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

CR 148-150 of 2017

BETWEEN: R E X - Prosecution

AND: PEAU LA'IAFI
NIVALETI TU'IONO
SIONE KAPA'IVAI - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho and Mrs. 'A. 'Aholelei for the Prosecution.
Mr D. Corbett for all the Accused.

RULING ON PRIMA FACIE CASE

[1] The accused were indicted each on three counts; manslaughter, alternatively grievous bodily harm and in the alternative common assault. As to the manslaughter count, the particulars given relation to all accused were that;

> "on or about the 15th June 2017 at Pelehake, together with {the other accused} did cause the death of Manu Grewe when he lawfully hit him on the head with a chair and repeatedly punched his face and mouth, causing multiple abrasions on his chest and back, and fracture of the left mandible, which caused him aspiration that led to his led to asphyxiation and resulted in his death."

[2] All three accused had elected trial by jury and the trial proceeded in a rather unorthodox manner. There was little evidence called in the case. The Crown produced by consent a document called a summary of facts and the officer in charge of the case was called to produce three records of interview which were not objected to by the defence. By consent a pathologist's report was produced also.

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[3] The background to the events of the 15th June 2017 is that it had come to the notice of the accused that the deceased had sexually assaulted the young daughter of Mr Tu'iono, who together with his two co-accused, Mr Lai'afi and Mr Sione Kapa'ivai, and the deceased worked on his plantation. The evidence reveals that the deceased had admitted the assault, and after a period of drinking together at the home of Mr Tu'iono, the atmosphere changed at about 2am when the deceased with the accused present, called out to the accused's daughter. Mr Tu'iono commenced to assault him by punching him to his face although he said in his record of interview that the deceased shielded this blow but also to his chest and stomach whilst he was on the ground. Mr La'iafi then kicked him in the mouth with his boot, after asking him to apologise and slapped him several times on the face. After that Mr Kapa'ivai punched him on the head and in the mouth and hit him on the head with a chair. He also said that he slammed his body around.

[4] The evidence reveals that Mr Tu'iono left and went to bed having been initially stopped by Mr Kapa'ivai assaulting the deceased. Mr Kapa'ivai then in his own words said he was tired of saying "enough" and he started beating the deceased, he said about 10 times to his mouth and head before he slammed him around. It seems also that Mr La'iafi left and was taken home whilst he said Mr Kapa'ivai was beating the deceased.

[5] It was not until about 8-9pm the next day that the deceased was seen to be so unwell that he was taken to hospital. There is no evidence that he was given food but there is mention of him being given a drink of milk in the morning, having at about 8am been offered food and saying that he did not want any.

[6] He was unconscious when seen later at the hospital. He died later that night at about midnight. Later a post mortem revealed numerous injuries, arms legs buttocks and torso. There were multiple abrasions on the deceased's chest ranging in size from 1 to 10 cms. There were also multiple abrasions of a similar nature on his back. He had a fractured left mandible.

[7] An internal examination of the deceased by a pathologist found that he had aspirated stomach content and this had blocked his bronchus. The deceased's lungs were also congested with evidence of pneumothorax seen on the left upper lung. This had been treated with a chest drain being inserted. There were no broken ribs.

[8] It appears that the examining pathologist, who was unavailable to give evidence at trial, did not give any reason for the cause of the left Pneumothorax and abrasions, or the bruising or fractured mandible. He has since left the jurisdiction. Apparently, the assaults were not discussed with him and he wrote his brief report without any reference to the assaults on the accused, or how they may have contributed to the cause of death said to be asphyxiation secondary to aspiration.

[9] At trial, the medical evidence was proposed to be given in terms of the original report by another pathologist, however shortly before the case was to resume, Mr Aho advised me that he could not take the matter any further in terms of causation and thus would not proceed with manslaughter or grievous bodily harm against any of the men. His difficulties in establishing causation had been made known to me on the afternoon earlier before we adjourned. I formed the view that consequently, the Crown would not be able to establish a prima facie case, on counts one and two against any of the accused, and had prepared this ruling. Rightly in my view, Mr Aho came to me with Mr Corbett and said that, after further consultation with his pathologist the evidence could not be advanced any further on cause of death as it might relate to the accused's participation and he would offer no further evidence. I indicated that accorded with the view I had formed. Counsel considered that my judgment which had been prepared in almost final draft should still be formalised and delivered, in any event, raising as it does for Tonga important issues of law and some guidance in what can be a difficult area of practice in the criminal law.

[10] Mr Aho had not sought to place the case on the basis of a planned attack. Rather, he asserted that the attack involved a series of spontaneous assaults that arose over a short period of time. I agree with that approach. There was no evidence of planning. Nor was this a case like *Mohan* [1967] 2 AC 187, at 194 (PC) or *Greatrex* [1999] 1 CR App R 126, at 149 where the accused were acting in a simultaneous, joint or concerted attack on the deceased where each could be said to be aiding and abetting or encouraging the actions of others involved in the joint attack. Although the episode was in duration short, the assaults were discrete, were perpetrated individually and the men were not acting as accessories, aiding and abetting or giving wilful support to another in a joint attack. Mr Aho had stated early in the trial that he was unable to establish what injuries were attributable to an individual accused that led to death. As a consequence, I had referred him to the Mohen line of authority but as I have said having read those authorities, which I will briefly consider below, I

consider that they do not apply to this case, where discrete acts of assault by an individual accused, albeit over a short period of time occur.

[11] In Mohen, Lord Pearson giving the judgment of the Board observed;

"It is however, clear from the evidence for the defence, as well as from the evidence of the prosecution, that at the material time both the appellants were armed with cutlasses , both were attacking Mootoo, and both struck him. It is impossible on the facts of the case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous harm Each of the appellants was present, and aiding and abetting the other of them in the wounding of Mootoo.

That is the feature which distinguishes this case from cases in which one of the accused was not present or was not participating in the attack or not using any dangerous weapon, but may be held liable as a conspirator or an accessory before the fact or by virtue of a common design if it can be shown that he was a party to a pre-arranged plan in pursuance of which the fatal blow was struck. In this case, one of the appellants struck the fatal blow, and the other of them was present aiding and abetting. In such a case the prosecution do not have to prove that the accused were acting in pursuance to a pre-arranged plan."

To similar effect is the judgment of Beldham J in Grteatrex [1999] 1 CR App R 126 at 138-139, and more recently, in R v Jogee [2016] UKSC 7, 8, the Supreme Court of the United Kingdom observed at para 95;

"In cases where there is a spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But, as we have said, liability as an aider or abettor does not necessarily depend on their being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and /or intended that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder."

In the present case, the accused did not, however, act as aiders and abettors of simultaneous joint or concerted action at the same time as others as in Mohan but discretely or separately although over a short time period. In order to be an aider and abettor an accessory must be assisting or encouraging prospective offending and not that which has occurred. The accused here were acting not in aiding and abetting concerted offending, in the sense that is conveyed by these cases. Cause of

death consequently must be proven and each accused's contribution considered separately.

[11] Mr Aho contended that I should adopt the approach to manslaughter in this case that I did in *Hala'ufia* and others (CR 35-93 of 2013, 6th June 2014). In that case, however, there was cogent eye witness evidence of the acts of two of the accused and medical evidence from which I could infer beyond a reasonable doubt that those two had materially contributed to the death of the deceased and were guilty of manslaughter. That also was a case where the beating and assaults took place spontaneously, rather than pursuant to a plan. In my view, in order to establish a prima facie case here , the Crown must adduce cogent evidence from which the Jury can infer that the cause of death, given as asphyxiation secondary to aspiration, was attributable to the actions of the accused considered separately and not as a group.

[12] There is a further problem with the way in which the Crown case proceeded as one of spontaneous action rather than a planned attack, or beating. The evidence reveals that Mr Tu'iono left the scene before Mr Kapa'ivai commenced to assault the deceased. Indeed, Mr Kapa'ivai had stopped Mr Tu'iono from assaulting the deceased further and then it seems after Mr Tu'iono had left to go to sleep shortly after had a change of heart and admitted to hitting Mr Grewe on the head with a chair, punching him in the face and head about three times, and then "slamming his body around". Mr Corbett for Mr La'iafi stated that he also left the scene and the evidence reveals he did go home having seen Mr Kapa'ivai commence beating the deceased. He seems to have seen no more on his admission in his record of interview than a punch to the mouth and face, before he left.

[13] On the basis that both Mr Tu'iono and Mr La'iafi left the scene of the beating, both may be said to have withdrawn from the beating. I have not been able to find much authority on withdrawal from a spontaneous rather than a planned attack, but I quote from Smith and Hogan 10th edition at page 177;

> "In all the cases discussed above the offence was pre-planned. It has been held that cases of spontaneous violence are different. If A and B spontaneously attack V, they are aiding and abetting each other, so long as each is aware that he is being assisted and encouraged by the other; but, if B simply withdraws, his participation in the offence apparently ceases without the need for any express communication to A, so that he will not be liable for acts done by A thereafter."

[14] The writers may have been referring to a Mohan type attack but, in my view, the same would apply in a case like this. Mr Tu'iono at least and possibly Mr La'iafi also could not be liable for the actions of Mr Kapa'ivai if they were found to have withdrawn and left the scene.

[15] In any event on the view I have taken here, each must be assessed on the issue of whether they made a material contribution to the death of Mr Grewe. Because the Crown is unable to adduce evidence which at its highest is evidence from which a Jury could infer that each man made a material contribution to the cause of death, I consider that no prima facie case had been established on counts one and two manslaughter or grievous bodily harm. Indeed to my mind no satisfactory causal connection had been advanced as to the accused's actions and the death of Mr Grewe which took place many hours after and was said to be asphyxiation secondary to aspiration.

[16] This ruling coincides with the approach the Crown took in offering no further evidence on counts one and two and the accused were acquitted shortly before this judgement would otherwise have been delivered. Each accused pleaded guilty to common assault, and were convicted on the third count in the indictment. I have formalised this ruling and delivered it as counsel agreed I should, it as I have said reflective of the approach Mr Aho took after consideration and discussion of the various approaches during the case.

SUPREME COURT TONGA

C. B. Cato

NUKU'ALOFA: 18 July 2019 **J U D G E**