IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOF REGISTRY CR NO.743/99

REX

-V-

SIONE MATANGI MALUPO

BEFORE HON JUSTICE FINNIGAN

Counsel: Ms S Tupou for Crown, Mr L Veikoso for Accused

Date of Hearing : 21 September 1999
Date of Verdict : 22 September, 1999

VERDICT OF FINNIGAN, J

The accused is charged with housebreaking and with theft of two items, both charges arising from the same incident. He is charged jointly with one other person. That person is not before the Court. I am told he has been charged.

The evidence for the Crown is from two witnesses. One is the complainant, the other is one of the police officers who interviewed the accused. The only Crown evidence implicating the accused is the evidence of statements made by the accused. This evidence was given by the police officer.

The accused and his mother gave evidence.

There are many unsatisfactory features in this case. Much of the evidence of the accused was given as yes/no in response to leading questions from counsel, despite a warning from the court. Much of the vital core of the defence was new evidence that had not been put to either crown witness.

Much of what the accused said did not impress me, but I am unable to decide whether to accept or reject the claims made by the accused, because many of them have not been tested.

Mr Veikoso made four submissions for the accused. There is a further serious matter, which the defence did not advance. This is the proviso to s 22 of the Evidence Act cap 15, which is as follows:

> "Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession."

Pursuant to that proviso I refuse to entertain the evidence of the police officer about the statements made by the accused.

It is clear from the evidence of the accused that he made statements to the police officer, though there were differences between his evidence and that of the police officer. These are my reasons for refusing to accept the evidence of the police officer about statements made to the police officer.

(1) Before the police officer sought from the Magistrate a remand in custody he had already made up his mind to charge the accused. He prepared and took to the Magistrate at the same time as the accused two summonses, for the Magistrate to sign. This is a strange procedure, and not the one laid down in Ss 13 & 14 of Magistrates' Court Act cap 11. However it demonstrates that the police officer already "desired to institute a prosecution in the Magistrates' Court" (s13). He must be taken to have held already sufficient information to enable him to do that, or he was in jeopardy of malicious prosecution. What happened then was that the Magistrate refused to sign them and told the police officer to bring them back after he had finished his work. The Magistrate then authorised the police officer to hold the accused in custody for 24 hours, so that the work could be done. This was a denial of the rights of the accused. If the police officer was ready to seek the issue of a summons he had no reason to seek a custodial remand in order to obtain further information from the accused.

(2) The accused was a boy of 11 years. He was arrested at 4pm on 7 June, some days after the events and was held in custody

from about 5pm under the Magistrate's warrant. The interview with him started at about 1 am the next morning. It was completed at about 2am. He was then held until released the following day just before 4pm. If his statement was voluntary, and if the police officer already had enough evidence to charge him, why was he held in custody? When in custody, why was he not interviewed in daylight hours? I am not satisfied that a statement recorded under those conditions was voluntary.

(3) Under the Constitution and other laws of Tonga, a suspect is entitled to his liberty. The police are not entitled to interfere with that liberty unless the police have lawful reason to hold him in custody. It is for the police to show the Magistrate why it is that the right of a suspect to his liberty should be taken from him, and if there were cause for that, it would have been easy to show. If there was no reason shown for holding the suspect, it was the Magistrate's duty to uphold this fundamental right, and refuse to permit the police to hold him. there was no evidence before me of any reason shown to the Magistrate why the accused should be in custody.

Those are the reasons why the evidence of the statements must be excluded. The only other evidence against the accused is that of himself and his mother. In that evidence there is raised the possibility that the accused was acting under the duress of another person. That person is not before the Court, and there is no evidence at all about his age, size or appearance. Observing the accused, I think that he is making up his story about being forced to do things by the other accused and by the police. About being forced by the police I have a doubt, but that arises from the circumstances of his custody, and his evidence does not add much to my doubt.

About being forced by Paea to enter the house I have no doubts. I disbelieve his evidence about this. The accused was close to his own home and knew who Paea was. I might have found his evidence more credible had he come back with the Walkman and returned it with an apology, but that did not happen until after Mele the complainant had reported the matter to the police. He said to his mother that he had not gone back because he was frightened. I observed him give evidence. I do not believe he was frightened. There is evidence of his mother and of Mele and of the accused that the claim about Paea was made during the apology, but regrettably all of Mele's

evidence about that was in yes/no answers to leading questions. She did not herself tell the Court what, if anything, the accused said to her about that. His mother's evidence was that he told Mele that Paea forced him, and the accused himself gave evidence that he had told Mele he was forced. However, that does not cause me any doubt, and I am satisfied the accused was a voluntary partner in the breaking into the house. More is needed to raise a doubt about duress than the claim of the accused that has been made in this case. On the housebreaking charge the accused must on his own evidence be convicted.

The theft charge is proved by the evidence of the accused himself. He voluntarily took the Walkman tape player that was produced in evidence. He was not forced, or even directed, by Paea to take that. It was his evidence that he took it because the stereo was too heavy for him to lift. Pursuant to s42(3) of the COA cap 18, I find him guilty of the theft, not of the ngatu launima, but of the walkman valued at approximately $60.

The accused is convicted of both charges. There is an order that the Court will return the recovered Walkman to the complainant after expiry of the appropriate period.

NUKU'ALOFA: 22 **September 1999** **JUDGE**