IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY APPEAL NO. AC 1 of 2011

BETWEEN : R E X

Appellant

AND : KAPUANA 'UNGA

First Respondent

AND : NAOMI TAULAFO

Second Respondent

Coram : Burchett J

Salmon J

Moore J

Counsel : Mr. Kefu for the Appellant

Mr. Niu S.C. for the First Respondent

DETERMINED BY CONSENT ON WRITTEN SUBMISSIONS

Date of Judgment : 15 April, 2011

JUDGMENT OF THE COURT

[1] The parties to this appeal are, first, the Crown (the Appellant); secondly, the accused in a trial before Shuster J sitting without a jury (the First Respondent, who was alleged to have committed bodily harm while being taken into custody on the Second Respondent, a police officer); and thirdly the Second Respondent. The trial ended when his Honour ordered each of the Respondents to be "bound over to keep the peace to all manner of persons", as regards the First Respondent in the sum of $700 for a period of 12 months, and as regards the Second Respondent in the sum of $200 for a period of 6 months, and dismissed the charge against the First Respondent.

[2] The Crown appeals, its arguments being fully supported by the First Respondent. Although counsel had submitted that the Court lacked jurisdiction to make the binding over orders in the circumstances, no reasons were given to justify the decision, except what may be gleaned from the language of the orders. The document drawn up and signed by the judge is in the following terms:

> **BEFORE THE HON. JUSTICE SHUSTER**
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> **HAVING HEARD** all the evidence in this case from the prosecution, and from the defendant in person on oath, and having seen the photographs of the injuries to the defendant whilst she was in Police custody I have decided that in the interest of Justice that this case can be best dealt with by <u>Binding over</u> the defendant, and the victim to keep the peace for such period as I consider necessary, for their <u>future</u> conduct.
>
> **HAVING HEARD** from both defence Counsel, and the Prosecution, the periods of the Bind Over's are as follows:-

IT IS ORDERED THAT:

1. KAPUANA ‘UNGA is bound over to keep the peace to all manner of persons in the sum of $700 for a period of 12 months.

2. NAOMI TAULAFO (a police officer) is bound over to keep the peace to all manner of persons in the sum of $200 for a period of 6 months.

   Each person agreed to being Bound over in the sum indicated and for the period stipulated by the Courts [sic]. They do not have to lodge these sums with the court. They will lose the sums if they commit any further crimes.

3. Charge of Bodily harm is dismissed.

4. Ensure the Police Commander is served with a copy of this order as it relates to his officer NAOMI TAULAFO.

[3] The general statement “I have decided that in the interest of Justice that this case can best be dealt with by Binding over…” cannot be read as a finding against each of the Respondents of facts entitling the Court to reach the further conclusion that either Respondent is threatening or may properly be suspected of being likely to engage in a breach of the peace. Certainly the minatory statement that “[t]hey will lose the sums [in respect of which they are bound over] if they commit any <u>further</u> crimes” does nothing to allay concern about the basis of the orders, since the acquittal of the First Respondent and the absence of a charge against the Second Respondent render the reference to “further crimes” meaningless.

[4] That reasons to justify the course taken are called for is made the more apparent by the evidence of Mr Kefu, as Solicitor General, that in his "14 years of legal practice in the Kingdom, [he has] never known any of the Courts imposing a sentence on an accused or complainant" in such circumstances.

[5] The modern authorities in England trace the jurisdiction to make orders of this kind back to the *Justices of the Peace Act* 1361. In *R v Aubrey – Fletcher, Ex parte Thompson* [1969] 2 All E R 846, which was such a case, Lord Parker CJ. said (at (847): "There is no jurisdiction to make this order unless, in the course of the proceedings, it emerges that there might be a breach of the peace in the future." Edmund Davies LJ (as Lord Edmund Davies then was) and Caulfield J agreed. There was no suggestion that any less demanding power was available.

[6] *R v Aubrey – Fletcher* was cited in *Hughes v Holley* [1987] Criminal Law Review 253 at 254 to a Divisional Court constituted by Glidewell LJ and Otton J. who followed it, holding that "[b]efore the power to bind over [arises] the magistrates must have some cause to believe that without a bind over the defendant might repeat his conduct".

[7] Both these cases were under the 1361 Act, not the common law. In *R v Randall* [1987] Crim LR 254 at 255, a Divisional Court presided over by Lord Lane CJ. emphasised that bind overs of this kind were statutory under the 1361 Act, and "not common law bind overs to come up for judgment".

[8] *R v Crown Court of Inner London, ex parte Benjamin* [1987] 85 Cr. App. R. 267 was another case where reliance was placed on a statutory power – in this instance section 1 (7) of the *Justices of the Peace Act* 1968. In the Divisional Court, May LJ said (at 272):

> "In my opinion there was ample material before the learned judge to found his view that a consequent breach of the peace [consequent upon the applicant's habit of sounding loud blasts on a conch shell in a market place] was not only possible, but indeed probable, if the applicant did indulge in future unbridled use of his shell trumpet. Thus in my opinion there are no grounds for ordering judicial review to bring up and quash the learned judge's order which is complained of."

McCowan J agreed.

[9] In Australia, Connor ACJ held in *Reid (No.2)* [1981] 2 A. Crim. R. 28 at 37:

> "that a binding over order may be available against a person who has not committed any offence in circumstances where the consequence of his lawful conduct is likely to produce a breach of the peace by other persons."

This accords with the view of the Court (Stephen Brown LJ and Taylor J) in *R v Crown Court at Swindon, ex parte Pawittar Singh* [1984] 1 All ER 941 stated by Stephen Brown LJ at 943:

> "In my judgment, it is a serious step to take and should only be taken where facts are proved by evidence before the court which indicate the likelihood that the peace will not be kept. Such cases may occur, but it seems to me that they will be exceedingly rare. Certainly, it must be rare in cases where the Crown has decided to prosecute a particular person on indictment, for an offence of inflicting grievous bodily harm on another person, for that other person to be bound over."

See also *Veater v G.* [1981] 1 WLR 567 at 574.

[10] In *Everett v Ribbands* [1952] 2 QB 198 at 204-206, Denning LJ. (as he then was), briefly but compendiously, discussed the nature of the procedure for binding over, and pointed out that it was no longer in England the same procedure that once obtained under the 1361 Act. He said (at 206):

> "The procedure is much the same as in the case of a summary offence. The substance of the matter is, not only fear of what the accused man may do, but also a complaint of something he has already done, some words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against the man if two things exist: first, a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach; secondly, a reasonable fear that this threat will be carried into effect. …[T]here must be something actually done by him such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made."

[11] Although it has been said that the English Common Law gave a similar power to justices, for a very long time the exercise of the power to bind a person over to keep the peace, when that has been necessary, has been based on statute, particularly the Act of 1361. And the foregoing survey of the case law makes it plain there had to be a basis proved before the order could be made. It is not made simply because a judge thinks there would be some good purpose served by it. Especially in the case of a complainant in proceedings brought by the Crown for bodily harm, it would be rare, as Stephen Brown LJ said, for such an order to be made against the complainant.

[12] In Tonga, the parliament has considered conferring on judicial officers the statutory power to bind over, and has enacted s.198 of the *Criminal Offences Act* Cap. 18. But this is a power to make an order akin to what Lord Lane CJ in *R v Randall* called a "common law bind over to come up for judgment", distinguishing it from an order made under the statutory power in the Act of 1361. That power has not been enacted in Tonga.

[13] Whether or not any part of the English Common Law power has survived as such in Tonga following the enactment of s.198 of the *Criminal Offences Act*, there is no doubting any such exercise of power to affect a person would have to be based on sufficient evidence. Here, his Honour has made no finding, nor has he given any reason, which could justify the orders made. The matter was certainly in controversy and adequate reasons should have been given. People are entitled to know why they have been subjected to coercive orders, and the appellate system requires that the reasons be revealed so they can be examined and their correctness considered.

[14] In the circumstances, the application for leave to appeal must be granted, the appeal allowed, and the orders made below, other than that dismissing the charge against the First Respondent, must be quashed.

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Burchett J

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Salmon J

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Moore J