

RE FELETI FOTU, PENI TAIMI 'ALIPATE AND TONGA 'AUKA.

(Habeas Corpus : Hunter J. Nuku'alofa, 24th May, 1956).

Hearing of charge within 24 hours of service of summons — Plea of guilty — Defect in proceedings — Conviction quashed — The Magistrate's Act 1919, Section 12, Section 23 (3) Cap. 6) — The Police Act 1923 Section 24 (Cap. 12) — The Constitution Clause 13.

The three accused were arrested at Neiafu early in the morning of the 6th March, 1956. At noon on the same day they were served with summonses charging them with stealing a pig. In the afternoon of the same day they were brought before the Magistrate, pleaded guilty and sentenced to prison. Less than 24 hours had elapsed from the time the summonses were served until the case was disposed of by the Magistrate. Application was made on behalf of the accused for the issue of a writ of Habeas Corpus on the ground that their conviction was bad and their detention illegal.

Mafua appeared for the applicants.

Hama appeared for the Crown.

HUNTER J. : These 3 applicants were arrested on the morning of the 6th March, 1956, served with summonses and on the afternoon of the 6th charged before the Magistrate who thereupon disposed of the case. The applicants all pleaded guilty. They had been in custody from the time of their arrest until the hearing before the Magistrate.

Section 12 of Cap. 6 provides that at least 24 hours must elapse between the service of the summons and the hearing of the charge against an accused.

In my view this provision is mandatory and a Magistrate has no power to proceed with the trial until this period of time has elapsed.

The Crown Prosecution drew my attention to Section 24 of Cap. 12 but in my view the purpose of that section is to ensure that a person shall not be kept in custody longer than 24 hours without being formally charged before a Magistrate. If he cannot be brought before a Magistrate within 24 hours of his arrest, then the police officer in charge must discharge him on a recognizance to appear before a Magistrate on a specified date.

If he be brought before a Magistrate within the 24 hours then, if he has already been served with a summons, the Magistrate's duty is to remand him for trial to a date and time not less than 24 hours from the time the summons was served, and if the offence with which the accused is charged is not punishable with more than 3 years imprisonment to admit him to bail.

In the present case the accused all pleaded guilty and it is suggested that this plea has waived any irregularity there may have been.

The Court of Appeal in England has held that there can be no waiver unless the Defendant knew not only of the objection but also his right to object. (R.V. Essex J, J. 1927 2 K.B. 475) and

in the case of *Manders v. Faleke* (1891) 5 Ch. 488 it was held that an appearance to an irregular notice to commit for contempt is not a waiver, the liberty of the subject being affected. In this case the liberty of the subject was obviously affected and there is no evidence that these accused knew of the objection that existed to the proceedings.

The reason for the provision that an accused person shall not be tried within 24 hours of the service of the summons on him is to ensure that he shall have time to consult his legal adviser and prepare his defence. It is most important that this privilege of a citizen be jealously preserved; the liberty of the subject being one of our most precious possessions.

The Registrar has kindly drawn my attention to an application which came before me on 7th September, 1954 — the case of *Stotame Vitalia*. The facts of that case were similar to the present one, but I refused to grant a writ. However in that case the Magistrate asked the accused if he wished the case to be heard that day and the accused said "Yes." It may be that the accused's request that his case be heard cured any defect in the summons, apparently I thought so at the time.

In my view the present detention of these applicants is illegal and I therefore quash their conviction and order their release.
