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

CR 170 of 2018

BETWEEN : REX

- Prosecution

AND : SAIMONE VAKA

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr. J. Fifita for the Crown.
Mr. Saimone Vaka, the accused.

Trial : 26, 27 and 28 June 2019.

Submissions : 5 July 2019 by the accused.
15 July 2019 by the Crown.

Submissions Hearing: 26 July 2019.

Ruling : 16 August 2019.

RULING

The charges, pleas, election and representation

[1] The Crown has charged the accused that he has committed criminal offences under the Criminal Offences Act, namely,

rec'd 19/08/19
AK

- a) one count of common assault (Count 1) under S.112(g),
 - b) three counts of assault with intent to commit sodomy (counts 2, 4 and 6) under S.137, and
 - c) three counts of sodomy (counts 3, 5 and 7) under S.136.
- [2] The accused has pleaded not guilty to all the charges and has elected to be tried by judge without a jury.
- [3] He has represented himself in this trial without any legal counsel. He had already been provided a copy of the instruction, in the Tongan language, of how to defend oneself in a criminal trial. He had similarly been provided with the same in two previous criminal trials in which he had represented himself, one in which he was acquitted and in the other he was convicted and sentenced to imprisonment. He is being tried now for these offences which are alleged by the Crown to have been committed whilst he was serving that sentence. He is still serving that sentence now. He told me that he wanted a lawyer to defend him but did not have any money to pay for one. He however said, at the commencement of this trial, he was prepared and willing to defend himself. He came equipped with a minute book and a pen.
- [4] I have to say that during the course of this trial, the accused has shown that he is well able to defend himself and that he was well prepared with questions to ask and evidence to give and his written submissions show careful consideration of the relevant matters.

The Criminal Offences Act provisions

[5] Common assault.

S.112(g) of the Act provides:

“112. Every person who wilfully and without lawful justification –

“(g) threatens by any act or gesture to apply force to another person if the person making the threat has or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose,

is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5,000 or imprisonment not exceeding 1 year or to both.”

The Crown must prove, beyond a reasonable doubt, that each of the following happened:

- a) The accused
- b) wilfully
- c) and without lawful justification
- d) threatened
- e) the complainant
- f) by an act or gesture
- g) to beat or hit the complainant, and
- h) the accused had the ability to do so, or
- i) caused the complainant to believe he had.

It must prove all of (a) to (g) and either (h) or (i) above. The accused does not have to prove any of them, especially that he had lawful justification. The Crown has to prove he did not have lawful justification.

[6] Assault with intent to commit sodomy.

S.137 provides:

“137. It is an offence for a person to assault another person with intent to commit sodomy”.

The Crown must prove, beyond a reasonable doubt, that each of the following happened:

- a) The accused
- b) assaulted
- c) the complainant
- d) with intent to commit sodomy.

[7] Sodomy

S.136 provides:

“136. Whosoever shall be convicted of the crime of sodomy with another person or bestiality with any animal shall be liable at the discretion of the Court to be

imprisoned for any period not exceeding ten years and such animal shall be killed by a public officer.”

S.140 provides:

“140. On the trial of any person upon a charge of sodomy or carnal knowledge it shall not be necessary to prove the actual emission of seed but the offence shall be complete on proof of penetration only.”

The Crown must prove, beyond a reasonable doubt, that the following happened:

- a) The accused
- b) knowingly
- c) penetrated the anus of the complainant
- d) with his penis.

The evidence

[8] The Crown called 3 witnesses to prove the 7 charges against the accused. They were the complainant, Lisiate Lakalaka, the Chief Prison Officer, Ponafasio Vake, and prison officer, Tevita ‘Ilaiū. In defence, the accused himself gave evidence and called no other witness.

Evidence of complainant

[9] Lisiate Lakalaka, aged 19, residing at Lapaha, working as a labourer in a working group of boys (who help each other in planting and maintaining their individual crops in turns of 2 hours per boy, or for someone else for money which is kept by the boy whose 2 hours have been utilized and who thereby forfeits his turn to plant or maintain his crops), stated that in March last year, 2018, he was a prisoner and he was being put in the area allowed to be used by prisoners who were nearing the end of their term of imprisonment. He was in fact released in late March or early April 2018. But due to lack of space in that area on or about 13 March 2019, he was put back in the main prison building. By that time, all the rooms there were already occupied by one or two prisoners per room. He therefore had to share and to ask an occupier of a room if he could share his room with him. He approached the

accused who had cell 3A to himself, but which had 2 separate beds, and he agreed and they then shared that room.

[10] He said that whilst he was asleep on his stomach that first night, the accused jumped astride on top of him and held both his 2 arms to his body with his knees and held his face pressed into the pillow to stop him calling out, while he pulled his, the complainant's trousers off. He said that the accused then put his penis with his left hand into his, the complainant's, rectum and copulated with his penis inside his rectum for about an hour to hour and a half. He said that at first he was doing it while he was on his stomach and then he turned him on his back and carried on until he ejaculated inside him. He said that the accused told him that if he was to tell anyone about this, he would kill him. He said he had told him that while he was still copulating. He said that when the accused pulled out his penis from his rectum, faeces came out of it on to the bed and the accused told him to move and he did and the accused wrapped up the sheet, to be washed later. He said it was nearly day break by then. He said he was afraid and frightened to do anything. He said that he later gathered up the dirtied sheet and blanket and put them in the rubbish bag and they each went to work.

[11] He said that in the following night, that is of 14 March 2019, the accused was lying on his own bed and fondled his own penis and told the complainant to come over and suck it and he told him no. The accused told him to come and do it or he would hit him. But he still did not go and do it. He said that the accused then begged and begged him and finally he went over to his (accused's) bed and the accused got him in a crouching position and then inserted his penis into his rectum and copulated until he pulled it out and ejaculated outside. He said that in that act he was not being forced to crouch and that he did let him do it to him. He said that during the copulation, the accused said several times that he loved him and asked if he loved him too.

[12] He said that in the following morning which was Friday morning, he was allocated to work at the poultry farm of the prison and because there was no warden watching him, he ran away. He said that he walked across the manioke patch onto the main road, waited and caught a bus to Nuku'alofa and went to the central police station there. He said his intention was to see his sister, 'Olivia Lakalaka, who was a police constable there, to complain to her about what the accused had done to him. But, he said, his sister was not there and he

thought to go and make his complainant to the Vaini police station. He then caught a bus to Vaini but also getting on the bus was Vatulele Vake, the son of the senior prison officer, Ponafasio Vake, who was in the Tonga Defence Services and was in uniform.

- [13] He said that Vatulele recognized him and that he had run away, and he texted his father. When the bus got to Nualei, about 2km before Vaini, Ponafasio Vake and other prison officers were on the roadside and they stopped the bus. Vatulele then held and led him off the bus by his collar and put him in the vehicle of Ponafasio which was there and they took him back to prison. He said that they beat him up to tell them why he had run away but he did not tell them why. He said they continued to beat him until he finally told them what the accused had done to him.
- [14] He said that they then brought out the accused and asked him if what the witness(complainant) had told them that he had done to him was true, and the accused told them that it was not true and that the complainant was lying. He said that the officer then beat up the accused and the accused then admitted that it was true.
- [15] The complainant described the beating which they had given the accused. He said that they had told him to strip and he did, and then they beat him with three siale mohemohe branches, each piece was about one and a half inches thick and about two and a half feet long. He said that each piece was used until it broke and the last piece was used up to 20 strokes – all on the accused’s buttocks – and then the accused cried and said that it was true and they then stopped beating him. He said that he and the accused were then each put into a maximum security cell until the next day, Saturday, when Senior Officer Vake questioned him and again he told him what the accused did to him.
- [16] At this point of his evidence, Crown counsel asked the complainant how many acts of sodomy that the accused did to him and he answered that there were 2 acts, the one that was done on the first night and the one that was done on the second night. Crown counsel then asked me that the complainant be treated as a hostile witness so that he could cross-examine him on the statement which he had made to and was written down by Senior Officer Vake, in which he had related 3 acts of sodomy. The accused did not agree to treat the witness as hostile. I ruled that a witness could not be held or treated as hostile simply because he may

have forgotten something and I ruled that the complainant would not be treated as hostile for that.

[17] The complainant confirmed and said that he was frightened of the accused when he told him that if he told anyone of what he had done to him he would kill him. He also said that when the accused said to him on the second night to come to him and suck his penis or he would hit him he felt afraid and that he only consented to the act on that night because of fear that the accused would hit him.

Cross-examination

[18] When cross-examined by the accused, he was questioned that it was Tuesday the 13th March 2018 that he had started to share the cell, and not Wednesday 14th March 2018 but the complainant maintained it was Wednesday the 14th. He also said that he did not know if any patrolling by the wardens was carried out after sleep time started. He said that the accused had jumped from his bed onto his bed and jumped on top of him and held him down. He said he could not answer why he had not said that in his evidence in chief (that the accused had jumped from his bed to his). He said that he had a pillow, a sheet and a blanket on his bed. He said that although the accused had held him by the neck, there was no mark on his neck. He said that he had suffered no injury to his anus or rectum and that there was no blood and no injury was inflicted on him. He said he went to work the next day and did not tell anyone because of the threat of the accused that he would kill him if he did.

[19] He said that when he left the prison and went on the bus on the Friday morning, he got off at Nualei for about half an hour to get a change of clothes at a friend's place there before continuing to Nuku'alofa. He said that he had not told the police that because he just did not want to tell them.

[20] The accused put to him that he was lying in what he had been telling the Court because he had said in his statement that when the faeces came out in that first night, the accused used a T-shirt to wipe and clean it and then put the T-shirt in the rubbish bag, whereas he had told the Court that it was the sheet that was used and which was put in the rubbish bag. In answer to that, the complainant said that that statement was not true and that what he has told the Court is the truth.

- [21] The accused put to the complainant that in that statement he had said that the first night he shared the cell with the accused was Tuesday 13 March 2018 and that it was Tuesday the 20th March 2018 that he had run away and was caught and taken off the bus at Nualei. In answer the complainant said that he was sure it was Wednesday and Thursday that he had shared the cell with the accused and that he ran away to complain on Friday, the following day.
- [22] He was then asked why he had not complained to another police officer at the Central Police Station at Nuku'alofa after he found that his sister was not there. He answered that he did not do so because there was no one at the complaint office there to take his complaint and so he thought to come back and make his complainant at the Vaini Police Station or at the Mu'a Police Station. He was then asked why he had not waited at the Central Police Station until some person came to the complainant office so he could lodge his complainant. In answer the complainant said he had no answer to that question.
- [23] He was asked why he had not complained to the police like he had done about a person named Paki Fukofuka who had done indecent things to him and which he had stated in his statement. In answer the complainant said that he did tell the warden, Senior Prison Officer Vake, that Paki Fukofuka did those things to him and that he complained about him, but Paki Fukofuka never did any such thing to him. He said that all the things he had stated in the statement were false, and that what he has told the Court was true.
- [24] The accused then put to the complainant, and the complainant agreed with the accused, that he, the accused, had been arrested and committed to this Court for trial upon that false statement. The complainant said that he made up all that he had stated in the statement. He also said that the accused had not threatened him at all whilst they were each put into separate maximum security cells after the prison officers had taken their statements. He went on to say however that what he had told the Court was true.
- [25] The accused then asked the complainant why he had only made his statement on the 27 March 2018 (when he had been caught and returned on 20 March 2018), and the complainant answered that it was because it was only on the 27th that the warden came to take his statement. He was then asked why he had told the warden what was stated in the statement, and he answered that it was because he, the accused, had apologized to him and

he had forgiven him and thought everything was finished. However, he said that he did not know why he had made the false statement to the warden.

[26] It was then put to him by the accused that he, the accused, never apologized to him and the complainant said that he did and that he, the accused, was crying and had said to him to forgive him for his shortfall in what he had done to him, and that he had forgiven him because he, the accused, had already been punished enough by the beating he had been given. The accused then put to him that he, the complainant, had not told the Court that he, the accused, had apologized to him at all and the complainant agreed. The accused then put to him that he had not told the Court because it was not true that he had apologized but the complainant said that it was true.

[27] The accused then asked him whether he was already released from prison when he made the statement and the complainant agreed but immediately after that said he was not sure and could not remember when it was that he was released from prison at the end of his prison sentence, but he said that the statement was written up after he had been released from prison. Then after that he then said that the statement was partly done in prison while he was there and then it was completed at the Vaini police station by a police officer there whose name he did not know. He said that what the Senior Prison Officer Vake, had written was just the caution at the commencement of the statement and that it was the statement which commenced the prosecution in the Magistrates Court.

[28] The complainant was asked why he had not complained to anyone at the prison and he answered that it was because the accused was always with him or close by at all times, even when he went to have his shower, except when the accused went and drank kava in the evening.

Re-examination

[29] The complainant was asked by Crown counsel on re-examination why he had gone to the Central police station at Nuku'alofa and he said he went to see his sister. He was asked why and he said he had no reason for it. He was asked again and he said he trusted her. He was asked why he had not complained to the prison officers when they were at Nualei (after he

was taken off the bus), and he said he was afraid. He was asked why he had not complained to the prison officer (before he ran away) and he said he did not know the answer to it.

- [30] He was asked whether or not the accused had told him to suck his penis or he would hit him, and he said that the accused did say that if he did not suck him he would hit him. He was then asked whether he thought when he was told that, the accused could hit him. In answer he said he did not think so.

Court questions

- [31] I was not sure if he understood the question, so I asked the same question to him myself and his answer was "I do not know." I then clarified the question and he said "I was afraid because he said he'd hit me but I did not know if he would hit me." I asked why he had gone to see his sister and he said he wanted her to prosecute the accused for what he had done to him. I further asked what was the difference if the complaint was made to his sister rather than to the prison officers, and he said that his sister would believe him whereas the prison officers would not. I asked him why he had not complained to the prison officers at Nualei and he said that he felt afraid because the accused had told him that if he would tell anyone, he would kill him.

- [32] I asked him if any lubricating substance was used, as far as he knew, by the accused to facilitate the entry of his penis into his anus and he said that he thought the accused had only used his saliva.

- [33] I asked him how the accused could have put his penis into his anus when both his (the complainant's) legs, and buttocks, were pressed together by the accused's knees. He said that the accused was able to do that because his penis was still soft (flaccid) and he could put it into his anus. He then added that it was possible for him to do that because the head of the accused's penis was already enlarged and hardened with Vaseline. He explained that vaseline is heated into liquid and is injected into the head of the penis with a syringe and it enlarges it and when it solidifies it maintains that largeness and hardness. He said that when the accused pulled out his penis while he turned him from his stomach on to his back that night, he was able to see the accused's penis and confirmed that that was what he had done to it.

- [34] I then asked him if any faeces came out of his rectum that night and he said no.
- [35] I asked him how he could still breathe when his face was being pressed into the pillow, and he said it was because he could breathe through his mouth.
- [36] I asked him why he had not asked the prison officers to find him another room or to ask another prisoner to share his room the following day, and he said that he did not do so because he had come to love the accused because he had poked his anus with his penis the night before. I asked him and he said that on that following night, Thursday night, he agreed to go to the accused's bed because he had begged and begged and he let him do it to him again.

Evidence of Chief Prison Officer

- [37] Chief Prison Officer, Ponafasio Vake, said he'd been on prison duty for 28 years. He said that on 20 March 2018, an officer, Feke, reported to him that the complainant had escaped and then later that morning his son, Vatulele, telephoned and spoke to him as a result of which he and officers Feke and Fa'apoi went to Nualei and met the bus on which the complainant was and had him taken off it and they brought him back to prison.
- [38] He said that when they got back to prison, he questioned the complainant and took his statement and then had him put in a maximum security cell.
- [39] He said that when the complainant's statement was being taken, there was no one else there. He said that the complainant told him something concerning the accused and he instructed another officer Tevita 'Ilaiū to take the statement of the accused. He said that after that statement of the accused was taken he then questioned the accused about what he had stated in his statement but that as there was no prior caution given to the accused, he said that that statement would not be produced as evidence. He said that he did not write down what the accused said when he questioned him. He said he asked him whether what he had stated in the statement was true and the accused said yes. He said that the accused then said that he was sorry for what he had done and that it was because of the devil. He said he then counseled the accused that what he had done was inappropriate and bad and that he must not do such thing again. He then instructed and the accused was put into a maximum security cell and he reported the matter to the Acting Commissioner of Prison. He said he

thought that the complainant was already put in the maximum security cell when he questioned the accused. He said that when he questioned the accused, he did not notice anything wrong about the accused and that he could answer the questions properly and clearly.

Cross-examination

[40] When cross-examined by the accused, he said he did not know if the accused had been beaten. He said that he did not see any cut on the accused's eyebrow. He said that the putting of the accused in the maximum security cell was not a punishment of him for any offence but he agreed the accused should have been taken to the Court. He maintained that he was not present at any beating of the accused. He said that he did not know if the accused was taken to hospital.

[41] He was then asked how long the accused was kept in that cell and he said that he did not know but it was over two months. It was put to him that it was six months and he said that that period was too long. The accused then said to him that he had been there for six months and he said that it was possible. He said that that was the practice and the commissioner had the authority to do that. When asked whether that was the law, he said he did not know. He said he did not know of any beating of the accused or that the accused was punched or kicked or heard of it being done to him or that the accused was beaten with any metal pipe or that the complainant was beaten. It was put to him that he was sitting there watching it at the time and he said he was not.

[42] He was shown the statement of the complainant and he confirmed that he had written all of it from beginning to end and that his signature appeared at the beginning and at the end and he agreed that he had put the accused in the maximum security cell because of that statement.

Re-examination

[43] The Crown had no re-examination, and I had no question for him.

Evidence of Tevita 'Ilaiū

[44] Tevita 'Ilatū said that he has been a prison officer for 8 years. He said that on 20 March 2018, he and Vatulele Vake were present when Ponafasio Vake questioned and took the complainant's statement. He said that after that, then the accused was questioned about what the complainant had said and the accused told them that it was not true. He said that the complainant was then let out to face the accused and the complainant told the accused to tell the truth and the accused then said that what the complainant said was true. He said that Ponafasio Vake told him to take the accused's statement and he took it but that statement was not being produced. He said that after the accused's statement was taken, the complainant was asked what he wanted done and that the complainant said he forgave the accused. He said that a statement was written of that and the complainant signed it and both the complainant and the accused were put into maximum security cells.

Cross-examination

[45] The accused put to him that he knew of the beating that was done to him and he said that he did not know of any beating done to him.

[46] The Crown then closed its case.

Evidence of accused

[47] The accused chose to and he gave evidence. He stated that he was 36 years old, was an electrician and from Haveluloto and presently serving a prison sentence.

[48] He said that he had just been released from prison building no.2 to building no.1 on Tuesday 13th March 2018 at about 2pm and he tidied it up the cell no.3 and occupied it and in the evening, the complainant asked him to share the cell with him and he agreed and they did that same evening. He said that when lock up time came they each slept in their own bed until the next day. The next day he said he went to work then did the washing and then played touch rugby, then showered and went to the cell. He said the complainant only came to the cell close to lock up time and they went to sleep. On Thursday, he said he was allocated together with the complainant and they weeded the taro patch. After work, one warden asked them to help fix up his pig pen. After that work, he and the complainant ate there then returned to prison and showered and watched television. He said that the complainant then went and slept in another cell that night.

- [49] He said that on Friday he went to work and then came and showered and read and that the complainant only came to the cell at about 9 in evening and they went to sleep after lock up. On Saturday he said he went to work up to noon then did his washing and had his hair cut, made phone calls, showered and ate then read in the cell and was sleeping before lock up. On Sunday, he joined the joint prayer then showered, and waited for religious service. After the service he said he ate and then went and waited for food from families of prisoners to arrive. He got some lū from that and ate some and returned and gave the left over to the complainant. He had fallen asleep about 6pm and woke up about 10pm and the complainant only came to the cell near lock up time. He said that he told him that he was going the following day with others to work at the Palace in Nuku'alofa.
- [50] On Monday morning, he said that he and other prisoners went and worked at the Palace and that people gave them money and he bought noodles and bread with it which he and the complainant ate that evening. He said that they then showered and he read and then went to sleep. On Tuesday morning (20th March 2018), he said he and the other prisoners were getting ready to go to the Palace to work there again, but he was told to stay back and do the weed spraying around the prison compound so he stayed. He said that he had to wait for the spraying equipment and so stayed in the mess whilst waiting. He said that he then came and helped in the cooking area, feeding firewood to the fire to cook their pot of food.
- [51] While doing that he said he saw Fa'apoi's car drive up and Vake, Fa'apoi and the complainant got out and went into the Prison Mobile Unit building. He said that that was about 11am. He said that Sergeant Vake came out and called him to come over and when he got there Sergeant Vake asked him what had he done to the complainant to make him run away. He said he told him that he had done nothing to him. Sergeant Vake told him he was lying and he told him he was not but the sergeant collared him and took him into the house and told him to strip and he did except for his boxer shorts and work shoes. He said that there were all of them there, Chief Prison Officer Ponafasio Vake, Tevita 'Ilaiū, Sergeant Vake, Tau'ataina and the complainant. He said he asked the complainant what it was he had told them he had done to him but the complainant just smiled at him. He said he had to ask him again but again the complainant just smiled at him. He said that the sergeant then said to him that he would beat him until he would say why the complainant had escaped.

[52] He said that the sergeant told him to lie down on the concrete floor and he did, face down. He said he asked the sergeant whether this was the procedure that they used and the sergeant said yes. He said he asked him whether they beat up and torture people like that and he said yes. He said the sergeant went and got a piece of metal pipe which was used for ringing the bell and he hit him just above his buttocks with it repeatedly. He said that when the strokes got to 25, he asked if they would put him in maximum security and then take him to Court but the sergeant just kept on beating him. He said that maybe when it was the 38th or 39th stroke, he was urinating in his boxer shorts, and the sergeant stopped and asked him if he was now going to say what he had done to the complainant. The accused told him that the complainant was lying that he had done something to him.

[53] The accused said that maybe by that time the sergeant's hand was sore from a nick which was on the end of the pipe he had been beating him with because he then went and got 3 siale mohemohe branches from the fireplace. He then used one stick and struck the accused's buttocks with it 4 or 5 times and it broke. He then used the second stick and it broke after 4 or 5 strokes as well. When that broke, the accused said that the sergeant told him to get up and put my hands on the wall. The accused said that while he was standing like that a Salesi Teisina then came and punched him on his right side and then on his left side from behind and he felt winded. He said he was then punched on the back of his head and his face hit the cross timber (noggin) on the wall which cut his right eyebrow and blood ran down his face. He said he put his hand up to hold his face and the man punched him again from behind on the sides of the stomach as before, one on each side. He said he then said "what sort of procedure is this?" and the man said, "I am beating you until you smell unless you say what you did to this other person." He said that he told them that he would sue them for what they were doing to him, and in response, the man punched the back of his head again and his face hit the wall noggin again cutting his forehead above his left eyebrow and blood was flowing from it as well. He said that the man then said he would beat him until he smelled and he told the man he would sue him. He said the man then said that many complainants had been made about beating in prison but there were no evidence to prove it.

[54] He said that at that time he began to fear that what the man was saying was right, that he might die like he was saying – and what was to happen to his wife and children. He said the man was saying to him: what do you say? Well, arsehole? He said that he said to the man that

he did not know what he was asking about. He said he was turning to face him when he was saying that and the man punched him right on the mouth and he went down on the floor, his vision darkened and lights were flashing in his eyes until his sight returned. He said that it was then that he apologized and asked the man to stop. He said he told him that it was true but please stop.

[55] He said that Tevita 'Ilaiū then came and wrote his statement without him telling Tevita 'Ilaiū anything. He said that after he had written out the statement, he gave it to him and he signed it without reading it. Chief Prison Officer Vake then directed and he was put into a maximum security cell.

[56] He said that the next morning he asked to be taken to hospital and he was never taken there. He said he kept asking every day for 2 weeks but they never took him. He said that his tooth was aching all that time and finally he pulled it out himself and the aching stopped. He said that Sergeant Vake brought him some tetanus medicine to put on the cuts on his forehead and eyebrow and he asked him why they were not taking him to the hospital. He said that the sergeant said that they could not do that until his injuries were healed.

[57] He said that after two months, a church Minister, Viliami Fanaika, visited him and he told him what had happened to him and the minister said he would see what he could do. He said that two months later, the minister returned and told him to just wait. He said it was altogether six months after he was put in there that they finally released him from the maximum security cell back to the main prison building.

Cross-examination

[58] Crown counsel cross-examined the accused at length but the accused maintained his evidence in chief as follows:

- a) It was Tuesday, not Wednesday, that the complainant first shared his cell, and that fact would be confirmed by the prison record.
- b) He and the complainant each had his own bed.
- c) In the first night, he did not pretend to be asleep.
- d) He was asleep before the complainant was.
- e) He did not jump from his bed to the complainant's bed.

- f) He did not jump astride onto the complainant's back or held his neck down or put his face into the pillow or to hold his hands with his knees.
- g) He did not pull the complainant's pants off.
- h) He did not put his penis into the complainant's anus with his hand or that he copulated with his penis in it or tell him not to tell anyone or he would kill him.
- i) He did not turn him over on to his back and put his penis into his anus again or copulated with his penis inside his anus or that he ejaculated there.
- j) He did not put his penis in his anus and no faeces came out because he did not do that. He said he did not know anything about any faeces. He said that what the complainant said was not true.
- k) He said that he had not had his penis injected with vaseline at all. It was put to him that what the complainant had said about his penis was true because he did not cross-examine the complainant about it. He said that the complainant had not said anything about the Vaseline when he made his statement to the warden and had not said anything about it in his evidence until questioned by the Court, and he said that the complainant just made it up.
- l) He said he did not go to the complainant's bed and then return to his bed on the first night.
- m) He did not go and drink kava on the second night because kava was only allowed on Friday nights.
- n) He did not tell the complainant to come and fondle his penis, and he did not threaten him to come and suck his penis, and he did not lie, and he did not put his penis inside his anus and he did not copulate with his penis inside his anus and he did not ejaculate on his buttocks and he did not say or tell him that he loved him or asked if he loved him. He said that the complainant was lying that he had done or said those things.
- o) The complainant ran away on Tuesday, not Friday, because he was with him on Sunday and he gave him some lū to eat on Sunday evening.
- p) He did not give the lū to him to make sure he did not tell anyone what he had done to him because he had not done anything to him.
- q) The complainant was lying about him being always around where he was because he was not.

- t) It was Tuesday that he did not go to the Palace work because he stayed to do the weed spraying and that he saw the officers bring the complainant and went inside the PMU building.
- s) What he had said when asked what he had done to the complainant, was; "There was never any problem in us occupying the cell." He did not lie to the officers and he did not threaten the complainant.
- t) He was truly beaten up by the officers and the complainant himself confirmed that in his evidence.
- u) He was truly injured and he suffered greatly from the beating because he was kept in maximum security for six months because of the beating. He said: "Just look at my scars and lost teeth in my mouth." His father was pursuing his complaint for his beating.
- v) He apologized to the warden that he was sorry but he did not say it was due to the devil because of the beating he had been given.
- w) He was reading and was following the teaching of the bible ever since he was convicted and sentenced to his present imprisonment on 29 September 2017.
- x) He and the complainant were not talking religiously at any time at all.
- y) The complainant never said anything about Paki Fukofuka or anything about what such person had done to him or any complainant by him about such person.
- z) He never thought to do any such thing to the complainant.

[59] I had no question to ask the accused and the accused called no witness and he closed his case.

Submissions

[60] The accused made written submissions in his own hand writing in Tongan and pointed out the following:

- a) It was Tuesday 13th March 2018 not 14th March 2018 that the complainant joined him in the cell because it was same day he himself had first occupied the cell.

- b) The complainant confirmed that in his statement to the warden dated 27 March 2018.
- c) The complainant has given evidence in Court which differ greatly from what he had stated in that statement of 27 March 2018:
- (i) that he the accused had jumped from his bed to the complainant's bed and held the complainant down on his stomach whereas no such thing was in the statement;
 - (ii) that in the statement he stated that he was forced to suck the accused penis whereas in his evidence he said no such thing;
 - (iii) that in the statement he stated that a T-shirt was used to wipe up the faeces which came out but in Court he stated that it was the bed sheet;
 - (iv) that in the statement he had stated that in the following morning the accused forced him and had sodomy on him again, but in Court he never said any such thing.
- d) The complainant lied when he said that he had put his penis whilst it was flaccid into his anus when he was lying on his stomach with his buttocks held together with his knees because it is impossible for that to be done.
- e) If what the complainant said did happen, that the accused had had his penis in his anus for such a long time like one to one and a half hour, as the complainant has said, the complainant's anus would have been raw and bleeding and sore – so much he would not be able to walk or walk properly and would have been confined to lie down. But no such soreness, blood, injury happened.
- f) If faeces had come out, as the complainant says it did, there would have been a stench which would have permeated to the other cells and would have stayed on the complainant the next day and others would notice and comment but there was no such stench because there was no faeces and there was no faeces because there was no sodomy.
- g) If the accused had done any such act, the complainant would have complained to the warden because as soon as such complaint was made, the person complained against would have been immediately separated and kept away from the person making the complaint. But he did not complain because nothing had happened to him.

- h) If the complainant had honestly and truthfully gone to Nuku'alofa police station to lodge his complaint with his sister who was working there, would he as brother have honestly made a complaint of sodomy to his sister? That would be most improper.
- i) If the complainant had honestly wanted to complain he would have complained to any officer at the Nuku'alofa police station but he did not. He could have stopped and complained at Vaini police station but he did not. Either station could have contacted the prison and say that the complainant was there and that he had not run away.
- j) There was no complaint by the complainant to any doctor and he had not gone to hospital for medical physical examination to confirm any injury caused to him.
- k) The complainant has just made up the story that the accused committed sodomy on him.

[61] The Crown made written submissions in reply and pointed out the following:

- a) It agreed that the first night the cell was shared was Tuesday night of 13 March 2018.
- b) Although there are inconsistencies in what the complainant said in Court and what he had stated in his statement, the inconsistencies are only with regard the date of the offence, the T-shirt that was used to wipe the faeces, the date the complainant left the prison and the time and place where that statement was written. He submitted that the three acts of sodomy were truly committed and the evidence of the complainant in Court confirmed it.
- c) The evidence of the witnesses, Ponafasio Vake and Tevita 'Ilaiū, confirmed that the accused admitted to them that he had committed the acts of sodomy on the complainant and apologized to them about it.
- d) The accused did not cross-examine the complainant as to the following:
 - (i) that the accused did not commit sodomy on the complainant;
 - (ii) that faeces had come out of the complainant's anus; what he cross-examined about was that the complainant had said in his statement that a T-shirt had been used to wipe it whereas in his evidence in Court he has stated that it was a sheet that was used;
 - (iii) that his penis had not been injected with vaseline.

- e) The complaint of the complainant that the accused had sodomised him was carried out on 20 March 2018 and it was a fresh complaint and that the accused admitted to the two officers, Vake and 'Iaiū, that it was true that he did it.
- f) It is most unlikely that the complainant would have made up such a story as he has told the Court. The truth of what he has told the Court is explained by the admission made by complainant that he had not sought another cell to go to the next day because he had come to love the accused because he had poked his anus with his penis.
- g) If there was consent by both the complainant and the accused to the acts of sodomy committed, it was still a criminal offence under S. 136. It is not a defence that there was consent to the act being committed.
- h) The case boils down to the evidence of the complainant and the evidence of the accused. The Crown submitted that the evidence of the complaint must be preferred because it is supported by the evidence of the other two witnesses, Vake and 'Iaiū, and the complaint was fresh as recent complaint.

Consideration

[62] I found the evidence of the complainant suspect and difficult to accept from the beginning when he described the first act of sodomy committed upon him on the first night. It was just impossible to imagine that with his buttocks pressed together with the knees of the accused (which held both his hands to his sides at the same time) and no doubt with the muscles of his buttocks being tightly tightened, and thereby his anus muscle as well, that:

- a) the accused could pull his pants off him for one thing, and more importantly,
- b) the accused could insert his soft and flaccid penis into his anus with his hand.

[63] He did not even attempt to explain how those two things could have been done by accused. I had to ask him about the putting of the penis in and his explanation in answer was even more incredible. If the accused's penis head had been enlarged and hardened with vaseline injection, it would have been more difficult, and indeed impossible, to insert it into his anus like he said.

- [64] I even had to ask him if any lubricant was used by the accused and in answer he said that he thought the accused had only used his saliva. If the act had actually happened the complainant would have been well able to describe in detail what the accused had done and how he had done it but he did not describe it in detail, in particular, about the detail which would have made the impossible possible according to his evidence.
- [65] I agree with the accused that if the act of copulation described by the complainant took about an hour or an hour and a half for ejaculation to happen, without any lubrication or saliva having been used, because the complainant did not describe that any lubricant had been used in all that time, his anus and rectum would have been rubbed raw by the accused's penis – so badly that he would be unable to walk properly or pass stool at all when he would go to the toilet except with excruciating pain. He would be bleeding there. But no such pain or blood or injury was suffered by the complainant, according to his evidence.
- [66] I just do not believe his evidence that the accused had done what he had described was done to him in the first night or that faeces came out at all. The cell would have smelled of faeces and neighbouring cells would have smelled it and trace it to their cell. If it did happen as the complainant said it did, they would have had to wash themselves with water and soap in their cell or in the shower to ensure there was no smell. The complainant would have been able to describe it in detail because it would have been ghastly to have it happen and to ensure that they were properly cleaned up so that they would both not smell of faeces when they would go to eat or to work. He would remember it clearly and would have described it clearly in his evidence but he did not. Instead, he just described it as if it was just dirt or mud which was easily wiped away and put in the rubbish bag.
- [67] I also do not believe his answer as to why he did not ask to have another cell to share with somebody else. He said that he did not do so because he loved the accused because he had poked his anus with his penis and so wanted to continue to share his cell. I believe he did not change cell because the accused had not done anything to him at all the night before or in any other night.
- [68] I do not accept his evidence that he had run away on the Friday morning at all. I accept the evidence of the accused, which is supported by the evidence of Vake and of 'Ilaiū that it was Tuesday the 20th March 2018, and not Friday 16th that he had run away. From the beginning,

the complainant stated that he came and shared the cell with the accused on Wednesday (the 14th) and that the accused forced him and sodomised him that night and again on the Thursday night and he decided to run away on the Friday morning. I believe he maintained that story, even when cross-examined by the accused, because it was consistent with his reason he had given as to why he had run away, namely, to lodge his complaint against the accused for the acts of sodomy he said had happened on Wednesday and Thursday nights. When the accused put his statement to him that it was the 13th, the Tuesday that he had begun sharing the cell and that he had only run away on Tuesday 20th, he said that what he had stated in the statement was not true, that it was all lies, and that what he said in Court was the truth.

[69] I accept that the complainant did not run away until Tuesday 20th March 2018. But his reason for running away – namely to complain to his sister about what the accused had done to him - is the most telling factor against the evidence of the complainant. He gave no plausible explanation and there was just no reason why he could not simply have complained to a warden at the prison. He was allocated to work elsewhere and away from the accused and yet he made no complaint to a warden. Yet he thought he should complain to his sister who was a police officer at the police station at Nuku'alofa, which is a most improper and incredible thing for him to do. No brother, especially in the Tongan custom, would dare think to do that. He would rather go to his brother or to his father or uncle or distant male relative, but never would he think to go to his sister and tell her about what another man had indecently done to him, especially sodomy.

[70] When he found that his sister was not at the police station at Nuku'alofa, he said that he did not complain to another police officer there because there was no one there at the complaints office to receive his complaint. Did he not think to go into some office there and ask for someone to take his complaint? No, he said he decided to come from there and lodge his complaint at the Vaini police station. Why? Now, what made him change his mind – to complain to someone else other than to his sister? He gave no explanation.

[71] Now when he was stopped and taken off the bus at Nualei by the prison officers and the army son of the prison officer, Vake, one would think that he would straight away have told the officers why he had gone off without permission to the Nuku'alofa police station,

namely, to lodge his complaint with his sister there and was going to complain at the Vaini police station instead because his sister was not working. But he did not. He kept silent and he refused to say why he had run off. Why?

[72] I have to say that I accept his evidence that he was beaten by the prison officers to tell them why he had run off. Why had he not have told them why he had run off – if his reason in running off was to complain about what the accused had done to him? I can only conclude and I conclude that it was because the accused had not done any such thing to him, and that he had not run off to complain about him or anything he had done to him. He had run off, I have to conclude, for some other reason, and I have to conclude and I conclude that he had to make up some plausible reason, for two reasons: one so that his beating would stop, and two, and more importantly, so that he would not be found guilty of escaping, an offence which I am sure he knew would entail further imprisonment for him, when he was just about to finish serving his prison sentence at about the end of that month, March 2018.

[73] To save his own skin, he lied to the officers that the accused did what he subsequently described in his statement. His beating then stopped and his escape from custody was accepted to be justified and he was not charged with escaping and he was duly released and discharged at the end of his prison sentence shortly afterwards. He thereby averted the dilemma and insurmountable situation he was in.

[74] The accused was however brought out and accused and beaten (to confess to acts of sodomy and indecent assaults which never happened) as both he and the complainant confirmed in their evidence happened to the accused.

Conclusion

[75] I have accordingly found, on the evidence, that the Crown has failed to prove all the charges which have been brought against the accused and I dismiss them all.

Nuku'alofa: 16 August 2019




L. M Niu J
JUDGE