IN THE SUPREME COURT OF TONGA **NO.AM.22-25/2004.**

APPEAL JURISDICTION

VAVA'U REGISTRY

BETWEEN : 1. *LOITI TONE*
2. *SIONE KULI LAU'I*
3. *TOHI TANGI 'ALE*
4. *POUVALU FUNAKI*

- **Appellants**

A N D : *POLICE* - **Respondent**

BEFORE THE HON CHIEF JUSTICE WARD

Counsel: Mr. Vaipulu for appellants
Mr. Kefu for respondent

Date of Hearing: 14 May 2004.

Date of Judgment: 28 June 2004.

Judgment

The appellants appeared in the Magistrate's Court in Vava'u on 9 September 2003 charged with various offences of housebreaking and theft.

They all agreed to have their cases dealt with at the lower court. They were unrepresented although Funaki had instructed counsel. A letter had been sent by counsel to the court advising that Funaki wished to plead not guilty to one offence but guilty to the rest and seeking an adjournment until his lawyer could attend.

The offences had occurred over a period of three months and the accused appeared in court about one month later. At the time the appellant Funaki was 13 years old, Tone was 14, 'Ale 15 and Lau'i 16.

The appeal, despite the pleas of guilty, was against conviction and the grounds raised matters relating to the lateness of the service of the summons, the failure of the

magistrate to advise the appellants of their rights, the suggestion that the magistrate had prevented them for obtaining legal representation and his failure to consider the request from Funaki for an adjournment.

During the hearing in this court, it appeared that, after the appellants had been arrested, the parents went to the police station but were not allowed to see or speak to their children. Mr Kefu told the court that the police practice in all cases is that they do not allow anyone except a lawyer to see an accused person until they have completed their investigation. Despite their youth, these appellants were treated in the same way.

The result was that, by the time they were before the court and being asked to decide how and where to be tried and then to enter their pleas, they had not seen anyone outside the police.

I asked Mr Kefu to ascertain whether Tonga was a party to any international conventions relating to the treatment of young offenders. I am grateful to him for his assistance.

It appears that, in December 1995, Tonga acceded to the Convention on the Rights of the Child with the exception of some of the optional protocols, which do not affect this case.

Article 37 of that Convention provides:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or

other competent, independent and impartial authority, and to a prompt decision on any such action."

Mr Kefu properly concedes that the manner in which these appellants were treated was in breach of the requirements of article 37.

However, whilst the accession by a State to a convention indicates its willingness to be bound by the terms of the convention, it will only be enforced by the enactment of necessary domestic legislation.

It is a matter of regret that, despite an apparent time limit of 2 years for compliance imposed by the convention, Tonga appears to have taken no steps to enact any of the provisions. It can only be hoped that Government will recognise its obligations and enact legislation to bring Tonga into line with international standards of fair and humane treatment of young persons.

In the absence of any such legislation, the police were acting within the law albeit a law which allows harsh and, I would venture to suggest, unconscionable conduct. The result was that these young people arrived at court to face serious charges without the opportunity to consult even with their parents.

This court has stated before that it will only allow an appeal against conviction following a guilty plea if there is some evidence of equivocation in the guilty pleas entered. Mr Kefu correctly points out that there is nothing in the record to suggest anything other than normal admission of the offences charged.

I accept that is the case but I consider the court also has a discretion to allow such an appeal if there are circumstances which leave the court with a serious doubt that the appellant understood the procedures under which he was to be tried. Such a decision should not be taken lightly and the court will only act where there is clear evidence of the circumstances which give rise to the concern. In this case, my concern arises from the manner in which these appellants were treated from their arrest to their trial and there is no dispute over that.

The need for the Convention on the Rights of the Child arose from the widely accepted realisation that children need to be treated in a different manner to adults in relation to police and court proceedings. Even in the absence of legislation, the court is entitled to use the terms of any convention to which Tonga has acceded or become a signatory as a guide to what is acceptable. Failure to conform with those terms may result in the court excluding evidence or reversing a decision on appeal.

In the present case, had the appellants been able to speak to their parents, they would have been given advice or a lawyer might have been instructed, as was the case with Funaki. I have no doubt that, had they been represented, the lawyer would have raised the circumstances of their detention.

I also have no doubt he would have raised the issue of the service of the summons. It is clear that at least some of the summons were served very late and certainly well short of the 24 hours required by section 14 of the Magistrates' Courts Act.

The proviso to that section allows the court to proceed if the summons has been served less that 24 hours before the court appearance but only with the express consent of the accused which consent shall be recorded. There is no record of any such consent having been sought or obtained. The explanation appears to be that the prosecutor did not advise the court that they had been served late. I have no doubt that the prosecutor knew of the lateness of service and it was part of his duty to the court to ensure it was advised in any case where the accused is not represented. In a case such as this where the accused are so young, he undoubtedly should have pointed out any possible ground of objection to the procedures to which these young people had been subjected especially such a vital matter as service of the summons.

The court also appears to have treated the appellants in exactly the same way as it would have treated adults and both court and prosecutor were at fault in so doing. The inappropriateness of the manner in which they were treated continued to the sentence. None of them had previous convictions but Tone and Lau'i who had admitted only one housebreaking and theft were sent to prison for a year, Funaki who admitted three offences was sent to prison for two years and three months and 'Ale, who admitted four housebreakings was sentenced to 4 years imprisonment. In addition Tone and Lau'i were ordered to pay $500 compensation, Funaki $1,000 and 'Ale $1,015.20 although the complainant in some of the cases told the court she did not want compensation so some of those orders were cancelled.

It only needs to state those sentences to see how grossly inappropriate they were in the case of such youthful offenders with no previous convictions. Sentences of this type are unjust and, when they are so far out of line with the proper range of sentences, bring the court system into disrepute. Had I not allowed the appeal against conviction I should have quashed the sentences and imposed a non-custodial penalty.

I allow the appeal against conviction and remit the case to the Magistrates Court with a direction that it be tried de novo by another magistrate.

NUKU'ALOFA: 28 June, 2004. **CHIEF JUSTICE**