IN THE SUPREME COURT OF TONGA CR 12 of 2018
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **FINAU HEUIFANGA VEA** **- Accused**

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho for the Prosecution
Mr. S. Taione for the accused

RULING ON ADMISSIBILITY OF EVIDENCE

[1] The accused, Finau Vea, was charged with a principal count of embezzlement contrary to section 158 of the Criminal Offences Act.

[2] At the commencement of her trial before myself as a Judge alone trial, Mr Taione objected to the admissibility of her record of interview. A voir dire was held at the commencement of the trial. The objection was that, under section 149(1) of the Police Act 2010, the accused had not been told that she could telephone or speak to a relative or friend before an interview was commenced. Mr Taione contended that this was a breach of her rights under that section which amounted to a statutory direction to an interviewing officer. As such, he argued that the record of interview was inadmissible.

[3] Detective Fifita gave evidence on the voir dire. He said that he had offered the accused the opportunity to consult with a lawyer and this was declined. This was confirmed in the record of interview. The accused signed this notation and I find her evidence on the voir dire that she had told him that she could not afford one rather unconvincing given that she had initialed that part of the record of interview. I accept that Detective Fifita conducted the short interview fairly, having cautioned the

accused at the commencement. He admitted that he had not, however, advised her of her rights under section 149(1) to consult with relatives or friends at the commencement of the interview because he had not known of the requirements of the section and had followed what he considered to be previous procedure. Mr Aho, in his submissions, acknowledged there had been a breach of section 149 (1) in this regard, but, he submitted, following my earlier decision in R v Sitiveni Muli CR 102/2018, 9th January 2019 in which I had ruled that sections 148-153 Tongan Police Act 2010 should be read together with section 22 of the Evidence Act, I should admit the evidence.

[4] I do not propose to revisit what I said in Muli, here, at any length but, in this case, I do not consider that it would be right for me to admit the record of interview given the Officer's candid admission that he had not known of the existence of section 149(1) of the Act and hence his obligation to advise the accused not only of her right to see a lawyer but a friend or relative if she chose. Some people may not be able to afford a lawyer or may not wish to have one present but may choose to have a friend or relative at an interview, or consult with one before participating in an interview. No doubt, Parliament saw this as mitigating the inherently coercive atmosphere of a custodial interview that I mentioned in Muli. In Muli, I considered that reading the Police Act provisions on questioning with section 22 of the Evidence Act was appropriate and wrote;

> "I consider a sensible resolution is to be found in an interpretation which would include breaches of section 148-153 of the Police Act within section 22 of the Evidence Act. This would mean that a failure to comply with the protection of those provisions would not affect the admissibility of a confession unless the breach was so serious, egregious, or deliberate that a court considered it could not be in the interests of justice to qualify for admission under the proviso."

[5] I have listened to Mr Aho' s attempts to persuade me that I should admit the record of interview despite the breach of section 149(1) because she was cautioned, offered the opportunity to consult with a lawyer, the interview was conducted fairly over a short period of time and further that she was a mature woman. Whilst these submissions carry weight, I consider that Parliament expected police to comply with the requirements set out in the section. I consider that it is of importance that police officers know the extent of their statutory powers and obligations and the appropriate legal procedures to adopt governing records of interview. The

provisions of sections 147-153 of the Police Act have been in force since about 2010 and the interview was conducted on the 31st August, 2016. I find it surprising that Officer Fifita with his many years of experience did not know about these provisions. He asserted that he had received no guidance concerning them. Ignorance of these provisions, important as they are in the context of questioning of a suspect, is a serious failing. I consider the failure to communicate the opportunity to telephone or speak with a relative or friend was an egregious breach of section 149(1).

[6] I finally note that neither counsel made any point about whether the accused was a person who had been charged with an offence under section 149(1) which appears as a prerequisite to the operation of section 149(1). In many cases, a suspect may not have been formally charged with an offence and in some case where there has been a voluntary appearance not formally arrested before interview in a custodial setting commences. In my view, the requirements sensibly should be taken to apply whenever police have a suspect in custody and wish to interview that person in terms of section 147 of the Police Act. In my view, a failure to comply with the legislation where it has commenced before a person has been formally arrested or charged in a custodial setting should invoke the potential to have the record of interview excluded under a section 22 exercise of discretion.

[7] For these reasons, I rule the record of interview inadmissible. This judgement is not to be published until after this trial ends.

SUPREME COURT TONGA

C. B. Cato

NUKU'ALOFA: 15 APRIL 2019 **J U D G E**