File. + Scan

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

CR 107of 2021

REX

-v-

Mikaele Hoponoa PAHULU

RULING

BEFORE: THE HONOURABLE COOPER J
Counsel: Mr. T. 'Aho for the Prosecution
Mrs. F. Vaihu for the defendant.
Date of submissions: 13 August 2021
Date of ruling: 20 August 2021

1. On 18th October 2019 the defendant, Mr. Pahulu, was working at the Viola Hospital as a security guard and stationed in the psychiatric ward.

2. He was seen to attack Mr. Nafetalai Latu, a 71 year old patient.

3. He kicked Mr. Latu and knocked him to the ground. He then went on to pick up Mr. Latu and bodily throw him to the floor.

4. This was all seen by medical staff at the hospital, via a CCTV screen. They ran to the ward and Mr. Latu was found lying on his back. The defendant was simply sitting in a chair.

5. Mr. latu was taken for emergency treatment. It is said he had suffered sever head injuries that meant, albeit he regained consciousness, he was left unable to speak or to understand what was said to him.

6. He could not feed himself any longer and had to be fed by nasogastric tube. He was unable to move.

7. Between that time and when Mr. Pahulu was sentenced for the original offence he faced, Mr. Latu's condition did not change.

8. That matter was reported to police 25th October 2019.

9. Mr. Pahulu was arrested 7th November 2019. He cooperated with the police.

10. He was charged with a single count of causing grievous bodily harm.

11. On 23rd July 2020 he pleaded guilty to that offence.

12. 28th August 2020 he was sentenced to 3 years' imprisonment, the last 18 months suspended on conditions.

13. Less than two months later, on 10th October 2020, Mr. Latu died.

14. The Crown have now charged him with Manslaughter.

15. The argument before me is whether they are barred from so doing by the doctrine of Autrefois Convict.

16. The defence have submitted that Clause 12 of the Constitution is that

> "No one shall be tried again for any incident..." rather than "...for any offence..." and that is how the Tongan translation for "koe 'uhi ko ha me'a" should be read.

17. The defence submit that by virtue of section 21 of The Interpretation Act the Tongan language version should take preference and so what is in issue is that the defendant should not be re-tried for this same "incident".

18. Section 21 provides :

> "Where it appears to a court that the Tongan language version of a provision in an Act differs in meaning from the English language 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."

19. No evidence has been placed before me by either party as to assist with the translation of the phrase "koe 'uhi ko ha me'a" .

20. But, the Crown argue that the Constitution was formulated in English between 1872 and 1875 by Shirley W. Baker at the pleasure of King George and for His Royal Majesty's approval.

21. The prosecution direct me to The Tongan Constitution, by Sione Latukefu[1], and draw my attention to section 12 of the Evidence Act :

> "Statements relating to facts in issue or relevant facts and made in historical books and records or in maps or charts, either generally offered for sale to the public or prepared under the authority of the Government, are admissible as evidence of any matters of general information contained therein, but are not admissible to prove facts of a private nature."

22. The defence have put no contrary argument before me nor drawn my attention to any other work that would rebut this understanding of how the Constitution was formulated. Therefore I can and do take Judicial Notice of this work.

23. Chapter 3 details how the codified laws of Tonga became refined in Baker's drafts and took also from the Constitution of Hawaii[2] as well as the laws of the Government of New South Wales.

24. Certainly the Hawaiian Constitution of 1852[3] at Article 9 states :

> "No person shall be compelled, in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law."

25. Having considered all this it appears to me so that I am sure, that the process of refining the draft Constitution that King George finally approved in 1875 was a process where,

---

[1] Published Tonga Traditions Committee Publication Nuku'alofa; 1975
[2] Page 41 The Tongan Constitution, A brief history to celebrate its Centenary, Sione Latukefu
[3] https://www.hawaii-nation.org/constitution-1852.html

in the Clause we are concerned with, the aim was to enshrine the principle that no person should be tried "…twice for any offence.".

26. If there is any material difference between that expression and the phrase "koe 'uhi ko ha me'a" then I find that that is a mis-translation into Tongan and or a clerical error and so following section 21 (b) the Tongan language does not apply as I find any potential difference in meaning does *not* go beyond a clerical error or error in translation.

27. Therefore I find that Clause 12 should be read so as to mean "offence" and not "incident".

28. Therefore the doctrine of autrefois convict applies and it is with this in mind I turn to the relevant case law.

29. *Connelly v DPP* HL [1964] 2 W.L.R. 1145; *R v Beedie* (Court of Appeal) Criminal Division [1997] 2 Cr. App. R 167.

30. In Connelly v DPP Lord Morris set out what are the nine guiding principles :

"In my view both principle and authority establish —

i. that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

ii. that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

iii. that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

iv. that the one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

v. that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus, if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies;

vi. that on a plea of autrefois acquit or ***autrefois convict*** a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the Court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

vii. that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

viii. that apart from circumstances under which there may be a plea of autrefois acquit a man be able to show that a matter has been decided by a Court competent to decide it, so that the principle of res judicata applies;

ix. that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principle applies that a man may is not to be prosecuted twice for the same crime"

31. In *R v Beedie* the Court of Appeal acknowledged that it was "no mean feat" to analyse all the strands to the arguments the Noble Lords set out in *Connelly v DPP*, so the distillation of those principles into guiding factors in the later decision are, respectfully, welcomed. The Court of Appeal also noted that the guidance from House of Lords had been widely misunderstood for over 30 years.

32. In short, the clarification from The Court of Appeal was necessary.

33. It is summarised in Archbold 2021 4-89 in this way :

> "The principle will not prevent a trial for murder or manslaughter where the victim has died after proceedings for assault: the offences will not arise out of substantially the same set of facts because of the additional fact of the death and/or special circumstances will exist."

34. The fifth principle of Lord Morris relates to autrefois convict, the third and fourth to abuse of process.

35. Turning to the instant case; in my view there plainly are special circumstances in this case that differ from the first, that being the death of Mr. Latu.

36. It is a fact that did not exist at the time of the first indictment.

37. Taking all these arguments together; in the instant case the offence charged in the second indictment had not been committed at the time of the first. Therefore the Crown are not barred from proceeding by way of autrefois convict.

NUKU'ALOFA
20 August 2021

SUPREME COURT TONGA

N.J. Cooper
JUDGE