'A. Kefu

3/11/14.

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION | AC 19 of 2014

NUKU'ALOFA REGISTRY | [CR 35 of 2013]

BETWEEN : KELEPI HALA'UFIA

- Appellant

AND : REX

- Respondent

Coram : Salmon J
Handley J
Hansen J
Tupou J

Counsel : Mr 'O. Pouono for the Appellant
Mr Kefu, A/AG for the Respondent

Date of Hearing : 24 October, 2014

Date of Judgment: 31 October, 2014

JUDGMENT OF THE COURT

Introduction

[1] After trial before Cato J the appellant was convicted of the manslaughter of Kali Fungavaka. He was sentenced to imprisonment for 11 years, the final year suspended. He appeals against conviction and sentence. The sole ground of appeal against conviction is that the Judge erred in accepting the evidence of a prosecution witness, 'Onitulei Manu. His appeal against sentence relates to the period of suspension which he claims is inadequate.

Background

[2] On 17 August 2012 Mr Fungavaka was socialising with others at the Time Out bar in the main street of Nuku'alofa. He was a Tongan, living in New Zealand and employed as a police officer. He was visiting Tonga to attend his grandfather's funeral, and was drinking at the bar with a relative, Tavake, following the funeral. Both were intoxicated.

[3] The appellant, who held the rank of Inspector, was the officer in charge of a group of Tongan police officers known as the Tactical

Response Group (TRG) which arrived at the bar. The TRG is responsible for policing difficult and dangerous situations and also routinely polices bars and nightclubs in Nuku'alofa.

[4] In circumstances which did not emerge clearly from the evidence Mr Fungavaka and Tavake were arrested for drunkenness. Tavake was placed in the police vehicle. Mr Fungavaka resisted arrest and instead of being placed in the vehicle was escorted to the police station on foot by two members of the TRG, Mr Maile and Mr Faletau. The station is only a short distance from the bar.

[5] The Judge found that in the course of being escorted to the station Mr Fungavaka was hit by Mr Maile with some sort of weapon and punched by Mr Faletau. At a later stage both were involved in further assaults on Mr Fungavaka leading to Mr Maile's conviction for manslaughter and Mr Faletau's for assault with intent to cause grevious bodily harm.

[6] The assault which led to the appellant's conviction, and which was found to be a substantial cause of Mr Fungavaka's death, took place immediately after his arrival at the police station. He was first taken into a room at the front of the police station

known as the charge room. A counter separated the charge room from the area open to the public which is accessed immediately on entry into the building. Mr Manu, the witness whose evidence the appellant seeks to impugn, was standing near the counter in this public area when Mr Fungavaka was brought in. He was taken by the two arresting officers behind the counter.

[7] The evidence of Mr Manu was that while Mr Fungavaka was being taken through the charge room by Mr Maile and Mr Faletau the appellant entered and struck him on the top of his head, towards the back, with a torch he was carrying. He said the torch was about one and a half feet long. Mr Manu said that the appellant then poked Mr Fungavaka in the chest with his torch. Mr Fungavaka was then taken into the watchhouse which adjoins the charge room. Mr Manu said he heard thumping sounds and Mr Fungavaka screaming abuse. He identified the appellant as one of those present at the scene.

[8] The Judge found, relying on the evidence of a number of other witnesses, that while Mr Fungavaka was in the watchhouse he

was strangled by the appellant with such force as to fracture the thyroid cartilage in his throat.

[9] From the watchhouse Mr Fungavaka was taken to the cells, dragged by Mr Maile and Faletau. The Judge found that in the course of this manouvre Mr Maile stomped "with all his might" on Mr Fungavaka's face. He was placed in a cell with other intoxicated prisoners, one of whom was the son of Mr Manu who had been arrested earlier for drunkenness. There was an altercation as a result of which Mr Manu's son also faced a charge of manslaughter. He was tried separately, acquitted of manslaughter but convicted of assault with intent to cause grevious bodily harm.

[10] Mr Fungavaka was then taken to another cell where it became obvious that his medical condition was deteriorating. He was taken to hospital where he underwent surgery to alleviate pressure on his brain. Treatment was unsuccessful. He died on 23 August 2012. A pathologist, Dr Fintan Garavan, told the Court that he had suffered a fractured skull and other head injuries. They caused bleeding in the brain which was the direct cause of death. He said the pressure on the throat that caused

the fracture of the thyroid cartilage would have been a secondary factor which materially contributed to death.

[11] Cato J found that the appellant was responsible for the skull fracture by means of the blow with the torch to Mr Fungavaka's head. He said that was a substantial cause of death. The judge was also satisfied that the appellant committed the act of strangulation which, by disrupting the blood flow and oxygen to the brain, also materially contributed to death.

The conviction appeal

[12] Mr Pouono submitted that there were three reasons why the Judge erred in accepting the evidence of 'Onitulei Manu:

(a) His evidence was "tainted" because of the nature of his son's involvement in the case.

(b) His evidence was, in any event, unreliable.

(c) The Judge failed to have proper regard for Mr Manu's previous conviction.

Involvement of son

[13] Mr Pouono argued that in the circumstances Mr Manu could be expected to, as he put it, "put the blame on others but not on his

own flesh and blood". He submitted that Mr Manu had an obvious incentive to tailor his evidence to mesh with the pathologist's evidence as to the location and force of the lethal blow to the skull. He pointed to the Judge's reliance on the pathologist's evidence as corroborating Mr Manu's account of the incident.

[14] The concern that Mr Manu's evidence could have been designed to protect his son was put to Mr Manu in evidence and raised with the Judge in closing submissions. Mr Manu rejected the suggestion that he bore ill-will towards the appellant; he said the appellant's brother was his next door neighbour and married to a relative. He went on to specifically address the involvement of his son in the following passage of his evidence:

> *"If my son is convicted for this charge of murder or manslaughter he should be going to prison for his crime because the reason we are here is to search for the truth."*

[15] In his decision the Judge acknowledged the concern that Mr Manu had a motive to give false evidence. He accepted Mr Manu's evidence that he was not badly disposed towards the appellant and noted his evidence that, if guilty, his son should be

punished. In treating the pathologist's evidence as corroborative of Mr Manu's account, he observed that there was no suggestion that Mr Manu knew of the contents of the pathologist's report.

[16] In the absence of any evidence to support the suggestion that Mr Manu may have tailored his evidence to favour his son, the Judge was fully entitled to accept Mr Manu's denial. It seems probable in any event that Mr Manu was not aware of what the pathologist was going to say. As the Judge indicated, it was not suggested otherwise in evidence. And it appears the pathologist's reports (there were two) were produced after Mr Manu made a statement to the police which, we were told, was consistent with his evidence at the trial.

[17] Of relevance too is that the Crown case was not advanced as a choice between two mutually exclusive alternatives - that death was caused by the blow struck by the appellant or as a result of the assault by Mr Manu's son in the cells. It was that the two were either jointly or individually responsible for causing death. By implicating the appellant, Mr Manu was not exonerating his son, as he himself seemed to recognise in his evidence.

Evidence not reliable

[18] In support of his contention that Mr Manu's evidence was not reliable Mr Pouono pointed to four matters:

(a) Mr Manu's evidence was not corroborated by other eye witnesses.

(b) The confined nature of the area in which the assault occurred.

(c) Mr Manu's account was implausible having regard to the number of people in the area.

(d) No police officer saw the appellant hit Mr Fungavaka with a torch.

These criticisms are interrelated and it is convenient to deal with them together.

[19] As previously noted the incident took place in the charge room where Mr Fungavaka was being held, one on either side by Messrs Maile and Faletau. Mr Manu was the only member of the public present, standing as we have said, on the other side of a counter which separated the public area from the charge room itself. At the other end of the room a passage led to two

separate rooms, the charge office on the left and the watchhouse on the right.

[20] There were two other police officers in the charge room proper at the time, Constables 'Aho and Vi. They were sitting at the counter facing the public area with their backs to the area where the assault took place. Mr Manu said there was a third police officer present, Assistant Deputy Commissioner Fua, who was standing next to him in the public area. There were three police officers in the charge office at the time with what the Judge said was a restricted view of the charge room.

[21] It does not seem to have been suggested to the trial Judge that the area was too restricted or too crowded for the incident to occur as described by Mr Manu and there is nothing in the evidence to which we were referred to support the suggestion. The photographs produced in evidence depict a spacious area. The Judge took a view and must be taken to have been satisfied that there was enough room for the assault to have taken place as described.

[22] It is true that none of the police officers present was able to confirm Mr Manu's account. But three officers saw the appellant carrying a torch and the Judge clearly had concerns about the evidence of the three other police officers said to have been present. He described Constables 'Aho and Vi as "rather vague" about what they saw. Mr Kefu, who was senior Crown counsel at the trial had submitted that Assistant Deputy Commissioner Fua, who had claimed to be outside at all material times, had not been frank in his evidence and had seen more than he was prepared to admit. The Judge made no express finding on the issue as Mr Fua had been an early prosecution witness and had not been challenged in crossexamination. However, in preferring the evidence of Mr Manu he implicitly rejected Mr Fua's claim to have seen nothing of the incident in the charge room.

[23] Although Mr Pouono doubted the Judges finding that the officers in the charge office had a restricted view of the area in which the assault occurred, the photographic evidence shows that clearly to be the case. Further, two of the three officers in the charge office had their backs to the charge room at the relevant time.

[24] None of the matters raised by Mr Pouono give any cause for concern about the Judge's view that Mr Manu's evidence was reliable. It was corroborated by the pathologist's evidence, not only in relation to the blow to the head but also as it concerned what Mr Manu had described as the poke to the chest with the torch which followed. There was bruising to the deceased's chest which was consistent with Mr Manu's description of what happened.

[25] In his admirably comprehensive and careful analysis of the evidence Cato J made a convincing case for accepting Mr Manu's evidence. Nothing has been raised which would cause us to doubt his assessment.

Previous Conviction

[26] Mr Manu accepted that he had previous convictions for assault, indecent assault and drug offending. The Judge acknowledged his criminal history and the consequential need to approach his evidence with caution. As our earlier discussion shows, he plainly did so.

[27] We are left in no doubt that the Judge was fully entitled to accept Mr Manu's version of the events that took place in the charge room and to prefer his evidence where it conflicted with the evidence of police officers also present.

Sentence Appeal

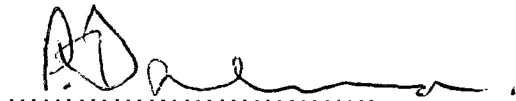
[28] There was no criticism of the term of imprisonment imposed by the Judge. The sole ground of appeal is that the period of suspension was inadequate. Mr Pouono submitted that having regard to the appellant's previous good character and family responsibilities – he is a 44 year old man with a young family – the period of suspension should have been 3 years.

[29] In sentencing the appellant, Cato J adopted a starting point of 13 years imprisonment which he reduced by 2 years to take account of his previous good character. The period of suspension gave further recognition to his good character. The Judge regarded that as appropriate. The appellant had not co-operated with the authorities or shown remorse. There was no basis for a longer period of suspension.

[30] We find no error in the Judge's approach. His reasons for limiting the period of suspension to one year in the exercise of his discretion are cogent and persuasive.

Result

[31] The appeal against conviction and sentence is dismissed.



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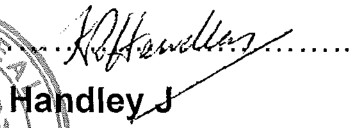
Salmon J



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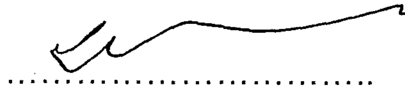

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Tupou J