IN THE SUPREME COURT OF TONGA **CR.APP.958/98**

CRIMINAL APPEAL **CR.APP.959/98**

NUKU'ALOFA REGISTRY

BETWEEN	:	NOBLE FAKAFANUA	-	***Appellant***
AND	:	1. WILLIAM C. EDWARDS	-	***Respondents***
		2. TANIELA FALETAU		
		3. MAKAMOA HELEPIKO		
		4. SEMISI FONUA FIFITA		
		5. SITANI FA'ASOLO		

BEFORE THE HON. CHIEF JUSTICE WARD

BETWEEN	:	SITANI FA'ASOLO	-	***Appellant***
AND	:	HON. FAKAFANUA	-	***Respondent***

Counsels: Mr Laki Niu for the Appellant
Mr John Cauchi for the Respondents.

Date of hearing: 28 May 1999
Date of judgment: 8 June 1999

JUDGMENT

On 21 April 1998, the noble Fakafanua brought a private prosecution as the person aggrieved under section 197 of the Criminal Offences Act. He had been arrested by the police on 16 March and charged with offences of forgery. He was arrested again on 21 March and charged with further offences and was released by the Supreme Court following an application for habeas corpus.

He brought a number of charges in the Magistrates' Court of unlawful imprisonment and abetment in unlawful imprisonment against the Minister of Police, Edwards, and the

police officers involved in the arrest and investigation, Faletau, Fa'asolo, Fifita and Helepiko.

The evidence was that he was arrested on 16 March and held from 12.30pm to 9.00pm and again on 21 March when he was held from 10.30am to 2.00pm.

At the conclusion of the trial the magistrate acquitted Edwards, Faletau, Fifita and Helepiko, convicted Fa'asolo of unlawful imprisonment and acquitted him of abetting Helepiko unlawfully to imprison Fakafanua. Fakafanua appeals against the acquittals and Fa'asolo appeals against his conviction. For convenience, I shall refer to Fakafanua as the appellant in this judgment.

The evidence of the appellant at the trial was that he was in his office on 16 March when Faletau, Fa'asolo and Helepiko entered and said they wished to question him. At first Fakafanua demurred as he did not want to be interviewed in his office but, when the officers then said they would arrest him and take him to the police station and question him there, the appellant tried to stop them. He telephoned the Secretary to Cabinet and asked him to contact the Minister of Police, Edwards. He rang back and said he was unable to make contact and would go and see the Minister.

The Cabinet Secretary gave evidence in which he agreed he had been asked by the appellant to help but that he had been unable to contact the Minister.

The appellant was taken to the police station and questioned until 9.00pm when he was released.

On 21 March when he was on his way to the Magistrates' Court, he was again arrested and taken to the police station and interviewed by Fifita. Fakafanua's lawyer arrived and advised him not to answer any questions. When the officer continued, the lawyer protested and was taken out. The appellant remained in custody until he was taken to the hearing of the application for habeas corpus following which he was released.

Faletau and Fifita gave evidence and the others defendants did not.

The prosecution case was that the detention was illegal and that each and every one of the defendants was involved. It was a criminal case and the burden on the prosecution was to prove each case beyond reasonable doubt.

The magistrate acquitted Edwards on the grounds of insufficient evidence. In relation to Faletau he held that the arrest was legal and that he then handed the arrested man over to Fa'asolo and Helepiko "to do the legal work on him". He found there was no evidence that he encouraged the other two to stop the appellant by force at the police station and acquitted him.

He then passed to Fa'asolo. He said:

"I believe that Sitani Fa'asolo is guilty because on 16th he questioned Fakafanua not only for the routine moves but also about the forgery and the cheques and it is clearly stated as it is and according to Soakai v Minister of Police, Fa'asolo has the authority to question but only to limit to name and address and only routine moves. I believe with no doubt that he is guilty and I also refer to CJ Lewis' habeas corpus." He acquited Fa'asolo on the charge of abetting Helepiko.

He acquitted Helepiko on both charges on the grounds that; "there is no evidence that Helepiko illegally stopped or illegally kept Fakafanua in custody. Helepiko is the lowest rank in all those policeman who did the work to Fakafanua. Why should Helepiko order to stop Fakafanua at the police station or why should he direct Fa'asolo who is an inspector to stop Fakafanua at the police station."

Finally he acquitted Fifita. He found that Fifita only asked for the appellant's name and address but his counsel stopped it. As the only questions were lawful the holding of the appellant at that time was not unlawful.

The record of the proceedings in the lower court are clearly inaccurate and inadequate. It is important that the clerk in a Magistrates' Court ensures the record is properly kept and, in this case, he clearly failed. As a consequence, there have been a number of passages which counsel for the appellant, Mr Niu, has sought to correct. Unfortunately, they were raised for the first time at the hearing of this appeal.

Counsel should realise that is not the proper away in which to challenge the record. Where there is such a challenge, counsel challenging the record should first advise his opponent of his challenge and seek agreement on what was actually said. If that fails, he should file affidavit evidence of the matters under challenge and seek the court's leave to adduce that evidence at the hearing of the appeal. The Court will then decide as a matter of fact whether that was the evidence given.

This case has been pending for a considerable time and I am surprised such experienced counsel should have failed to follow the proper procedures. Fortunately, counsel for the respondents, who was not present at the trial in the lower court, was willing to proceed on the basis that the evidence was as the appellant contended. The court is grateful to him for that forbearance.

The case of the appellant in relation to Edwards is that he encouraged the officers to carry out the unlawful detention. Although on the version of the evidence that Mr. Niu put forward, there was evidence that the Minister may have known of the investigation and arrest, there was no evidence to link him directly with the actual arrest and detention and the magistrate was right to acquit him. Mere knowledge, if he had any at the time, falls well short of abetment and certainly does not give him, as Minister of Police, the right to interfere with routine police work. The evidence taken at its highest failed to establish that he took any part in the matters in relation to the appellant on either 16 or 21 March. The appeal in relation to Edwards is dismissed.

The case against the police officers was that the arrest was unlawful because it breached the provisions of section 22 of the Police Act in that the arrested man was not taken before the magistrate as soon as practicable.

Mr Niu takes it further. He suggests that the police had no right to question the arrested man apart from the "routine matters" of his name and address to establish his identity. On that I disagree. The Court of Appeal when considering the order of habeas corpus in this case, Appeal 6/98, did not exclude the right of the police to ask questions about the offence. What they clearly and firmly pointed out, as has been stated so many times before, is that the terms of section 22 require the police to take anyone arrested without warrant before a magistrate without unnecessary delay. It gives them no right, to delay simply for the purpose of interrogation.

Mr Cauchi, for the respondents, suggests the prosecution was based on a fundamental mistake as to the nature of the offence of unlawful imprisonment. The test, he says, is whether the arrest was lawful. If it was, it does not become unlawful if the police ask improper questions. To that extent, he is correct. A lawful arrest is completed when the arrest is complete and, if it was a lawful arrest when executed, it will not be made unlawful by subsequent acts. However, the offence in this case is unlawful imprisonment. I do not consider the arrest in this case was unlawful. To the extent that the arrest resulted in the detention of the arrested man, the detention was also lawful but, once the police failed to comply with the requirements of section 22, the continued detention became unlawful.

Mr Niu's assertion that the questioning by Fifita went too far when he asked about the arrested man's position and, in itself, rendered the detention unlawful cannot be sustained. Such questions are not forbidden. The way in which they differ from the routine questions to establish identity is that the arrested man need not answer them. At the police station, Mr. Niu, as Fakafanua's lawyer was perfectly within his rights to advise silence. The police acted wrongly in ordering him out for giving that advice. The magistrate found that the questions did, in fact, only deal with establishing his identity and that was a finding open to him on the evidence he heard.

However, I do find, as I have stated, that the unnecessary prolonging of the original detention of the accused man in breach of section 22 was an unlawful imprisonment. The magistrate erred when he failed to consider that point.

Faletau was charged with abeting Fa'asolo and Helepiko in the unlawful imprisonment on 16 March. The evidence against him was solely that he had been involved in the arrest and taking of the appellant to the police station. It should be mentioned that the appellant denied being told the reason for his arrest. The magistrate clearly did not accept that evidence and preferred that of the officers involved. On the record of evidence, that was a conclusion open to him and I accept the arrest was lawful. There was no evidence against Faletau beyond the arrest and the fact he told the appellant he was being taken to the police station for questioning. That falls far short of proving the criminal charge. The appeal in relation to Faletau is dismissed.

Helepiko was charged with unlawful imprisonment on 16 March and with abeting Fa'asolo in the same offence. In his case the evidence clearly established the first charge in proving the failure to take the appellant before a magistrate as soon as practicable. He was, as the magistrate said, the junior of the officers charged but that is no defence. No police officer is obliged to obey unlawful orders or lawful orders to do an unlawful act. The appeal against the acquittal of Helepiko is allowed and a conviction ordered for unlawful imprisonment. I consider the charge of abetment is effectively alternative and I do not interfere with the verdict of the magistrate on that charge.

Fa'asolo was charged with the unlawful imprisonment and abetment of Helepiko in relation to 16 March. Whilst I agree with the magistrate that he should be convicted of the substantive offence, I do so for different reasons. The magistrate based his decision entirely on his view that the officer was not entitled to question the prisoner about anything but the "routine moves". That was incorrect. The reason why the questioning was unlawful was because the appellant was being detained to allow it to take place instead of being taken before a magistrate. The appeal by Fa'asolo is dismissed and the conviction confirmed albeit for reasons different from those of the magistrate. As in the case of Helepiko, I do not interfere with the acquittal on the charge of abetting the other officer.

Fifita was charged with unlawful imprisonment on 21 March. The evidence was that he also failed to take the appellant before a magistrate without unnecessary delay. That made the continued imprisonment unlawful. The magistrate's verdict is set aside and a conviction substituted.

The Magistrate ordered "six months of good behaviour probation" for Fa'asolo. Such a penalty was inappropriate in a case of this nature. I accept the officers here were following a practice that has become all two common. I am satisfied the conviction is sufficient penalty in itself and I shall fine Fa'asolo, Helepiko andFifita the nominal sum of $5.00 or 2 days imprisonment in default of payment.

NUKU'ALOFA, 8 June, 1999

CHIEF JUSTICE