IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY APPEAL NO. AC 32 of 2009

BETWEEN : 'ILAISAANE KAHO

Appellant

AND : REX

Respondent

Coram : Ford CJ
Salmon J
Moore J

Counsel : Mr. Pouono for the Appellant
Mr. Kefu for the Respondent

Date of Hearing : 8 July 2010

Date of Memorandum : 14 July 2010

MEMORANDUM OF THE COURT

[1] This appeal is against the appellant's conviction for murder after a trial before a Judge and Jury in the Supreme Court.

[2] The Court has not heard full argument in this matter. It became apparent to the Court for the reasons set out below that there was a strong possibility that the matter would need to be sent back to be Supreme Court for rehearing. Equally it seemed to the Court that the guilty plea to manslaughter, which had been entered by the appellant prior to trial must stand so that the result of a rehearing would be that the appellant would be found guilty at least of manslaughter. In these circumstances the Court invited Counsel to consider whether the delay and cost would justify a rehearing or whether the better course would be for the Crown to accept the manslaughter plea. After discussion between Counsel they advised the Court that the Crown was willing to accept the plea of guilty to manslaughter and to consent to the setting aside of the murder conviction.

[3] In her amended appeal the appellant claimed that the summing up of the Judge to the jury was defective because he had not put self defence and provocation to the jury. As indicated above the appellant pleaded guilty to manslaughter prior to trial but not guilty to murder. At that stage the Crown was not prepared to accept a plea of guilty to manslaughter so the trial proceeded on the murder charge. It is important to note that the appellant had been charged in the alternative with murder and manslaughter.

[4] The Court advised counsel that it appeared clear from the decision of the English Court of Appeal in R v Cole [1965] 2QB 388 that where there are two counts in the indictment, one charging a serious offence, and one a lesser offence, that the correct procedure to be followed where a prisoner pleads guilty to the count charging the lesser offence and not guilty to the count charging the more serious offence is as follows. If the plea to the less serious offence is not accepted, the prisoner will then be put in the charge of the jury only on the more serious count. If he was acquitted on that count he will then be sentenced on the count to which he has pleaded guilty. It was for that reason that the court formed the view that if the matter were to be re-heard the appellant would be found guilty at least of manslaughter.

[5] If a jury finds the defence of provocation established it must bring in a verdict of manslaughter. The judge in the Court below did not put provocation to the jury. He addressed provocation but specifically directed that as a matter of law it could not be considered. In reaching this determination he said that the only act which could be regarded as provocation was the bad language which the victim used to the appellant's husband the previous evening. The judge concluded as a

matter of law that was too remote to come within the legal definition of provocation. However in the appellant's statement to the police she described how, in a fight with the victim, she felt that she had lost control and it was then that she took the knife which was in her husband's jacket, which she was wearing, and stabbed the victim. Her assertion of loss of control was supported by one of the witnesses called for the prosecution. The judge did not refer to what happened in the fight in the context of provocation nor to the attitude of the victim prior to the fight commencing. The matters which may amount to the defence of extreme provocation are set out in section 89 of the Criminal Offences Act. The first of those is where an unlawful assault committed upon the accused person by the other person was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation as to be likely to deprive any person of ordinary character, being in the circumstances in which the accused person was, of the power of self-control.

[6] There was plenty of room for dispute as to whether the evidence established extreme provocation in terms of this provision, however it seemed to the Court that there was enough evidence relating to the fight between the appellant and the victim and in relation to the victim's attitude prior to the fight to make it appropriate for the issue of provocation to be put to the jury.

[7] In the light of the above circumstances and as a result of the agreement reached by counsel the Court allows the appeal, quashes the verdict of guilty to murder and enters a verdict of guilty to manslaughter. The case is remitted to the Supreme Court for consideration of the appropriate sentence to be entered for manslaughter. It will be for the judge in that Court to determine what, if any, weight should be given to the element of provocation.

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Ford CJ

COURT OF APPEAL TONGA

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Salmon J

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Moore J