SUPREME COURT OF TONGA **CR.619/99**

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

REX

-V-

'ATALO VEAMATAHAU

BEFORE THE HON. CHIEF JUSTICE

Counsel: Miss Sela Tupou for the Prosecution
Accused in person.

Date of hearing: 30 July 1999

JUDGMENT

The accused in this case appeared before the magistrates' court charged with one offence of causing harm, contrary to section 107 of the Criminal Offences Act, and one offence of common assault, contrary to section 112 of the same Act. The magistrate has sent the case to this court for sentence under section 35(3) of the Magistrates' Courts Act.

There are many aspects of this case that cause me concern but they are not unique to this particular case. Cases are coming before the Supreme Court far too frequently in which the magistrate has not only failed to follow the procedure set out in the Magistrates' Courts Act but has shown only too clearly that little or no notice is being taken of earlier judgments of this Court.

The position of magistrate is entirely statutory. Although like any judicial officer, he has considerable discretion in the exercise of his judicial role, his powers are created by and limited by statute. The exercise of his functions is subject to appeal to this Court and he must accept the decisions of this Court as binding upon him. His duty to the State and the public is to ensure that he

keeps abreast of developments in the law including the rulings of the Supreme Court and Court of Appeal. This is yet another case where the magistrate has apparently not borne those factors in mind.

In the present case, the accused was charged with two offences arising out of the same attack on his wife. The charge under section 112 was of a summary offence whilst that under section 107 was indictable because the sentence for the offence was 5 years. In such a case, the lesser offence should go with the more serious and so the magistrate needed to hold a preliminary inquiry.

There appears to be some uncertainty as to the correct course for the magistrate when, as here, the accused faces indictable and summary offences arising out of the same incident. The confusion stems from the remarks by Hampton CJ in the case of R v Kula, 940/95, questioning the power of the Supreme Court to hear purely summary offences. The point had not been argued and his comments were purely obiter. The proper procedure is still that stated by Martin CJ in Practice Direction number 1 of 1991 and referred to by Dalgety J in R v Palanite, 126/93. Offences arising from the same incident must be tried by the same court. If one is indictable and is committed to the Supreme Court, the other case cannot be dealt with by the magistrate and should be remitted to the higher court to be dealt with at the same time.

The record in the present case shows that the magistrate pointed out to the prosecutor that one offence was summary and the other indictable. The record continues:

> " Prosecutor – Your worship, I hereby request for these two cases to be both heard under your jurisdiction.
> Court – Accused, what do you say?
> Accused – That is correct your Worship. I agree to that."

The magistrate then checked that the accused understood the charges and the pleas were taken. The accused pleaded guilty to both charges and the case continued as a summary trial.

I pause there. Section 35 (1) of the Magistrates' Courts Act appears in Part III, which deals with preliminary inquiries. It provides:

> "If at any time during the preliminary inquiry into the offence it appears to the Magistrate, having regard to any representations made in the presence of the accused by the prosecutor or made by the accused, and to the nature and circumstances of the case, that the punishment that the magistrate has power to inflict ...would be adequate, the Magistrate may...proceed to deal with the case summarily...".

That section provides the only power for a magistrate to try an indictable offence summarily and the requirements of the section must be complied with before the magistrate may exercise it. This has been pointed out by this Court many times. As recently as October 1998 in the case of Cocker v Police, Cr.App 1252/98, Finnigan J, in a careful and exhaustive account of the effect of section 35, disagreed with the submission of the prosecution that the magistrate was properly acting under that section. He stated:

> "...I have been unable to agree for the following reasons. First, the magistrate was not acting "during a preliminary inquiry into the offence", as he was required to be for exercise of that jurisdiction. Second, the magistrate did not act for the reasons that are set out in section 35(1) as necessary conditions precedent to the exercise of the jurisdiction. Third, the magistrate did not give the accused the option that he was bound by section 35(2) to offer him, nor seek his consent, nor explain to him what is meant by being tried summarily."

I am willing to accept that the magistrate in the present case was acting during a preliminary inquiry. There is nothing wrong with the prosecutor asking the magistrate to consider summary trial at the very outset of a preliminary inquiry. Indeed, if he has already decided the case is suitable for summary trial, it is sensible to make that representation as soon as possible. However it is not sufficient for the magistrate simply to check that the accused consented and then proceed with summary trial as happened here. The grounds upon which a magistrate may decide whether to proceed summarily are clearly stated in the section. The decision is only to be made when the magistrate has had regard to any representations made by the prosecutor or accused and to the nature and circumstances of the case. Having heard those, the only question for the magistrate is whether, in view of what he has heard, he considers the punishment he has power to inflict will be adequate.

As I pointed out in Hu'ahulu and another v Police (1994) TLR 93, in order to assess that nature and circumstances of the case, it is necessary for the magistrate to ascertain the general nature and scale of the evidence the prosecution will be seeking to present. Only on hearing that, can the decision be made and, as with all judicial decisions, it should be recorded with the reasons why the magistrate reached that decision. In this case the magistrate failed to consider the nature or circumstances of the case and equally failed to record any reasons for the decision.

The consent of the accused is required, as was pointed out by Finnigan J in Cocker's case, but it only becomes relevant when and if the magistrate has decided the case is one in which his powers of sentence would be adequate.

The reason why this is an important decision is that it will bind the magistrate's power of sentencing. By section 35(3), the magistrate has the

power to commit the accused to the Supreme Court for sentence but only in limited circumstances. In Hu'ahulu's case, I explained:

> "Section 35(3) provides that, where the accused is convicted on summary trial, the magistrate may only send him to the Supreme Court for sentence "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." If, having allowed summary trial and heard the case, the magistrate considers it is more serious than he originally thought, he is not empowered to send it up for sentence on that basis. The words underlined in the passage above mean that he can only commit for sentence if receives information, unknown to him when he agreed to summary trial, relating to previous convictions or other matters concerning the accused's character: R v King's Lynn JJ ex p Carter (1969) 1QB 488; R v Hartlepool JJ ex p King (1973) CrimLR 637. 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."

Clearly, as the magistrate should only consent to try a case summarily after a consideration of the nature and circumstances of the case, the seriousness of the case will be within his knowledge. Thus, that cannot be a ground for committing it to the Supreme Court for sentence, as was the case here. What he cannot be told at this stage, of course, is whether the accused has any previous convictions so the decision has to be made without knowledge of those.

In the present case, the accused had no previous convictions and there was nothing in his character and antecedents that gave the magistrate the right to send the case up for sentence.

During the prosecutor's statement of facts after the plea had been taken, he referred to the fact that the assault by the accused caused his wife harm. The magistrate then asked how big was the cut and the prosecutor said he had no medical report but the cut was a "small thing". The magistrate pressed him for more information on the size and was told it was approximately half an inch at which the magistrate commented that a cut of half an inch on either the head or forehead is not a small cut.

I mention this for two reasons. The first is that, as this was effectively the only evidence of the scale of the injuries, it was presumably the basis for the decision that the magistrate's powers of sentence were insufficient. I consider that was scant evidence upon which to decide that a sentence of 2 years imprisonment would not be adequate. Second, when the case appeared before me, counsel for the prosecution told the court that there was, in fact, no evidence that there had ever been a cut. There can be no blame on the magistrate for that; it lies entirely on the prosecutor. No prosecutor should

make any statement as to the facts of the case, which he is not able to prove by evidence he has at that time.

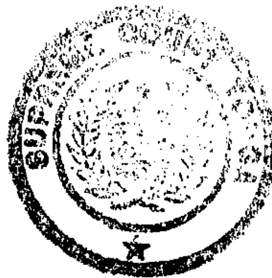
Finally, the magistrate concluded with the following words:

> "In addition, the magistrate does not agree when the prosecutor always reduces the wife's right in common assault and bodily harm cases. With respect to these proceedings, it was the prosecutor who suggested they be heard in the magistrates' court even though there is a bodily harm charge."

I am uncertain what exactly is meant by the reference to the prosecutor always reducing the wife's right. Even if it is correct, the fact other cases were wrongly tried summarily can never be a reason to send this particular case to the Supreme Court. The danger of such a remark is that it could be seen as suggesting the magistrate is taking a subjective view based not on the facts of the case but on a personal opinion of cases of a particular type.

More important is the suggestion by the magistrate that the decision is that of the prosecutor. The prosecutor's role is to suggest summary trial where he considers it appropriate. It is limited to making representations to that effect. The decision is that of the magistrate alone. Unless the magistrate agrees, no indictable offence can be tried summarily and, as the decision to try the offence summarily can have such a limiting effect on the maximum sentence available, it is the magistrate's duty to ensure any request for summary trial is made on good grounds.

For reasons I have given, I do not consider this case was properly committed for sentence. However, in view of the remarks of the magistrate in the hearing, I do not consider I can properly send the case back for sentence by the trial Magistrate. I have, therefore, passed sentence but limited myself to the powers of a magistrate.



NUKU'ALOFA: **CHIEF JUSTICE**