

APPELLANT JURISDICTION

NUKU'ALOFA REGISTRY

has been a delay in forwarding the appeal to this Court. The appeal notice had been filed by the Crown on the 31st May 2016. The record did not arrive in this Court until mid-October 2016. Delays have been systemic in the Magistrates Court. Systemic delay in the administration of justice and the orderly disposal of appeals may be a factor for a Court to take into account in mitigation of sentence.

- [2] The Crown contended that the Magistrate had incorrectly gone on to dismiss a charging of causing serious bodily harm on the grounds that willful in the English section 107(1) and 2(c) of the Criminal Offences Act was not represented by the Tongan word included in the Tongan version of the legislation, "fakalotokovi". As a consequence because he considered that "fakalotokovi" meant ill will and did not mean willful, on the facts before him the charge should be dismissed because the Respondent had not acted "wickedly" when, during what seems to have been a drunken evening, the complainant had asked the respondent to shoot him after the complainant had held the gun towards his chest. The Respondent had obliged and, although the pellet had lodged in the complainant's chest, mercifully no further harm than allegedly serious harm had eventuated.

- [3] Mr Lutui, who argued the case for the Crown, pointed out that Magistrate Mafi had applied the approach that existed under the former section 21 of the Interpretation Act that read;

"if upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the section which the accused

person is charged with violating differ in meaning, then in deciding the question of the accused's guilt or innocence, the court shall be guided by what appears to be the true meaning and intent of the Tongan version."

- [4] Mr Lutui contended that the Magistrate had overlooked the new provision contained within section 8 of the Law Revision (Miscellaneous Amendments) Act 7 of 2009, that reads;

"Where it appears to a court that the Tongan language version of a provision in an act differs in meaning from the English version of that same provision –

- (a) the court may give the provision its correct meaning and act accordingly if it considers that there has been a simple clerical error or error in translation; or
- (b) the court shall treat the Tongan language version of that provision as giving the true meaning of the law if it considers that the difference in meaning goes beyond a simple clerical error or error in translation."

- [5] Applying the English version of the Act, willful means no more than intentional or purposeful. It is not required to constitute a successful prosecution that there be present any blameworthiness, male fides or moral obloquy accompanying the act. This point was made by Professor JC Smith in Smith and Hogan, "Criminal Law" 10th ed, at page 70 where it is said that, "the word 'rea' refers to the criminality of the act, not its moral quality." An example of this given by Dr Smith was R v Kingston [1994] 3 ALL ER 353 which had followed Yip Chiu-Cheung

[1994]2 All ER 924. Yip had upheld a charge of conspiracy to export drugs where the accused had conspired allegedly with an undercover officer to export drugs from Hong Kong to Australia. Albeit that the undercover officer's motives were good that is to entrap criminals and he was acting on superior orders, neither would have been a defence if the undercover officer had been charged. Thus, the appellant's defence was that he could not be a conspirator with the undercover policeman failed. In Kingston, the fact that the accused, a man with paedophilic inclination, who had indecently assaulted a 14 year old boy said that he would not have given way to his inclinations and committed the offence but for drugs secretly administered to him with intent that she should do so, was no answer to the charge. Professor Smith went on to say;

'An actus reus generally is, or includes, some very undesirable result – killing , wounding, theft or damage to property etc and an intention to kill, wounding, theft or damage to property, etc- and an intention to cause it is nearly always a state of mind which ordinary people would regard as blameworthy; but moral blameworthiness is not the legal test. "

[6] Indeed, the position taken by the Magistrate has, I am informed by Mr Lutui, never been taken before in Tonga despite the fact that the offence of grievous bodily harm also contains the same provision and has existed in the Criminal Offences legislation for many years. The change postulated by the Magistrate would represent a radical change in approach for Tonga in common offences such as causing serious or grievous harm. Such a change would in my view as Mr Lutui argued be quite inconsistent with the English approach to mens rea and have to

be one that was plainly intended under the Tongan version of the legislation.

[7] Mr. Lutui pointed out that the correct approach was for the Magistrate to have satisfied himself first whether there had been a simple clerical error or error in translation, and only if it went beyond that could the Court treat the Tongan version of that provision as giving the true meaning of the law. He had not it seems done so or applied his mind to this issue and, accordingly, he had misdirected himself.

[8] There is no reference at all in Magistrate's Mafi's decision to dictionary meanings, or expert evidence. He said in a translated version;

Ticket to Bodily harm- that the defendant is released upon this court based on section 21 of the Interpretation Act. When the Tongan Act is compared with the English Act, there are differences. It states if one is heard due to breach of the law then it has a difference from the English Act in that which the defendant is being charged upon. Therefore the defendant will be judged whether he is innocent or not based upon the Tongan language.

However in this case there has been willful which must be proved by the Prosecution the main elements of wicked act been made. There are important terms which are willful, ill-will – this is wickedness but yet proved. That the bodily harm was because of willful but it is clear here that the prosecution asked the defendant to shoot him when he held the gun mouth towards his chest. The

defendant was shooting at bottles. Therefore the ticket to bodily harm is released from the defendant."

- [9] I interpret the Magistrate in this translation, which may be rather limited, from what he had recorded in Tongan to assert that the word "fakalotokovi" to require proof of ill-will, rather than mere intention or deliberation, and could have no other meaning. The fact that the complainant requested the accused to take the action in his view absolved the Respondent of responsibility, and the prosecution was dismissed. Mr Lutui, who speaks fluent English and Tongan, says that is not so. "Fakalotokovi", he contended, was intended to mean deliberate or intentional although it could also have the meaning ill -will, as well.
- [10] I consider that I should refer the matter back to the Magistrate to reconsider this issue in accordance with the appropriate statutory provisions. In relation to the issue of whether the Tongan version is materially different, the prosecution should proceed to have Tongan dictionary meanings available, and because the issue is so important for the orderly development of Tongan law, expert Tongan evidence on the point. I understand Mr Lutui to say that "fakalotokovi" was the only word that could be used in Tonga to encapsulate intention, and that it did.
- [11] In any event, it would seem, although I express no view upon the issue, that even if the interpretation in Tonga is not materially different and moral culpability is not required then the defence of consent may be available to the otherwise unlawful act of firing the rifle and causing serious harm.

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[12] Again, the commentary in Smith and Hogan at pages 420-422 is helpful. For some, but not all assaults, consent can be a defence to an intentional application of force for example murder. Professor Smith discusses limitations on consent to the infliction of physical harm. The law is not clearly settled, as the commentary suggests. See Brown [1993] 2 All ER 75, at 79, 86, 106 119 HL, and the criticism of Smith at pg 421, at least in so far as the judgment suggests consent is negated because harm occurred regardless of whether it was foreseen. For robust horseplay by Royal Air Force officers involving setting fire to others garments, leading to serious burns see Aitken [1992] 1 WLR 1006, and the comment by Professor Smith, at page 422;

“Two such incidents apparently caused no harm but then P sustained severe burns. It was held that a ruling that it was not open to the court martial to find that the activities were lawful was wrong. If P consented to them or if D believed reasonably or not that P consented to them, it was open to the trial court to find there was no offence.”

[13] This plainly is a case which raises some uncertain and quite fine legal issues and is unusual. I am informed by Mr Lutui that the firearm was a air rifle in good working condition, and the accused and the complainant had been drinking and were in a sense involved also in horse play plainly also of a robust kind, so the issue may arise as to whether or not if consent applies to this charge, the causation of harm per se is sufficient to negative consent, or whether the prosecution must prove that the accused must have foreseen the possibility of harm, as Professor Smith opined should be the correct approach. In which case, the

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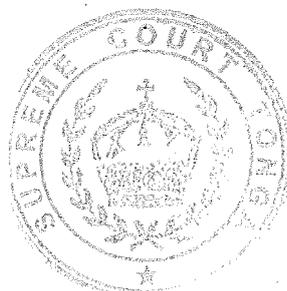
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nature of the weapon and its propensity to cause harm and the accused's awareness of this possibility in the circumstances as he found himself may be factors which assume importance.

[14] The issues raised in this case in my view are of significant importance to the orderly development of Tonga's criminal law. In my view, a senior prosecutor should be instructed to conduct this prosecution to ensure that the Magistrate is given every assistance at the trial.

[15] I quash the ruling made by the Principal Magistrate for the reasons I have given and refer the matter back to him, in his enhanced jurisdiction, for a rehearing. The Respondent is granted bail on terms which have been set out at the conclusion of the hearing. His next appearance is before Principal Magistrate Mafi in his enhanced jurisdiction in the No 3 Court room of the Supreme Court on the 7th February 2017 at 10 am for a trial date to be set.

DATED: 13 JANUARY 2017



A handwritten signature in black ink, appearing to read "Cato", is written over the printed name.

C. B. Cato

JUDGE