



*"Because this case was set for Preliminary Inquiry and the prosecutor having indicated that the accused wishes that his case be heard in this court, this court reverted into a Magistrates' Court jurisdiction and heard the case. As a result it became known that \$1580 has yet to be recovered. Therefore, I summarise the case as follows: Forward for sentence, at the same time accused to be held in custody pending sentence in the Supreme Court because there are still items not recovered."*

I do not consider this was a proper order and direct that the case be remitted to the magistrate for sentence.

The case causes me some concern. This Court has pointed out before that there are clear limits imposed on the power of magistrates to commit for sentence; see *Hu'ahulu and another v Police, Tonga LR 93*. The conduct of this case unfortunately suggests the presiding magistrate was unaware of any such report.

As was pointed out in that case, section 35 (1) gives the Magistrate the discretion to try the case summarily after hearing any representations by the prosecutor or accused only if, having regard to the nature and circumstances of the case, it appears to the magistrate that his powers of punishment would be adequate.

That clearly imposes a duty on the magistrate to obtain sufficient information about the nature and circumstances of the case to make such a decision **before** he agrees to try it summarily. Any such information should be noted in the court record. There is no indication in this case that the magistrate was given any such information or that he requested it.

Once the Magistrate has accepted a request to try the case summarily, section 35 (3) only gives him the right to commit for sentence following conviction "...if, on obtaining information about his character and antecedents the magistrate is of opinion that they are such that greater punishment should be inflicted for the offence than the Magistrate has power to inflict..."

The limited information in the magistrate's ruling suggests that the only reason he decided he could not sentence adequately was that "it became known that \$1580 has yet to be recovered".

That is not a reason arising from information about the accused's character and antecedents. Neither should the actual value of the goods have been a surprise to the magistrate. The summonses, which he must have seen before deciding whether to hear the case, stated the total value of goods stolen on 31 August was \$1580.00 and on 22 November was \$1660.00. Having seen such high values, he might have considered asking if they had been recovered before

agreeing to summary trial if he considered that fact was likely to render his powers of punishment inadequate.

As has been explained in Hu'ahulu's case, once a magistrate has agreed to hear a case summarily under section 35, he can only commit for sentence "if he receives information, unknown to him when he agreed to summary trial, relating to previous convictions or other matters concerning the accused's character. It is only in the rarest cases that a man with no previous convictions can be sent for sentence to the Supreme Court after summary trial."

The case is remitted to the magistrate for sentencing within his powers under the Magistrates' Courts Act and the Criminal Offences Act.

As the accused was committed in custody, I direct the case shall be listed within 7 days of this Order.



*Wand.*

**NUKU'ALOFA: 9<sup>th</sup> JANUARY, 2003.**

**CHIEF JUSTICE**