

poles to be charged with electricity. 'Isileli Palu (Mr Palu) received an electric shock when he touched a tent pole, and he died.

[3] Sections 86(1)(b), 86(2) and 92 of the Criminal Offences Act provide:

86 Definition of culpable homicide

(1) Culpable homicide consists in the killing of any person either —

(b) by omission without lawful excuse to perform or observe towards such person any legal duty.....

(2) Culpable homicide is either murder or manslaughter.

92 Manslaughter

Culpable homicide which does not amount to murder is manslaughter and if such homicide was caused by negligence the offence is only manslaughter by negligence.

[4] The particulars of the offence in the indictment read:

Uilisoni Falahola of Kolomotu'a, on or about 3 August at Kolomotu'a you did make an electrical installation in a tent, whilst not being registered as an electrical contractor under the Electrical Contractor By-Laws, and you were grossly negligent in making such electrical installation because you did not ensure proper and safe installation of electrical tube lights and wiring on to the metal frame of the tent, which caused the metal frame of the tent to be charged by electricity, and when 'Isileli Palu touched it, he was electrocuted and this caused his death.

[5] I have reminded myself at the outset that the onus of proof lies on the prosecution at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charge and every constituent element of the charge.

[6] The elements of the offence that must be proved beyond reasonable doubt are the following:

- (a) Mr Falahola, on or about 3 August 2017;
- (b) Installed the light fixture in a tent at Kolomotu'a;

- (c) Mr Falahola owed a duty, to persons including Mr Palu, to ensure the proper and safe installation of the light fixture;
- (d) That Mr Falahola breached the said duty and was grossly negligent in the circumstances (for which, see paras [30]-[34]); and
- (e) Mr Falahola's breach of duty was a substantial and operative cause of the death of Mr Palu.

The witnesses

Prosecution witnesses

[7] The prosecution called only two witnesses.

Matiu Faletau

[8] The first witness was Matiu Faletau. He is a cousin of Mr Palu.

[9] He said that Mr Falahola is known in the village as a handyman, plumber and an electrician. He referred to building projects where Mr Falahola did electrical work.

[10] On 3 August 2017, Mr Falahola had set up a light in a tent at Kolomotu'a. Mr Faletau and others were in the tent. He was cleaning cow intestines and slicing them into a pot. When he touched the lid of the pot he got an electric shock and he told one Folofola that he had been shocked. Mr Palu came from the back and grabbed the tent pole, shouted "oiaue" and fell to the ground. He was found to have no pulse.

'Asita Langi

[11] The second witness was 'Asita Langi. He is a Technical Manager with the Electricity Commission. He has worked for the Commission for 14 years.

- [12] On 4 August 2017, he had gone to investigate the death of Mr Palu. He had interviewed a relative of Mr Palu, had inspected the light fixture and had prepared a joint written report with a Mr Valita. He spoke to the report.
- [13] The light fixture had been tied to the tent's metal pole and there were two extension cords to run the power to a neighbour's property. The extension cords were found to follow approved standards, but the light fixture was not safe.
- [14] The power cord of the light fixture had been extended. It appears that the power cord was cut and two wires spliced on to it so as to lengthen it. These wires were a live (phase) wire and a neutral wire. These additional wires were in turn connected to the light fixture. The additional wires were not properly insulated (or insulation tape that was used had, over time, come away in places) because the live (phase) wire was exposed at one point. There was no protective earth wire connected to the light fixture. In his report, Mr Langi put the matter this way:

However, this wiring was not safely done using proper wire and termination...part of the wiring (Phase Wire) was exposed and also there was no earth wire (Protective Earth) connected to the fixture. These were the main cause of the fatal electrocution. The exposed wire was touching the tent's metallic frame when the deceased came in to contact with the tent pole. Without the protective earth to help trip the breaker and prevent any electrical hazard when the tent frame became live...the tent pole became live and stay live.

- [15] Mr Langi said that the re-wiring of the light fixture required a permit and could only be done by a licenced electrician. He said that Mr Falahola was not licenced to do electrical work. He stated in his report:

Since the light fixture was wired by the electrician (Mr Uili Falahola) and not an approved factory prewired fixtures, it requires an Electrical Permit. Also, only licenced and qualified electrician are allowed to do electrical works

(rewiring light fixtures). By doing the wiring without an Electrical license nor Permit, Mr Uili Falahola was doing the work illegally.

[16] Mr Langi did not have personal knowledge that Mr Falahola had re-wired the light fixture. He relied upon what he was told by the relative of Mr Palu. That relative was not called as a witness. Mr Langi's evidence of what he was told is inadmissible as evidence that Mr Falahola re-wired the light fixture. This is important because Mr Falahola says, and put it to Mr Langi in cross-examination, that he had not re-wired the light fixture.

[17] In answer to a question from me, Mr Langi acknowledged that the person he had spoken to did not say that they saw Mr Falahola do the re-wiring, rather, they said they saw him install the light fixture; these are quite different matters.

[18] Also in answer to a question from me, Mr Langi said that if the exposed live wire had not come into contact with the metal frame of the tent there would not have been a problem in this case.

Medical report

[19] The prosecution submitted into evidence, by consent, a medical report confirming that the cause of Mr Palu's death was electrical injury.

Defence witness

[20] Mr Falahola gave evidence on his own behalf. He wished to call another witness but that witness was not available. In the event, this has not prejudiced him.

Mr Falahola

[21] Mr Falahola worked as a handyman at Tonga High School. He was asked to provide a lighting appliance and an extension cord for the tent. Food was to be prepared in the tent for the funeral. He provided the light fixture and an extension cord. He hung the light fixture. It was Saia Faletau who plugged the extension cord in at a neighbour's property to supply the power.

[22] After installing the light fixture he had touched the tent and had not received a shock. The first person to receive a shock was Matiu Faletau. When the alarm was raised, Mr Falahola immediately went to unplug the light fixture. Saia Faletau warned Mr Palu not to touch the tent but Mr Palu said words to the effect that it was alright and he would go with his deceased father. Mr Palu then touched the tent pole and was electrocuted. Mr Falahola immediately went to Mr Palu's aid.

[23] Mr Falahola accepted that he was known for doing electrical work but said that he did work under qualified people and that at Tonga High School his work involved:

...replac[ing] light bulbs or work on starters, these are handiworks but when it comes to rewiring of electricity there are people who do that work.

[24] He said that he did not re-wire the light fixture and he had used it many times, including at his home, without incident.

Discussion

[25] I am satisfied that all of the witnesses gave their evidence honestly, although, as will become clear, I do not accept all that was said by Mr Faletau or Mr Langi.

[26] I am satisfied that on 3 August 2017, Mr Falahola installed the light fixture in the tent at Kolomotu'a. He supplied and hung the light fixture in the tent as well as providing one of the extension cords by which it was connected to the power supply. He did this without payment or other reward to assist in the funeral of a neighbour who he was close to.

[27] The issue whether Mr Falahola owed Mr Palu (and others using or coming into contact with the tent) a duty to take care, is not straightforward. The prosecution presented no analysis of the considerations that give rise to such a duty in this case. The principal matter that has troubled me in making such a finding (that such a duty exists) is the gratuitous nature of

Mr Falahola's undertaking. Much could be written on this topic, but my research satisfies me that a duty to take care did arise. Mr Falahola was under no obligation to provide the light fixture but he agreed to do so and, in the circumstances, his conduct in supplying and then installing it induced both reliance and dependence upon him giving rise to a duty to take care (see Todd, Hawes and Cheer, *The Law of Torts in New Zealand*, 7th Ed at 5.6.08).

[28] I am satisfied also that the light fixture was not safe, for the reasons given by Mr Langi, which caused the tent pole to be charged.

[29] I am satisfied that Mr Palu received an electric shock when he touched the tent pole causing his death.

[30] The principle issue that arises in this case is whether it has been proved beyond reasonable doubt that Mr Falahola breached his duty to take care in the circumstances.

[31] In relation to this element of the offence, the case law makes it clear that it will not be enough that the prosecution proves a simple lack of care on the part of an accused. A high degree of negligence is required, which the Court of Appeal in *Fisi'inana v R* [1995] Tonga LR 62, 65, described as "gross negligence."

[32] In *Reg v Adomako* [1995] 1 AC 171, 187 Lord Mackay said:

The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.

[33] In *R v Holani* [2005] Tonga LR 18, 21, Ward CJ considered that what was required was that the accused "showed a disregard for the life and safety of others."

[34] To similar effect, in *Bateman* (1925) 19 Cr App R 8, 11-12 Hewat L.C.J said:

In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and shows such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment.

[35] Mr 'Aho advanced two lines of argument in relation to this issue. The first argument was that Mr Falahola was grossly negligent because he performed re-wiring work without a licence or permit. He relied, particularly, upon s. 10 of the Electrical Wiring By-Laws, which makes it an offence for any person to install electrical wiring without the permission of the Tonga Electric Power Board. I dismiss this argument. For reasons I shall come to, I find that Mr Falahola did not re-wire the light fixture but, in any event, the absence of a permit to do such work says nothing at all about the standard or quality of work performed.

[36] Mr 'Aho's second argument was that Mr Falahola had held himself out as an electrician, which requires proper training and certification, and, therefore, in performing electrical work Mr Falahola must be judged by the standard of a trained electrician. A trained electrician (the argument goes) would have been grossly negligent to install such an unsafe light fixture.

[37] The legal principles upon which this submission is based are well-established. In *Bateman* (supra) at 12-13, Hewat LCJ said (in a medical context):

The law as laid down in these cases may be thus summarised: If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing special skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment....As regards cases where incompetence is alleged it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man.

[38] Where I disagree with Mr 'Aho's submission is in the application of these principles to the facts of this case.

- [39] The evidence fell well-short of satisfying me that Mr Falahola held himself out as an electrician, or, of possessing particular skill and knowledge in that field, to the people of the village. Mr Faletau said that Mr Falahola was “known” to be an electrician but he did not say that Mr Falahola ever held himself out as such. He also said that Mr Falahola was a plumber and a handyman. I do not accept that he believes that Mr Falahola is both a qualified plumber and electrician as well as a handyman. No one else was called to give evidence that Mr Falahola represented that he was an electrician and I do not believe that Mr Falahola did so. Mr Falahola was a handyman, and whilst on occasion he did some electrical work, I accept his evidence that such work was of a basic kind or was supervised.
- [40] The prosecution proceeded on the basis that Mr Falahola had re-wired the light fixture but he said he did not do so and I accept his evidence. He supplied a light fixture and an extension cord (as a favour) and hung the light fixture in the tent. That is all he did. To my mind, it is entirely artificial to suggest that this is electrical work. It is certainly not electrical work of a kind that requires an electrician with his/her specialist training, knowledge or skill.
- [41] Mr Falahola is not therefore to be judged by the standards of a qualified electrician; but that is not an end of the matter. There is still the question whether, judged against the standards of a reasonable man, he was grossly negligent in installing the light fixture.
- [42] Returning to first principles, the standard of negligence presumes that a reasonable man would have foreseen some particular consequence as the result of doing or omitting to do some act. This is not a case where Mr Falahola knew that the light fixture was unsafe and went ahead to install it anyway, nor do I consider that he was indifferent to whether it was safe or not. Having seen and heard him give his evidence, I do not regard him as a man who would be reckless with the safety of others.

- [43] The light fixture is plainly old and the re-wiring has not been done professionally and there is no earth wire. An argument could be mounted, based simply on its appearance, that Mr Falahola should have taken greater care to ensure the light fixture was safe to install. However, against that argument, four factors weigh in Mr Falahola's favour.
- [44] First, Mr Falahola gave evidence (and I accept) that this light fixture came from Tonga High School where it was then currently in use and that he had used it himself at home without incident. Having a great deal of previous experience in the safe use of this light fixture it was not unreasonable that Mr Falahola would consider it safe to use on this occasion also.
- [45] Secondly, the absence of an earth wire in itself does not make the light fixture unsafe, albeit, it does rule out a safety feature.
- [46] Thirdly, Mr Langi agreed that had the live wire not been exposed and come into contact with the metal pole of the tent, the accident would not have occurred. I have concerns that Mr Langi's evidence was based on an inspection of the light fixture once it had been removed from the tent and not *in situ*. The photographs he produced in support of his evidence show the light fixture removed from the tent. Certainly, the light fixture as it was presented in Court is not in the same condition that it must have been on the day of the accident, as the additional wires have become detached. This makes it difficult to know how the light fixture presented to Mr Falahola at the time he hung it. Notwithstanding that, the exposed part of the live wire is very small indeed. The exposure is at just one point where the wires were spliced and covered by insulation tape. It is not at all clear to me that a close inspection of the wires before hanging the light fixture would have disclosed this fault.
- [47] Finally, Mr Falahola said, and I accept, that after installing the light fixture he touched the tent and did not get a shock. In those circumstances, I can understand that he would be satisfied that the installation had been completed safely.

- [48] Standing back and looking at all the circumstances, I am not satisfied beyond reasonable doubt that Mr Falahola was grossly negligent. He did not show such a disregard for the life and safety of others as to be guilty of the crime of manslaughter.
- [49] Finally, there is an issue whether, in a legal sense, Mr Falahola's actions caused the death of Mr Palu. The evidence of Mr Falahola, which again I accept, was that Mr Palu was told that the tent was live and went ahead and touched it anyway. Unfortunately, because Mr Falahola was representing himself, this allegation was not put to Mr Faletau in cross-examination, and, the witness Mr Falahola wished to call to confirm his evidence was not available. Nevertheless, Mr 'Aho cross-examined Mr Falahola vigorously on his evidence and there was no application made to call rebuttal evidence.
- [50] Mr 'Aho argued that it was improbable that Mr Palu, who had travelled to Tonga to assist at his father's funeral, would have effectively committed suicide, but that is not the only explanation for his actions. Mr Palu might, for instance, have touched the tent pole in an act of bravado. The evidence was too insubstantial for me to make an assessment of Mr Palu's intentions.
- [51] Doing the best I can with what is before me, whilst Mr Falahola unknowingly created a dangerous situation when he installed the light fixture, Mr Palu voluntarily touched the tent pole in full knowledge of the danger. His deliberate conduct, in the face of an obvious danger, distinguishes this case from other cases where a deceased has simply been negligent in some fashion and thereby contributed to the circumstances leading to his death.
- [52] In my view, Mr Palu's conduct acted as a *novus actus interveniens* and broke the chain of causation. It was not therefore proven beyond reasonable doubt that Mr Falahola's conduct was, in law, the cause of Mr Palu's death.

Result

[53] The charge has not been proven to the required standard and Mr Falahola is acquitted of the one count in the indictment.



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

O.G. Paulsen

NUKU'ALOFA: 19 June 2019

LORD CHIEF JUSTICE