Mr. Kefu.

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION AC 6 of 2016 14/09/16

NUKU'ALOFA REGISTRY [CR143 of 2015]

BETWEEN : 'ALANI AFU aka 'ALANI KOLOAMATANGI

- Appellant

AND : R E X

- Respondent

Coram : Moore J
Blanchard J
Hansen J
Tupou J

Counsel : Mr S. Tu'utafaiva for the Appellant
Mr 'A. Kefu for the Respondent

Date of Hearing : 6 September 2016

Date of Judgment : 14 September 2016

JUDGMENT OF THE COURT

[1] Mr Koloamatangi appeals against the dismissal by Cato J of his application to the Supreme Court under s.10 of the Extradition Act for a writ of habeas corpus. He had been remanded in custody by Principal Magistrate Mafi who had committed him for extradition to Australia to face a charge of murder.

[2] In both the Supreme Court and this Court the appellant has argued that there are two reasons why he should not be extradited:

(a) The great length of time since he allegedly committed the crime in Australia; and

(b) The prejudice he says he may face as a Tongan if required to stand trial in Australia.

[3] The murder charge arises from the stabbing to death of a woman in her own home on 9 August 1990 – just over 26 years ago, when the appellant was 23 years of age. It is alleged that the appellant was paid by the husband of the victim to kill her. The New South

Wales Police investigated the crime in 1990. They considered that the appellant was a person of interest but concluded they had insufficient evidence to charge him.

[4] In August 1997 the appellant was deported from Australia to Tonga after serving a sentence of imprisonment for an unrelated offence of armed robbery.

[5] Since coming to Tonga the appellant has not offended against the law. He has married. He and his wife have six children. He is the breadwinner for his family. He has been employed by a stevedoring business for 13 years.

[6] In 2012 the New South Wales Police Unsolved Homicide Squad began re-investigating the 1990 murder. They now have further witnesses as to the appellant's alleged involvement and have brought a murder charge against him. Hence the very belated application for his extradition.

[7] Section 10(3)(b) of the Extradition Act authorises the Supreme Court to order that a person committed for extradition be discharged from custody if it appears to the Court that by reason of

the passage of time since he is alleged to have committed the offence it would, having regard to all the circumstances, be unjust or oppressive to return him.

[8] Cato J referred to counsel for the appellant's submissions concerning his family circumstances, including that he is the breadwinner for the family and to the disruption to their lives if extradition occurred. He noted also a submission pointing out that the appellant had been living in Tonga without any further criminal problems since being deported from Australia. The Judge said that it was plain that a long time has passed since the murder in 1990 and the deportation in 1997 and that in that time the appellant had established a new life. The Judge continued:

> *"These factors might well, in a case involving some lesser crime where the public interest in bringing an offender to justice was not so pressing as in this case, be telling factors that would justify an order being made. However, in this case the offence for which extradition is sought is murder and one that is a particularly serious example involving the allegation that the applicant was hired by another person, being the husband of the deceased, to kill the deceased. The allegation is that the applicant stabbed the deceased in her home and was paid for carrying out the crime by the husband of the deceased".*

[9] Cato J then described how it came about that the New South Wales Police have recently brought charges (including charges against the victim's husband and his brother) and applied for extradition. He said that in assessing whether it would be unfair or oppressive for the appellant to be required to return to New South Wales for trial because of the delay, the Court should consider, "in the balance", the public interest in ensuring that persons who commit serious crimes are brought to justice. This was a very serious crime and in the Judge's view it was neither unfair nor oppressive to require the appellant to face the charge in New South Wales "albeit that there has been a long passage of time" since the murder and the deportation.

[10] In this Court Mr Tu'utafaiva complained that Cato J had inappropriately concentrated on the public interest and had not considered all the circumstances, including the family situation. He accepted however that the public interest was a relevant consideration. Counsel said that it was nevertheless unfair for Australia to ask the appellant to return when he had not fled from that country but been deported.

[11] We do not accept the argument that the Judge failed to take account of the appellant's family circumstances or omitted to notice any relevant matter. Our above account of the Judge's remarks demonstrates that he did give consideration to the effect on the appellant's family life and the fact that he is the family breadwinner. As Cato J recorded, the crime was a very serious one of murder allegedly committed for money – a contract killing with the appellant said to have been acting as the "hitman".

[12] Section 10(3)(a) of the Extradition Act requires the Court to consider whether "by reason of the trivial nature of the offence" it would "having regard to all the circumstances, be unjust or oppressive to return [the committed person]". Obviously that provision can have no application where the offence is one of murder. The more serious the offence the more compelling is the argument for requiring the person to return and face trial. That is all we think Cato J meant by his reference to the public interest. Where offending is of a very serious nature it will be harder for the committed person to establish that in all the circumstances, including as here a long passage of time since the offending, return would be unjust or oppressive.

[13] By a considerable margin we have not been persuaded that Cato J erred in his exercise of discretion under s.10(3) and in his conclusion that return in this case would not in the circumstances be unjust or oppressive. The passage of time was certainly very extended and the appellant's now long established family life will be disrupted. That will cause hardship to him, and through his absence, to his family. But the offence he is alleged to have committed is so serious that these considerations are outweighed.

[14] The applicable principles in Australia concerning personal oppression and the seriousness of the offence were summarized by Sackville J in *New Zealand v Venkaraya* [1995] 57 FCR 151 at 165. In determining whether it would be oppressive to surrender a person a court can take into account the financial hardship, domestic upheaval and emotional distress the person would experience if surrendered. But the gravity of the offence charged is a relevant and very important consideration. It would rarely if ever be appropriate to decline return to a designated country on the ground of injustice or oppression where the charge to be faced is murder, at least if capital punishment is not an available penalty.

[15] The appellant's deportation from Australia does not make his return there unjust or oppressive. It was unconnected with the murder and occurred at a time when the New South Wales Police had insufficient evidence to charge him. They have changed their attitude towards him only because there is now further evidence said to incriminate him.

[16] The appellant's other contention is that, in terms of s.6(1)(c), he might, if returned, be prejudiced at his trial by reason of his Tongan race. If he could establish that he cannot be returned. But the only basis on which this suggestion was put forward by the appellant was his bare assertion, backed only by reference to the fact that Australia had previously deported him. Cato J was understandably dismissive of this suggestion, pointing out that the deportation was after a conviction for armed robbery and saying that there was "no onus on the New South Wales authorities to show he will not be prejudiced at trial". Mr. Tu'utafaiva was critical of the latter statement. He submitted that it was enough for the appellant to raise the issue of racial prejudice and the respondent was then obliged to prove that the trial would be unaffected by it.

[17] We reject this submission. It must be assumed in the absence of any evidence to the contrary that the legal system of a designated country will operate fairly in relation to an extradited defendant. Such an assumption must be taken to underly the Extradition Act and the Government of Tonga's decision to designate a particular country under it. Otherwise the country seeking extradition would be obliged to go to great lengths in order to prove the negative proposition, that there will be no relevant prejudice to an extradited person, merely because that person has made an unsubstantiated assertion of possible prejudice.

[18] There is nothing at all to indicate that the New South Wales criminal law system will not protect the appellant against prejudice at his trial arising from his race. The fact that he was previously deported from Australia does not demonstrate any such prejudice. He was deported not because of his race but because of his criminal conviction for the serious crime of armed robbery.

[19] For these reasons the appeal is dismissed.

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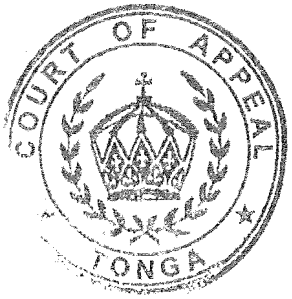
Moore J



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Blanchard J

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Hansen J

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Tupou J