IN THE SUPREME COURT OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

AM 3 of 2016

BETWEEN: **POLICE** - **Appellant**

AND: **FATAI MALUPO** - **Respondent**

BEFORE THE HON. JUSTICE CATO

JUDGMENT

Mr Kefu for the Appellant
Mr Clive Edwards for the Respondent.

[1] This appeal commenced in a rather unusual way. The Respondent, a police officer for ten years, had been convicted by a Magistrate of causing simple bodily harm involving a person who was in the process of being arrested. It was alleged that as a consequence of a punch the accused effected, the complaint lost a number of teeth. The Magistrate had sentenced him to a term of probation. From this, the Crown appealed on the grounds that the sentence was manifestly wrong (disproportionate to the offence) and that the Respondent should serve at least a suspended term of imprisonment with a condition that he perform some community work.

[2] However, the Crown in its appeal document, also had requested that the case be remitted back to the Magistrate's Court to be tried de novo before a different Magistrate. I do not know why

this ground of appeal was included. Mr Clive Edwards, who had appeared for the Respondent at his trial and at his Appeal indicated in a memorandum filed shortly before the hearing that he had no objection to the Crown's course of action, namely to remit the matter for a retrial. In a memorandum filed, he outlined a number of reasons why he considered the Magistrate's verdict was wrong.

[3] The Crown, however, had in a memorandum filed on the 23rd June 2016 sought leave not to proceed with the second ground of appeal and indicated its desire to proceed simply on the sentence aspect. This application had not been dealt with at the time of the appeal. Mr Edwards and Mr Kefu appeared before me on this appeal. It was not disputed that the second ground of the Crown's appeal had meant that Mr Edwards had not filed an appeal against conviction, as he, but for the second ground of the Crown appeal, would have done. In these circumstances, it seemed only fair and proper that I should examine closely the circumstances of the offending to see whether a miscarriage of justice would arise should I proceed to treat this matter as a sentence appeal only, or whether there was reason to remit the matter for a retrial. Mr Kefu, did not cavil at my considering the merits of the case and the conviction before determining whether the case should be remitted to the Magistrates Court. This is in keeping with the approach and spirit dictated by Parliament in section 81 of the Magistrate's Court Act that an appeal is to be decided on its merits. A considerable time had elapsed since the offending took place as Mr Kefu pointed out. The offending took place on the 26th April 2014 but the trial in the Magistrates Court did not take place until the 10th November 2015 and the judgment was given a few days after.

[4] The transcript of the evidence is not very clear, and I have been assisted by some of the evidence as recorded by the Magistrate

in his judgment. The circumstances of the offending were that on the 26th April 2014, police were called to an incident at Patangata around 8-9pm. The complainant who was drinking had, he said, passed out about 2pm and woken up at about that time. He had found a wallet and alcohol missing and had walked to his parent's home where his defacto partner was living. He had an argument with his defacto partner and assaulted her at his parent's house, and the police had been called. There were four police officers and one person who had been previously arrested in the police vehicle, which is known in Tonga as a double capped van. The complainant alleged that he had been told to get in the van. He said an officer in uniform had pulled him and thrown a punch and that was when he had blacked out for he could not see properly. Earlier, he had said there were four police officers, two were in uniform and two were in overalls. There was no evidence that he had known or was acquainted with the officer who had assaulted him. He said, subsequently, that a number of teeth had to be removed. He said, at the time, the lights from his parent's home was still on but there were no street lights. He said he only knew the name of the officer later, at the police station. He said to the prosecutor, the person who punched me is right there referring to the accused. Under cross-examination, he said my eyes faded when I was punched, I only saw things clearly when the police were still holding me. It appears there had been some verbal confrontation before the punch had been delivered.

[5] The second witness was his defacto partner. She said there was an argument with the complainant over liquor and his money and he had touched her and his father had rung the police. She said she had not seen the complainant get into the vehicle. She said that she had only seen the police who had come around and punched him in the mouth. She said the police in uniform also punched and then they all got into the vehicle and took off. She said lights were on and she saw three officers. She saw one

officer in uniform and one in overalls. She said the one I saw walking around to Taani was an officer wearing overalls. She said that she believed the person who punched Taani is sitting right there sir. She said she did not know anything about how the complainant got into the vehicle. What she said happened took place outside. She also mentioned that a police officer in uniform had also it seems punched Taani.

[6] A third witness for the prosecution was the mother of the complainant. She said there were two officers; one came and took Taani to the vehicle; the person who punched Taani held his mouth while another officer punched him. She said the moon was up and the lights from the store were on. Her account advanced in a statement made to police and tendered in evidence by Mr Edwards was materially different from her evidence given at the hearing. She also said to the prosecution that is the man who punched Taani sitting right there. She said that in evidence that Taani was outside the van on the ground when punches were thrown at him. (This appears more clearly in the Magistrates record of the evidence then in the transcript which is unclear) In her statement made about the time of the incident, she had said that the punch was delivered after Taani had been placed in the van and they had punched him from the top of the vehicle. Taani had been thrown out of the van she said on his buttocks. She said that her evidence was correct not what she had said a year ago and that the police had acted improperly in the taking of her statement. A police officer was called to confirm that her statement had been given freely and without any improper conduct.

[7] The defence and one witness, also a police officer who was in he vehicle with the accused that night gave evidence. Both denied that the accused had assaulted the complainant. Their evidence confirmed there were four policemen in attendance that day. It was not confirmed who was wearing overalls. The defence

witness said he was driving, and that two other officers Salt and Ma'ake were present also, besides the accused. The complainant has been behaving aggressively when confronted by police. The accused, it was confirmed by the defence witness had not thrown a punch and he said he would have seen it if a punch had been thrown. The accused said it was he who had taken the complainant into the police station when he had accused him of punching him.

[8] The Magistrate in his judgment said;

> "Within this case, it is very clear how witness statements are different from each other from both parties. Three of the prosecution witnesses all say that a punch was made. Two of the witnesses given by the defence both say there was no punch. All the witnesses of the Prosecution all say that there was a punch made. Both statements of the mother and Taani's defacto are similar saying that the defendant walked around and punched the victim. The victim states that it was the defendant who made the punch and that he told this to Hinemoa Aho."
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> What it really comes down to is credibility.
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> This mother is the person who confirmed that the call be made to the police, so that Taani can be taken away. She saw one of the police throw a punch at Taani. It was someone who wore an overall. The partner of Taani also stated that after he had hit her that evening, she did see the defendant punch Taani. As submitted by counsel for the defendant, that the statement be balanced, it is heavier to that of the Prosecution. If there were some differences then I guess it was meant to be this way. The Court relies on the evidence given by the prosecution. If there were some differences then I guess it as meant to be this way. The punch on Taani Nonu was made at this very night and that punch was made by the defendant Fatai Malupo, also the punch was illegal. Therefore, I sentence the defendant Fati Malupo guilty for the crime against him, which is bodily harm."

[9] The Magistrate appeared to decide the issue simply on a finding of credibility. He preferred the evidence of the prosecution witnesses. As I read the evidence, however, the complainant, Taani's identification of the accused as the person who assaulted him was suspect. On this own admission, he had said his eyes

faded when I was punched, I only saw things clearly when the police were holding me. On his evidence, the punch was thrown by an officer already in the van and one who was in overalls. If this were true, it was plainly at variance with the evidence given by his partner who said she saw the punch thrown whilst he was outside the vehicle. Also, the statement made by his mother to police is at variance with her own evidence at trial that the assault took place outside the vehicle when he was on the ground. There is no evidence, aside from the prosecution witnesses, confirming that the accused was wearing overalls. In any event, on the account of the complainant, two of the policemen present that night were wearing overalls. There was never any suggestion that more than one punch was thrown causing the injury so the location of the punch became important. Whilst it is likely true that a punch thrown that night caused the damage to the complainant's teeth, the two versions of when this punch was thrown that is inside or outside the vehicle render the Crown case inherently unreliable. The Magistrate, it seems, treated this conflict as mere inconsistencies but to my mind they were more fundamental than that.

[10] The Magistrate appeared to take the view that weight of numbers resolved the matter of guilt and in my view his justification of the differences as no more than "his guess that it was meant to be this way", inadequately dealt with what was, as I have said a major conflict in the evidence as to where the assault took place. As Mr Edwards had submitted and again raised in his memorandum for this hearing, this was a serious conflict. The mother's evidence was to my mind so objectively unreliable that her evidence could not be relied upon to support any conviction. That left only the complainant who said the assault arose inside the vehicle and his partner who said it took place outside. As an appeal Judge reviewing the evidence and allowing for the general principle that credibility lies with the trier of fact, I was left in a state of real doubt on the evidence as to

where the assault took place, and consequently the reliability of the Crown evidence.

[11] Even more fundamentally, however, a review of the evidence reveals that the Prosecution did not establish beyond a reasonable doubt or, even to the lower standard of a prima facie case, that the accused was responsible for the assault on ordinary standards of identification. All three of the Crown witnesses gave dock identifications that the accused was the man responsible for the assault. A dock identification is always tenuous and before convicting, there should be supporting evidence either direct or circumstantial that establishes beyond a reasonable doubt that the accused was the perpetrator of the crime alleged. There was no suggestion here either that the accused was known to a witness before the event, to such an extent that he or she could be said to have been familiar with the Respondent before the assault. The dangers inherent in exposing a suspect alone to an eyewitness before trial and a dock identification have been emphasised by the Courts for many years. In *Davies and Cody v The King* [1937] 57 CLR 170 the High Court of Australia (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ) observed on a case concerning identification;

> " ...if a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. The tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question."

Elsewhere, in the judgment, it is stated;

> "We think the view accepted in England, and as far as we know, elsewhere in the Dominions where the provisions of the Criminal Appeal Act have been adopted, should be applied in Victoria. That view, as we understand it, is that, if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown

> the accused alone as a suspect and has on that occasion first identified him, the liability is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence, direct or circumstantial. Where that further evidence consists in or includes other witnesses whose identification been of that kind, the number of witnesses, their opportunities of obtaining an impression or knowledge of the prisoner and other circumstances in the case must be taken into account by the court of criminal appeal for the purpose of deciding whether on the whole case, the possibility of error is so substantial as to make the conviction unsafe".

To similar effect, is Archbold, 2016 edition at paras 14-59, pages 1628-9

[12] There was no evidence here in support of the Respondent being the perpetrator other than the dock identifications. Nor was there any other evidence that could be said to reliably link the accused with the crime. To my mind, the prosecution evidence also failed to meet the dictates of the Court of Criminal Appeal in Turnbull v DPP [1977] 1 QB 225 which has been followed in other Commonwealth jurisdictions. Plainly, the action of punching would be a momentary act, one that could fairly be described as providing the eye witnesses with a fleeting glimpse of the assault. The action took place in or about an unlit street. There was, however, some light the witnesses said from the complainant's parents nearby store. In these circumstances, the identification by an eyewitness or eyewitnesses of the accused as the perpetrator, required to be supported by other evidence that the accused was the person who was responsible for the punch that caused damage to the complainant's teeth. This is because a convincing and honest witness may be a mistaken witness; the Court noting, that even, in cases of recognition, mistakes can be made and warnings should be given to juries that there is a special need for caution. In the absence of supporting evidence linking an accused with a crime, it was stated by the Court of Appeal that, if the case involved a fleeting glimpse, it should be withdrawn from the jury.

[13] There is no supporting evidence here that could be said to confirm any of these dock identifications. Dock identifications cannot support other dock identifications in the absence of one of the witnesses being familiar with the accused before the event. In the absence of evidence of prior familiarity, a conviction dependent on dock identification cannot stand unless there is, as was said in Davis and Cody, other supporting evidence, direct or circumstantial, that implicates an accused as the offender beyond a reasonable doubt. Davis and Cody and Turnbull are cases which reflect the importance of care in identification where it is well known through experience that even honest witnesses can be mistaken in their recognition and miscarriages of justice occur. These principles must be adhered to also in Tonga. Identification issues and pre-trial methods of identification such as identification parades, informal crowd scenes and the use of photo montages should be the subject of careful police training. A failure to use these procedures where required, and to expose the accused alone prior to trial, or at trial by dock identification may cause prosecutions to fail in the absence of other supporting evidence of guilt. A guide for the implementation of appropriate procedures in Tonga is provided by the New Zealand Evidence Act, 2006 which adopted common law principle and modified this to some extent.

[14] In this case, as I have said, the prosecution depended entirely on dock evidence and involved also a conflict in the evidence as to the location of the assault which made matters worse. There was no evidence independently of the prosecution evidence to say that the accused was in fact wearing overalls that night, and in any event, the complainant said that there were two officers that he observed wearing overalls. Having reviewed the evidence, I consider the case fell well short of establishing guilt beyond a reasonable doubt, nor for the reasons I have given a prima facie case. Accordingly, I see no reason to remit the matter for a retrial. I quash the conviction and discharge the Respondent.

[16] Finally, as I have said in other cases of police violence on prisoners as illustrated in the case of Faletau, (CR 91/13, 29th July 2014) errant police officers involved in unlawful violence against civilians under arrest or in custody can expect to face imprisonment. Whether imprisonment will be suspended and to what extent will depend on the seriousness of the assault. When it is fully suspended, as in Faletau, a condition of suspension should include a lengthy sentence of community work, in that case, slightly over a hundred hours. Excessive and unlawful violence by members of the Tongan police force will not be tolerated by the Courts. The fact that members may be later subject to disciplinary proceedings under the Police Act, 2010 should not be taken into account by a Magistrate in sentencing. Probation was not, in my view, an adequate sentence for an unlawful assault by a police officer when effecting an arrest that involving punching a prisoner in the mouth causing a loss of his teeth.

[17' I discharged the Respondent on the 31st August, 2016 after the appeal was heard and I had quashed his conviction, but indicated that I would deliver a written judgment because the case involved important issues of principle, and matters of practice that were important for the Tongan police to adapt to and follow. I backdate this to the date of the Respondent's discharge which occurred, yesterday.

DATED: 31st August 2016 **JUDGE**