12] I have examined the provisions of the relevant sections being section 5 of the Amendment providing a new Section 25A relating to breathe screening devices. It is clear that police officers in Tonga have wide powers to require persons to undergo breath screening tests using a breath screening device. These include;

Section 25 1 (a) a driver of or a person attempting to drive a motor vehicle;

Section 25 (1) (b) a person whom the officer has good cause to suspect has recently committed an offence against this Act that involves the driving of a motor vehicle.

[13] There are other provisions. Section 25A 1(c) enables breath screening tests to be taken from the driver of a vehicle involved in an accident, or other person whom the officer has good cause to suspect was in the vehicle if the driver is unable to be ascertained. Further, under Section 25 A1 (d) they may be administered to a person in a hospital or doctor's surgery to a person as a result of an accident provided that the medical practitioner in attendance determines that the taking of the breath screening test would not be prejudicial to the persons' health.

[14] The evidential breath test provisions are contained within section 25B of the Act. Essentially, these allow evidential breath test procedures to be undertaken where a person has undergone a breath screening procedure that indicates a proportion of alcohol in the person's breath exceeds 150 micrograms of alcohol per

litre of breath (subsection 1(a)) or if the person fails or refuses to undergo a breath screening test without delay after having been required to do so by a police officer under section 25A. For the purposes of this case, it is section 25B (1)(c), however, that is important. That subsection provides;

"The person could be required to undergo a breath screening test without delay under section 25A but cannot be tested because either a breath screening test is not readily available or for any reason a breath screening test cannot be carried out, and there is good cause to suspect that the person has consumed alcoholic drink."

[15] In my view, the procedure requires a breath screening test to be conducted ordinarily before a person is taken into custody so that it is only if the device exceeds 150 microgram of alcohol per litre of breath that further steps should be taken and the suspect taken into custody. Administration of a test means that those not registering this level should not be taken into custody. However, section 25 B (1) (c) allows an evidential breath test to be administered without a breath screening device being administered first if one is not available or for any other reason one cannot be carried out and there is good cause to suspect that the person has consumed alcoholic drink. The latter exception Ms Moa submitted was applicable to these circumstances.

[16] Here, there was available both at the scene and at the station breath screening devices. Having heard all three police officers, Constables Ha'apai, Manu and Sgt Likiliki I accept their evidence that the reason the accused was not the subject of a breath test at the scene was because of the Constables' concern for his safety. Constable Manu had told Constable Ha'apai to leave the scene quickly to prevent hostility manifested towards their

prisoner. Both officers confirmed the reason a test had not been carried out was to ensure the accused's safety. It is implicit in their answers that they would have conducted a test but for the accused's safety that both had suspected that the accused had consumed liquor, a factor which was confirmed in the evidence of Sgt Likiliki in his subsequent conversation and observations at the station of the accused before administering the breath test. Mr Edwards did not suggest to either Constable that they were manufacturing their accounts and had not told Sgt Likiliki that they had omitted to require a breath screening test because of their concerns for the accused's safety. Nor was Sgt Likiliki challenged about this information being communicated to him, only that this was not his real reason for dispensing with a breath screening test. He was adamant, however, despite being closely questioned by Mr Edwards on this aspect that the Constables' communication of concerns about the accused's safety was the reason why he had proceeded to administer the evidential breath test at the station without first administering a breath test. It was his view that the breath screening device should be administered at the scene before a person was placed in custody and that where a suspect had been arrested as here on another charge, there was no reason to administer a breath test. Before administering the test however, he had also satisfied himself that the accused had been drinking an admission going unchallenged that he consumed alcohol and had 6 beers

[17] In my view, as Ms Moa submits section 25B(1)(c) where it provides that an evidential breath test can be administered if a person could have been required to undergo a breath test without delay, and in particular the provision "for any reason a breath screening test cannot then be carried out" is sufficiently wide to include a situation where arresting officers, as I have found here, decided not to administer the breath screening test

for safety reasons. I accept that the officers were truthful in their evidence about this. It is not as Mr Edwards suggested in cross-examination of Sgt Likiliki only where a screening device is unavailable that an evidential breath test can be administered. There may as the legislation says be other reasons. So long as the reason advanced is not capricious, unreasonable or manufactured which I find is not the case here, then an evidential breath test can be administered without the breath screening test being administered. I consider the safety of an accused and or officers at the scene of an accident from reprisals is a relevant and reasonable consideration for dispensing with a breath screening test at the scene.

[18] I do not consider, although there could have been no criticism if he had administered a breath test at the station, that Sgt Likiliki was himself bound to administer a breath screening test before proceeding with an evidential test. He said he knew of the relevant provisions and as a senior officer in traffic I accept this and decided to proceed directly with the evidential test because the officers had felt unable to administer a breath screening test at the scene, as a prerequisite to an evidential breath test. He, however, satisfied himself also that the accused had been drinking before doing so. Again, I consider no criticism can be made of him for taking this added precaution. I accordingly rule the evidence of the evidential breath test admissible.

[19] During the course of argument, I posed the question whether a failure to follow procedure correctly that was not the product of deliberate police malpractice or abuse but a genuine mistake in procedure should inevitably mean that evidenced is excluded. I was referred to Tuputupu [2014] Tonga LR 65, at para 230 by Mr Edwards on Court's observance of strict compliance with procedures leading to the creation of statutory offences. That was not, however, a case where the trial Judge had been asked

to consider an issue of deficiency in procedure as a question of the admission of the evidence of an evidential breath test. The issue had been raised as an issue of weight of the evidence to be considered by the jury. The Crown was not able to supply me with any other authority where this kind of issue had been considered in Tonga on any issue of admissibility.

[20] However, the High Court of Australia in *Bunning v Cross* (1977-78) 141 CLR 54 has ruled that in relation to an unlawful conduct of a patrol man which had arisen from mistake rather than deliberate or reckless regard of the law, evidence derived from the application of an evidential test without an earlier preliminary breath sample test was admissible. Nor in the opinion of the Court had the nature of the illegality affected the cogency of the evidence. Guidance on the exercise of such a discretion where there has been non-compliance with a statutory procedure is to be found in the judgment particularly of Stephen and Aickin JJ at pages 78-82 which consider the balance of public interest in bringing criminals to justice and individual liberty. If contrary to my ruling, a breath screening test should have been undertaken by the officers at the scene or for that matter by Sgt Likiliki at the station before the evidential test was undertaken, I do not regard the omission as anything other than an error and not one that could be described as a deliberate or reckless disregard of the accused's rights. It could easily have been performed by Sgt Likiliki. Nor was the failure to administer a breath screening test a material abuse of the accused's right to liberty because he had been arrested. The evidence was cogent, and not corrupted by the illegality. A not dissimilar approach to improperly obtained evidence involving a balancing of the societal or public interest in the prosecution of crime and individual concerns with liberty is to be found now in section 30 of the Evidence Act 2006 in New Zealand.

DATED: 11 MARCH 2016



A handwritten signature in cursive script, appearing to read "C. B. Cato".

C. B. Cato

JUDGE