IN THE SUPREME COURT OF SAMOA

HELD AT APIA

MISC. 23104 & 23129

BETWEEN: FUIMAONO SUAFO'A LAUTASI

APPELANT

AND: P O L I C E

RESPONDENT

Counsel: A.S. Vaai for appellant
B.P. Heather, Attorney-General and M. Leung Wai for Respondent

Hearing: 12 & 13 May 1998

Judgment: 15 May 1998

JUDGMENT OF SIR GORDON BISSON

This is an appeal against conviction, the appellant having been convicted after pleading not guilty in the Magistrates Court at Apia of three offences under the Road Traffic Ordinance 1960, namely, that at Malie on 25 November 1997 he,

1. drove a pick-up number Govt.9472 negligently on West coast Road and did thereby caused the death of Mathew Seiuli, contrary to S.39A and;
2. failed to stop and ascertain whether he had injured any person, contrary to S.44(1)(3); and

3. failed to report the accident in person involving injury to Mathew Seiuli to the nearest police station or to a constable as soon as reasonably practicable; contrary to S.44(2)(5).

The appellant was convicted and sentenced on the first charge by way of a fine of $1,000.00 to be paid no later than 6.4.98 in default 3 months imprisonment and disqualified from holding or obtaining a drivers licence for a period for 5 months commencing on the day sentence was imposed, 30 March 1998. In respect of the other two charges he was convicted and discharged. The appellant on 30 March 1998 gave notice of appeal against conviction and sentence in respect of all three charges. On 31 March 1998 the Magistrate who heard the case ordered a stay of execution of his decision until the matter is determined in this Court.

The grounds given for the appeal were :-

1. that the decision was wrong in law
2. that the decision was against the weight of evidence

The appeal by the appellant against sentence has been abandoned but the Attorney General on behalf of the Police on 24 April moved to have the time extended for a cross appeal against sentence on the ground that the respondent had not been advised until 20 April 1998 that the appellant's appeal against sentence would be withdrawn. Until then the respondent was entitled to rely on making submissions during the appellant's appeal against sentence. In these circumstances time to give notice of cross appeal is extended to 24 April 1998. The grounds for the cross appeal is that the sentence and penalties were clearly inadequate and inappropriate and it is made pursuant to s.138 A(2) of the Criminal Procedure Act 1972.

Turning first to the facts of the case which was heard on 12, 13 & 16 March 1998 I quote the following passage from the Magistrate's decision.

"The material evidence adduced by the police is that at Malie on late afternoon of 25 November 1997 Mathew Seiuli, aged 21 years, a police officer (hereafter referred to as "the deceased") had been drinking beer. He was drunk but not very drunk. At between 9 and 10 o'clock that evening the deceased crossed the West Coast Road (hereafter referred to as "the road") at Malie from the seaward side (having been at his family's guest house) to the inland side of the road where his family's residential home is situated. As the deceased walked across the road and arrived at about the centre of the road a speeding white double cap pick up was seen by eye witness Laki Brown travelling from east going west. This witness (who was talking with Tina Solo a fellow choir member and sitting not far on the opposite side of the road to where the deceased was crossing) heard the horn of this vehicle sounded and then almost immediately the vehicle struck the deceased. The deceased disappeared after being struck and was seen again when the vehicle ran over his body about 30 yards west from where he was hit. The vehicle proceeded on without stopping. Laki Brown and others who either saw the accident or heard the sound of the deceased being struck by the vehicle then ran over to where the deceased laid and moved him to the side of the road while he was still alive. They acquired the assistance of one of the two passing vehicles and brought the deceased to the National Hospital at Motootua where he died not long after."

In support of the appeal against conviction Mr Vaai first submitted that the presumption of innocence under Article 9(3) of the Constitution had not been rebutted beyond reasonable doubt, the burden of proof being on the prosecution throughout the case. He contended that the Magistrate had at one point reversed the onus of proof. Arising out of the appellant's claim that the damage to his vehicle was from hitting a cow, he was asked by Senior Sergeant Talosaga to go with him and show him where his vehicle struck the cow. The appellant refused that request and the Magistrate in his decision said,

"The defendant refused that request. The defendant was not obliged to comply with the Police officer's request. However, had he done so it may have cleared him once and for all. The only reasonable inference I can draw from his refusal to show where his vehicle hit a cow is that he did not struck a cow at all."

I think that was a fair comment on the appellant having declined an opportunity given him by the Police, in fairness to him, to substantiate what he said had caused the damage to his vehicle. It certainly did not amount to a reversal of onus of proof. A denial of guilt and an

innocent explanation are matters to be taken into account when considering the prosecution case. The question is whether the innocent explanation of the appellant raises a reasonable doubt as to his guilt. In the circumstances it was open to the Magistrate to reject the appellant's explanation but it still left the onus of proof of guilt on the prosecution, the rejection of an innocent explanation not adding to the evidence against the appellant.

Mr Vaai submitted that the case for the prosecution was based entirely on the testimony of Police officers and that their evidence demonstrated support for his submission that they had fabricated evidence to prove the identity of the appellant as the driver of the vehicle involved in the collision with the deceased. The evidence of one Police witness, Corporal Upumoni Pio was rejected by the Magistrate in one respect, namely that he had found part of the grill on the road which matched the grill from the appellant's vehicle. The evidence of two other witnesses, one a Police officer, proved that Corporal Pio had not found the piece of grill at the scene. That was a serious error on a crucial part of Corporal Pio's evidence and will no doubt be investigated by his superiors. However, in view of the fact that this error was disclosed by the evidence of Senior Sergeant Tuli Levasa I cannot accept the submission that there was a Police conspiracy to fabricate evidence.

Mr Vaai criticised the Magistrate for relying solely on his observation of the demeanour of the other Police officers to find credibility. But that is exactly what the Magistrate must do in considering and assisting him to decide the credibility of a witness. For example in his decision at p.10 the Magistrate said :

> "From my consideration of the totality of this witness evidence and his demeanour while giving evidence I have no reason to doubt the credibility and reliability of Senior Sergeant Talosaga's evidence that the defendant admitted to him being involved in the accident in the manner he described."

A further example is to be found at p.12 where the Magistrate has considered and expressly ruled on counsel's argument that the police had fabricated evidence and there had been a conspiracy on the part of the police to convict the appellant. In dealing with this submission the Magistrate said :

> "This argument is based principally on the evidence of Corporal Upumoni concerning the grill parts and the manner the confession/admission by the defendant to Inspector Uili and Senior Sergeant Talosaga were obtained.
>
> From the evidence before me I am not able to find that there was a conspiracy in the way claimed by Dr Vaai on the part of the police. But as to the evidence of Corporal Upumoni, I have already rejected his evidence concerning the two grill parts".

The Magistrate had the advantage of seeing and hearing the witnesses in the atmosphere of the Court room where they were subjected to cross examination and he rejected the submissions of counsel. The same submission of a Police conspiracy to fabricate evidence was made to me in this Court. I cannot possibly reach any other view of the matter than that of the learned Magistrate who rejected the submission. There is no independent evidence to corroborate the evidence that the appellant made a confession to two Police officers on separate occasions but on the other hand there is no evidence to support a conspiracy.

Mr Vaai's second submission in support of the appeal against conviction was that the two confessions were never made. Again he argues that the evidence of the confessions was fabricated. I have already dealt with that approach.

This is not a case in which an accused says he made a confession but it was not voluntary because his will was overborne by undue pressure or threats or because of hopes of advantage. Nor is it a case in which protection under the Constitution or the Criminal Procedure Act 1972 is pleaded. This is a case in which the appellant denies the confessions were ever made. He cannot run two defences. One that the confessions were never made and

another that if they were made they were not voluntary. He has chosen the former defence and his case was conducted in that way. Senior Sergeant Talosaga Time said on oath in his evidence :

> "However, in the course of our conversation, he (the appellant) then said to me that he do admit that the person who died was the one he hit but however deny being broken the law. He said that he did not know he is breaking the law".

That does not sound like a fabricated admission of guilt but a defensive qualified admission with a ring of truth to it. However, the defence that it was never made appears in the following question and answer in the course of a forceful cross-examination as recorded in the notes of evidence,

> "Q. Would be correct to you that you also lying to this Court regarding the defendant admit to the offence?
> A. I am correct".

Similarly, as to the other confession made to Inspector Uili Lafaele. This witness's evidence of what took place is as follows,

> "During that time I went to have a little rest at the Government Complex at the parking area. I met the defendant or the accused over there, and he asked me if the Prime Minister talked to me. I said no, and he said what about the Minister of Police and I said no - and he told me that he was talking to the Prime Minister that morning and he said that the Prime Minister told him to come to the police station to pick up his vehicle. The defendant's vehicle was seized by police. After that he said sorry to me. The actual words he said "faamalie atu i lau susuga ona ua le mautonu lou mafaufau i lena aso" I apologise to you sir as I was uncertain on that particular day that is why I did not inform you of the right thing that happened. O le mea moni lava ua faafuasei lava ona oso ae le tama - the boy suddenly hopped on to the road - ua le mafai ona toe fai i ai se isi laasaga ma o le mea lena na so'a ai e le taavale, ana i ai se mea ou te mafaia semanu e le tupu le faalavelave". And then I said it is right I knew what happened on that day and I know you were uncertain and you could not make up your mind what to say - things like that can happen but nobody can prevent accidents as we cannot foresee them. And then he said that he was worried about his career as a politician and he wanted to build up his reputation as a faipule".

Again that does not sound like a fabricated confession but something from a man who wanted to clear his conscience. The cross examination was directed to this evidence being a lie. I quote this passage from the notes of evidence -

> "A. Well to me it was a good admission to me and a good evidence for me to bring to Court.
>
> Q. Or you could have come to this Court and make it up yourself.
>
> A. I am on oath
>
> Q. So what
>
> A. I am speaking the truth"

Mr Vaai also submitted that the Magistrate had failed to address what is required under s.39A of The Road Traffic Ordinance 1960 to find negligence on the part of the appellant. There was no need to define negligence in the judgment as the meaning is so well known, namely, a failure to take reasonable care in all the circumstances. What the Magistrate did was to apply that definition to the facts of the case and there was ample evidence from eye witnesses that the vehicle in question was being driven at a high speed in fact, the witness, Laki Brown when he saw the vehicle approaching, was prompted to remark to his companion "this car is coming very fast". It was a fine night, the vehicle had its head lights switched on, the driver should, if keeping a proper look out, have seen the deceased walking across the road and if driving at a safe speed been able to slow down or swerve to avoid him. Instead, when only about 10 m away he sounded his horn and hit the deceased in the middle of the road and drove on without slowing down or stopping.

Mr Vaai argued that there must be some conscious taking of an unjustifiable risk as opposed to an inadvertent taking of an unjustifiable risk. The conscious taking of an

unjustifiable rest would be recklessness but the appellant was not charged with reckless driving. All that was necessary was a failure to take reasonable care in all the circumstances and that was clearly the case here.

Mr Vaai pointed out that the information charging the appellant with failing to stop and ascertain whether he had injured any person had as the statutory authority for the charge originally.

"Road Traffic Ordinance 1960, s.44(1)(4)"

It appears that the Magistrate altered the information in ink to read (3) instead of (4). It was submitted that this amounted to an amendment of the information during the trial under s.36 of the Criminal Procedure Act 1972 without the charge as amended being stated to the defendant and he being asked how he pleads before the trial continues. The difference between these two subsections is that s.44(3) relates to failing to stop "in any case where any other person is injured in the accident" and it carries a higher penalty for the offence than s.44(4) which relates to failing to stop "in any case where no other person is injured in the accident". Clearly the information should have cited s.44(3). I regard the citing of s.44(4) therefore as an obvious clerical error which the Magistrate corrected. To settle the matter, I would exercise the Court's jurisdiction under s.144(2)(c) to amend the conviction to s.44(3) and will deal with the question of sentence on the cross appeal.

As to the cross appeal against sentence, it was argued by Madam Attorney that the conviction and discharge of the appellant in respect of the charges of failing to stop and failing to report the accident warranted a substantial penalty because of certain aggravating factors. It would be obvious to the driver of the vehicle that serious injury would be caused by the force of the impact and because the vehicle also ran over the injured person. It is a particular aspect of s.44(1) that in conjunction with the statutory obligation to stop is the

duty to render all practical assistance to the injured person including transportation of that person to hospital. In this case the injured person was still alive when the eye witnesses ran to his aid but there was some delay in transporting him to hospital which would have been avoided had the appellant stopped and provided immediate transport to hospital. As well as his failure to report the accident the appellant endeavoured to conceal the fact that his vehicle had been involved in this fatal accident. It was further submitted that the fine of $1,000.00 on the charge of negligent driving causing death was inadequate and/or inappropriate on the basis of the appellant's behaviour, the seriousness of the offence and the public interest.

I have read the Probation Service Report which describes the appellant as follows,

> "Information shows that he is a man of good character and has a lot of responsibilities in his church, village, district and the government. He is also well recognised for most of his contributions to the country through the Ministry of Works."

The report seeks the court's leniency in this matter. I have also read some very favourable character references but I am concerned to read that the appellant has previous convictions for traffic offences some involving speeding and drunken driving. This experience should teach him a lasting lesson to drive in a way which has regard for the safety of other persons on the road, including those who because of intoxication may be less able to care for themselves.

In a State appeal against sentence a stronger case for increasing a sentence needs to be made out than in an appeal to reduce a sentence. I have studied the schedule of sentences imposed in other cases which vary widely as one would expect as the facts of cases can be so different.

In this case the Magistrate took into account the special circumstances of the appellant and the hardship which will necessarily follow from his losing his seat in Parliament and the loss of salary as a member and Parliamentary Under-Secretary. The Magistrate adopted a sentencing technique of treating the failure to stop and to report the accident as part of the offence of negligent driving causing death, and of imposing the sentence on that offence while convicting and discharging the appellant on the other two offences. Another sentencing technique is to impose separate sentences for each offence making them cumulative or concurrent as the case may be. The state did not press for a sentence of imprisonment. The question is whether a fine of $1,000.00 is adequate in all the circumstances. It was a bad case of its kind and might well have deserved a higher fine but the Magistrate saw fit to show some leniency because of the particular circumstances of the appellant and his otherwise good behaviour and good works for his church and community. I do not regard his sentence as clearly inappropriate nor inadequate where lenience has been shown nor one which this Court should increase on appeal. The cross appeal against sentence is accordingly dismissed. The stay on execution of the sentence imposed in the Magistrate Court has now expired on the delivery of this judgment and the sentence is hereby varied to the extent that the fine of $1,000.00 is to be paid no later than 22 May 1998 in default 3 months imprisonment and the period of disqualification from holding or obtaining a drivers licence for a period of 5 months is to commence today 15 May 1998.