

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 35 & 36 of 2013

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16/07/14

**R E X**

**V**

**1. KELEPI HALA'UFIA**

**2. SALESI MAILE**

**BEFORE THE HON. JUSTICE CATO**

Mr Kefu for the Crown

Mrs Taufateau for the first defendant

Mr Pouono for second defendant

**SENTENCE**

[1] The prisoners Kelepi Hala'ufia and Salesi Maile were convicted of manslaughter after a lengthy trial before me sitting as a Judge without a jury. A third person, Fatai Faletau, was convicted of assault under section 112 of the Criminal Offences Act. His sentencing was further adjourned in order to obtain a probation report. On the 1st July, I heard submissions from the Crown and counsel for both prisoners, before adjourning the matter to give sentence today.

[2] In closing remarks to me during his submissions, Mr Kefu described the circumstances of the offending as tragic and the case of profound importance for policing in Tonga. I agree with his assessment of the circumstances as tragic and would add, very needlessly so. I also agree that the circumstances of the offending involving Mr Fungavaka's death in police custody is of

*Rec'd 16/07/14*  
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profound importance for policing in Tonga. It is to be hoped that lessons have been learned.

[3] The deceased, Kali Fungavaka, was a Tongan, aged 38, at the time of his death. He had been a constable in the New Zealand police force for over 6 years. At the time of his death, he was visiting Tonga and had recently attended the funeral of his grandfather. Mr Fungavaka had five children by his first wife aged between 14 and 6. She delivered personally a very moving victim impact statement about the adverse effect that his death had had on her and particularly his young family. Another moving account was also read to the Court by Mr Kefu from his second wife who also had worked for the New Zealand police. She has recently moved to Australia to fulfil a plan which she had shared with Mr Fungavaka to migrate to Australia to continue with his career as a police officer. I do not intend to state much more about the contents of these reports. Suffice it to say, both have been deeply affected by the death of Mr Fungavaka as have the children he left behind. They reflect that he was a good father, much loved by his children, his wife and those associated with him, and was a man who was well rounded and involved not only with policing, but with sport, family and the community. He had much to live for.

[4] On the night of his death, on the 17th August, 2012, Mr Fungavaka had been drinking in a bar in down town Nuku'ualofa with a friend. Not much is known about the events of that night but the evidence reveals that when the police arrived he was intoxicated as also was his friend. He was arrested and was plainly unhappy about this. He was taken back to the police station by two officers, one of whom was Faletau and the other was Maile. I found that, around the area of Langafonua near Friends café and across the road from the bar, he was assaulted by Maile, who was carrying some kind of

object, around the upper body and Faletau soon after punched him also. He then was escorted back to the Central police station nearby. He was dumped on the floor at the entrance of the watch house. Evidence was given that Maile threatened to punch him and was stopped from doing so by the officer in charge of the charge room which was adjacent to the watch house.

- [5] Shortly after Inspector Hala'ufia arrived, as he was then. He was the officer in charge of the team known as TRG (Tactical Response Group) who had been on duty that night policing bars. Hala'ufia, with other officers, had returned to the station, a little after Maile and Faletau arrived with Fungavaka's relative, who had also been arrested. It appears that neither had been arrested for anything other than drunkenness. I found that Hala'ufia, with another police officer, took the other arrested man into the watch house, and then came out irritated to find that Faletau and Maile had left Mr Fungavaka outside the watch house.
- [6] Faletau and Maile seized Fungavaka by an arm each with his head positioned forwards. I accept that, at this point, Hala'ufia was to the rear of Fungavaka and struck him with what I find was a heavy blow to the top of his head with a large torch. Medical evidence given by a forensic pathologist from New Zealand, where the autopsy had taken place, asserted that the skull was fractured. The extent of the fracture was plain and obvious in the autopsy photographs placed in evidence.<sup>1</sup> It is plain that this blow delivered from behind when Fungavaka was held by two officers was delivered with considerable force by Hala'ufia, who cannot have had any regard at all for the wellbeing of his prisoner when he administered this blow. I found that this was a material and, indeed, a substantial cause of his death.

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[7] Fungavaka was then placed in the watch house. It is plain that he continued to resent his arrest and was vocal about this and abusive. Difficult though he may have been, it is plain he did not understand why he had been arrested. He repeatedly asked why this was so. It does not appear that any police officer took the trouble to explain to him why he had been arrested at the police station but chose to respond to his verbal abuse and resistance with violence. During his period in the watch house, where he had been taken after being assaulted by Hala'ufia, I found that he was subject to various assaults as police were attempting to process him and remove his clothes and other items before he was taken into the cells. There was punching by various officers, although I was not able to identify who perpetrated these assaults and I acquitted those officers against whom allegations of punching had been made. I found, however, that Faletau had stomped on the groin area of Fungavaka as his belt was being removed, evidence that was given by a police officer present in the area.

[8] I found that during this period Hala'ufia applied a strong headlock to the deceased as police restrained him to remove clothing before he was taken to the cells. Hala'ufia also forced his neck and upper body as he lay on the floor into the wall, and more relevantly, he strangled him breaking a cartilage in his throat. The pathologist had opined that this was with extreme force and would have worsened the trauma of the head and brain injury already experienced by the blow to the top of his head. These were the two acts upon which I based my verdict of manslaughter against Mr Hala'ufia, and for which he now faces sentence. During the course of this period in the watch house and earlier in the charge room, Hala'ufia was also seen to use a torch to prod Fungavaka in his upper body area, and this was consistent with bruising to his upper body.

[9] In relation to Maile, whilst I found that he had assaulted Fungavaka outside Langafonua, I did not find that this was a blow to the head, as the prosecution had alleged. I do, however, regard this as demonstrating Maile's disposition to use unreasonable and inappropriate force from the outset in Fungavaka's arrest. The more serious matter, however, for which I found Maile also guilty of manslaughter was an act of stomping on the face of Fungavaka as he was being taken from the watch house to the cells. There was evidence he was face up with his head off the ground, being dragged by Faletau and Maile, when Maile stomped heavily on his face causing his head to impact with the floor. I had no doubt that this brutal act materially caused and contributed to the death of Mr Fungavaka. Evidence was given that he had a swelling of the brain which surgery could not improve, a subdural haemorrhage, and bleeding to other parts of the brain. Evidence was also given that, after the stomping, Mr Fungavaka, who had been still vocal when being dragged by Faletau and Maile from the watch house to the cells became quiet. I sentence him today for the stomping which I have no doubt was a material and also a substantial cause of Mr Fungavaka's death. Like the actions of Hala'ufia, I consider his act of stomping whilst he was being dragged to the cells, brutal, senseless and cowardly. His and Hala'ufia's acts gravely brought into disrepute the Tongan police force.

[10] I pause to comment on the effect of the abuse and resistance displayed by Mr Fungavaka during that evening. Although his arrest and processing was difficult, I do not regard his verbal abuse of police officers as amounting to any kind of provocation that could be said to mitigate their actions or responsibility. Police officers are trained to deal with difficult arrests in a civilized way and they are given powers under section

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100 of the Police Act 2010 to use reasonable and proportionate force to deal with difficult situations. Hala'ufia's leadership of his officers was totally lacking. He should have taken control of the situation in a professional way, but he chose to further inflame Mr Fungavaka by hitting him over the head with a torch, and then fighting with him in the watch house as they attempted to remove his personal effects. He may also have been incensed by Fungavaka's abuse but that was no excuse for his undisciplined reaction. I consider his actions in the watch house in strangling Fungavaka with such force that he broke a cartilage in the neck demonstrates how he had lost control and had inflamed an already difficult situation.

[11] When a police officer arrests a citizen, that citizen falls under the care and control of the police and the police must treat he or she with decency. As I have said, police have certain powers that must be exercised reasonably to deal with difficult arrests. Arrest does not, however, give a police officer the power to discipline or take the law into his or her hands, and effect retribution. It is a truism, but sometimes ignored by those in authority, as occurred in this case, that police officers are subject to the law, and they must act strictly within the powers given to them by law. Lord Hailsham<sup>1</sup> said in Wong Kam-ming v The Queen [1979] 1 All ER 939, at 946 on a related point, that of excessive police conduct in the process of interrogation;

"... in a civilized society it is vital that persons in custody or charged with offences should not be subject to ill treatment or improper pressure..."

[12] During the course of submissions, Mr Kefu submitted that an appropriate starting point in the case of Mr Hala'ufia for manslaughter on facts such as these was one of 10 to 12 years imprisonment for Hala'ufia and 8 to 10 years for Mr Maile. Defence counsel did not cavil

with these submissions which seemed to me appropriate for offending of this kind involving the death of Mr Fungavaka which must be the paramount sentencing consideration. In so far as these officers were concerned, I consider that the fact this offending took place, whilst Mr Fungavaka was in custody and in the care of the police adds a further aggravating feature to the offending. The few cases advanced by Mr Kefu as guidance include a case of manslaughter (R v Kaufusi CR 143-145 /12 17th June 2013), where I had adopted a starting point of eleven years for a young man who, together with other youths, had set upon a man who was drunk and beaten him to death by kicking and punching him. In that case, I considered other relevant authorities including R v Filimone CR 59-61 19th August, 2011, a similar case of assault and manslaughter, where the sentencing judge had considered a starting point of 12- 15 years. Here, I consider that factors which place this case in the serious category, is the use of a large torch as a weapon with force sufficient to break Mr Fungavaka's skull and his actions in strangling him, again using sufficient force to break a cartilage in his neck. Hala'ufia was a mature officer aged about 48, and a senior and experienced police officer. He must have appreciated the serious risks associated with hitting a man a heavy blow with a weapon to the top of his head and strangling with force sufficient to break a cartilage in the neck. His violent actions were perpetrated against Fungavaka whilst he was in police custody and under his control which in my view is an aggravating feature justifying an overall starting point of 13 years. In R v Fungavai [2009] Tonga LR 147 the fact a rape occurred whilst the victim was police custody was treated by the sentencing judge as a breach of trust and an aggravating factor. Counsel did not cavil either with the circumstances of the assault being in police

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custody being considered an aggravating feature of the offending.

[13] Likewise with Maile, he had been in the police force for several years. From the beginning of the arrest, he demonstrated a disregard for the law and his stomping was equivalent in my view to the use of a weapon to the head. In a number of English cases, Attorney-General's Reference Nos 44,49 (1995) 16 Cr App R865 and (2006) 2 Cr App R 505 a kick has been treated as equivalent to the use of a weapon and this was a particularly brutal act because Fungavaka was being dragged defenceless with his head facing up and off the floor by officers from the watch house to the cells. I have no doubt, like Hala'ufia, he administered his own retribution for Mr Fungavaka's abuse and resistance. I fix 11 years as an overall starting point for his offending taking into account also that Fungavaka was under his care when the stomping occurred. The defence did not oppose the starting point suggested in argument nor was opposition expressed to aggravation.

[14] I now turn to mitigation. For the families of both prisoners their actions have brought their own form of tragedy. Not only gone are their livelihood and careers as policemen, but they have ended in disgrace, and their families will not be able to rely on them for support for lengthy periods. I have read the probation reports. Mr Hala'ufia has been married for many years and has several children whom he and his wife have adopted. He was promoted to Inspector in 2010. He does not drink or smoke and said to his probation officer he could not tolerate corruption in the police force. He has received a commendation for the role he played in a drug importation. His wife asks for mercy. He has included a number of references which show he was active in the community, in his church and well regarded. He is of course a first offender. He is,

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adamant that he was not responsible for harming Fungavaka. I consider on the basis of the evidence I have heard his denial is unrealistic. I do not consider, although he advanced a limited apology to his probation officer, that he has displayed any contrition, nor did he co-operate with the authorities. Rather, in his sentencing submissions, as he has done formerly, he seemed to complain of the failure to initiate a police disciplinary inquiry in this case, and also about the lack of police support for financing his defence which tends to suggest he still does not really appreciate or acknowledge the seriousness of his misconduct, or how damaging it has been for the reputation of Tongan police. For his previous good character and community work, however, I allow him mitigation of two years. The sentence I impose upon him is one of 11 years imprisonment. I order that the final year be suspended on condition that he commit no further offences punishable by law for the period of his suspension. I add that the only reason I have allowed him any period of suspension is because of his former good character. He did not manifest any co-operation with authorities or show any contrition, factors which are normally associated with being a good prospect for rehabilitation.

[15] As to Mr Maile, he is unmarried but he supports aged foster parents, and it seems also his natural parents out of what was a modest police salary. He had been in the police force for about 6 years serving as a constable. I have also read reports which speak highly of his good work in the community and supporting the activities of his church. I allow him also 2 years by way of mitigation for his former good character and support of his community. In neither case, can dislocation of family obligations mitigate very much if at all. Dislocation of family relationships are a sad but inevitable incident of the offending which I have also taken into account, in so far as I am able in the

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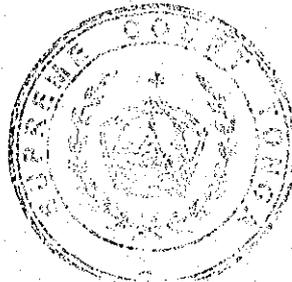
mitigation I have allowed. I accordingly sentence Maile to nine years imprisonment. I also suspend the final year of his imprisonment on condition that he commit no further offences punishable by law for the period of his suspension. Like Hala'ufia, I consider his protestation of innocence unreal in the face of the evidence I heard. I do not regard him as showing any contrition. He did not co-operate with authorities, but maintained his innocence throughout. I accord him a measure of suspension only because of his former good character.

[16] In the case of both prisoners, I have imposed sentences that reflect condemnation or denunciation of their acts and are also intended to act as a firm deterrent against this kind of behaviour by police officers in the future as they carry out their important duty of maintaining law and order in Tonga.

[17] Accordingly, I sentence Hala'ufia to 11 years imprisonment with the final year suspended on the condition that he commits no further offences punishable by imprisonment during the period of suspension. The sentence is backdated to the date of his remand in custody for sentence.

[18] I sentence Maile to nine years imprisonment with the final year suspended on the condition that he commits no further offences punishable by imprisonment during the period of suspension. The sentence is backdated to the date of his remand in custody for sentence.

**DATED: 9<sup>th</sup> July 2014**



*C. J. T.*  
**J U D G E**