

**KELEPI HALA'UFIA**  
*(Applicant)*

V

**R E X**  
*(Respondent)*

**BEFORE THE HON. JUSTICE CATO**

Ms. Taufateau for the application  
Mr. Sisifa for the Crown

Pre-trial application;

**J U D G M E N T**

- [1] I heard a series of late applications filed shortly before trial which is due to commence on the 8<sup>th</sup> April 2014, after an adjournment sought and granted at the request of the Crown. I had previously in a chambers sitting of all accused aside from Mr Manu who was to be tried separately at his election with a jury, ruled on certain matters relevant to these applications.
- [2] I incorporate with this judgment as an annexure the minute of rulings I made on that occasion. Essentially, I had ruled on application by Mr Pouono for two accused that I did not intend to recuse myself and I gave my reasons. I have received a further application from Ms

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Taufateau to recuse myself which I will further address, and also other applications.

[3] A summary of the applications she brought were these;

- a. That the accused was a police inspector and had been denied due process of inquiry pursuant to the Tonga Police Act, 2010
- b. That the accused has been denied full preliminary inquiry for preparation of his defence in the police Magistrates Court pursuant to the Magistrate's Court Act.
- c. That the Attorney- General pursuant to section 197 of the Criminal Offences Act should have commenced this proceeding and not by the police.
- d. That the victim, Mr Kali Fungavaka, was a New Zealander and His Honour is from New Zealand who presided on the accused's appeal (against the committal to this Court). Mr Mcfee, who is a Tongan Commissioner of Police, is from New Zealand and he suspended the accused because of this criminal proceeding by the police without any reports of internal investigation given to the accused for justice purpose.
- e. That His Honour, Cato J, is the Chairman of the Tongan Police Board and the accused is currently suspended without pay due to this allegation by the Police and this trial is unfair.

f. That the accused constitutional rights are breached for this trial is unfair. His Honour, Cato J would have a separate hearing and ruling on the same charges for all accused. This is contrary to clauses 11, 14, 145 and 20 of the Constitution.

g. That there should not be a separate trial ordered by His Honour for it will prejudice and cause injustice to the accused.

h. Further grounds outlined in memorandum.

[4] During the course of the hearing, the principal reasons advanced appeared to me to relate to the issue of apparent bias, and the fact that there would not be a joint trial for all accused. Issues relating to the legitimacy or otherwise of the procedure adopted at the committal hearing had already been ventilated in a lengthy hearing which I ruled upon on the 5<sup>th</sup> July, 2013 at which Ms Taufateau had made submissions as to the irregularity of the committal. I had dismissed the appeal, in her client's case.

[5] My reasons in that case for ruling that the committal of her client was regular, is contained within that judgment. Accordingly, I did not entertain here any additional arguments relating to those grounds. In so far as there was a suggestion that not all the witnesses had been called at the committal, hearing and this was unfair I reminded her that many had and the Crown had furnished the defence with additional statements, of those that were not called; and to the extent that the

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Magistrate had allowed oral evidence that had not been in keeping with the procedure that should have been followed, which required an entirely paper committal.

- [6] As to the other grounds, I do not see any relevance of the Tongan Police Act, 2010 for these proceedings. Her client had been suspended, but there had apparently been no further action pending I assume the outcome of this trial. His case had not come before the Police Board.
- [7] Nor do I see any relevance of section 197 of the Criminal Offences Act. That section related to private prosecutions and it is plain that this prosecution had been initiated by the police. There could be no complainant about that.
- [8] On the issue of apparent bias, Ms Taufateau had been present when I effectively dismissed the application he brought on this ground. An additional ground, he had brought was that my daughter is a member of the New Zealand police, which I had revealed to counsel and the defendants prior to the appeal. Mrs Taufateau did not seem to press this matter at the hearing. However, I reminded her that this was not a matter involving the New Zealand police against Tonga police. The deceased was simply a Tongan civilian visiting Tonga to attend a family funeral when the incident occurred. It was not even known to Tongan police until after the incident that the deceased was a New Zealand policeman.
- [9] The fact that I am a New Zealander (also I revealed to her an Australian citizen) or that the Commissioner of

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Police was a New Zealander was in my view irrelevant to the inquiry. I had been appointed by the Chief Justice to Chair the Police Board. I had not dealt with this matter in that capacity. Mr Sisifa submitted that the matters Ms Taufateau addressed were too remote citing passages on "apparent bias" from Archbold, and I agree. In any event, as I explained in the minute, in a jurisdiction like Tonga where there are only two Supreme Court Judges, and the other is heavily committed to other work and administration, the rules which might apply in jurisdictions where there were a number of Judges cannot readily be applied. This trial is a lengthy and complex criminal matter and has now been set down since late last year. It was only recently that Mr Pouono brought this application and now the applicant. The incident arose nearly two years ago, and must be tried. I do not regard there as being any valid reason for me to recuse myself.

[10] Ms Taufateau also complained that the trial should be a joint trial. I pointed out to her, as indeed I had in my minute, that the Supreme Court Act provisions on election dictated the fact that there would be separate trials. I had already ruled against her client changing his election to a jury trial ruling that he could not now withdraw his election and ask for a jury trial because the Supreme Court Act did not provide for that; only for an accused to withdraw his election for jury trial in which case the trial would be before a Judge alone. Nor do I see, in any event, any prejudice arising because Mr Manu has a separate trial. His involvement came later when the deceased was moved to the cells where

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he was under arrest. Relevant witnesses will have to be called at both trials.

[11] During the course of the hearing, Ms Taufateau indicated she would like permission to withdraw as counsel. I indicated I would not accept this so close to trial. She indicated her client might choose to terminate her instructions. I warned her if that were to be the case, her client would have to represent himself. No adjournments for other legal representation would be considered. The matter has been set down since before Christmas.

Accordingly, I reject the applications

**DATED: 2 APRIL 2014**



**JUDGE**