

**IN THE COURT OF APPEAL OF TONGA**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**APPEAL NO. AC 10 of 2010**

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**BETWEEN : SIONE TALIA'ULI**

**Appellant**

**AND : REX**

**Respondent**

**Coram : Burchett J, Salmon J, Moore J**

**Counsel : Mr Tu'utafaiva for the Appellants  
Mr Kefu and Miss Lafaiali'i for the  
Respondent**

**Date of Hearing : 5 October 2010.**

**Date of Judgment : 8 October 2010.**

## **JUDGMENT OF THE COURT**

[1] Today Talia'uli died in hospital on 8 September 2009 as a result of a severe infection arising from major injuries to his back and buttocks. The infection caused his major organs, especially his heart, his brain and his kidneys to break down. He was four years old. His father had beaten him over two days on the 4<sup>th</sup> and 6<sup>th</sup> of September with a broomstick and then with a knotted power cord. On the second occasion it seems that the beating went on from early in the evening until around midnight when the boy's mother got up and stopped the beating. The next morning the 7<sup>th</sup> September the parents realised that the boy was non-responsive and took him to the hospital. When he arrived his heartbeat was barely detectable. He had a heart attack but was able to be resuscitated. However for the reasons set out above he eventually died about 10 pm that night.

[2] The appellant who is the boy's father was charged with murder. He was tried before a judge and jury in the Supreme Court and was found guilty. He was sentenced to life imprisonment and the judge recommended that he serve a minimum of 35 years before being considered for parole release. This appeal is against conviction and sentence.

### **The factual background**

[3] The key facts are outlined above. The appellant is married and had three children. The eldest is a female child aged seven. The two youngest were twins, a girl and the boy who was killed. The couple also have an adopted daughter. Today as the boy was called was of average size for a four-year-old. He was apparently considered difficult to

discipline. The punishment appeared to have commenced after he kept crying for food. On Friday, 5<sup>th</sup> September the appellant was seen hitting the child with a broomstick on his feet chest and body. The assault carried on until late at night. On Monday, 7<sup>th</sup> September the appellant again disciplined the child for not going to sleep and not keeping quiet. The appellant took the boy's clothes off and repeatedly hit him with an electric wire which had knots on at one end. The boy suffered injuries to his back his buttocks his chest and legs and arms. In addition to severe injuries to the boy's chest abdomen and legs the assaults caused internal bleeding and shock.

### **The appeal**

[4] The grounds of the appeal are as follows:

1. His Honour's summing up to the jury including the time for translation to the Tongan language, was far too long, covering matter not relevant to the issues before the jury, giving more emphasis to the prosecution's case than the appellant's and therefore erroneous in law. (The summing up lasted for 4 ½ hours.)
2. The summing up can reasonably be said to have caused confusion in the mind of the jury and/or influenced their verdict. (They retired for about 20 min)
3. Alternatively, His Honour erred in fact and in law in recommending that the appellant serve no less than 35 years imprisonment.

### **The appellant's submissions**

[5] Mr Tu'utafaiva told us that during his closing address to the jury he conceded that the punishment given by the father to the boy was excessive. He submitted that the judge's summing up was unbalanced.



He said that the judge had not adequately put the defence case to the jury. In particular he noted that the judge made no reference to answers given in the police interview which counsel specifically referred to in his closing submissions. The appellant did not give or call evidence so that the material placed before the court on the appellant's behalf consisted essentially of counsel's address to the jury. It was in this address that the defence to the charge was outlined.

[6] Mr Tu'utafaiva referred as well to a direction given on direct evidence which included examples which were described as unnecessarily prejudicial. There was also a direction given on intention where once again counsel submitted that the examples given by the judge were prejudicial. Counsel also referred to a lengthy passage in the summing up where the judge referred to an early English case on the chastisement of children and to the UN Convention on the Rights of the Child and submitted that the judge should just have told the jury that legitimate chastisement was lawful but excessive chastisement was unlawful.

### **The submissions for the Crown**

[7] Mr Kefu submitted that neither the length of the summing up nor the brevity of the jury's retirement were matters which could affect the validity of the verdict. He said that if the jury were confused they had already been told by the judge that they should return a verdict of not guilty. He submitted that the trial judge's summing up was neutral and presented both sides of the case fairly.

## Discussion

[8] We have decided for the reasons that follow that the judge's summing up was flawed. There has been a miscarriage of justice, and there will need to be a new trial.

[9] The summing up should be tailored to the facts of the case, and it is not the practice of appellate courts to insist that trial judges use any particular form of words. It is the overall impression made by the summing up on the minds of the jury as a whole which is important: Alan [1969] 1 WLR 33; [1969] 1 All ER 91. In Mowatt [1968] 1QB 421; [1967] 3 All ER 47 at p.50 Diplock LJ said:

"The function of the summing up is not to give the jury a general dissertation on some aspect of the criminal law, but to tell them what are the issues of fact on which they must make up their minds in order to determine whether the accused is guilty of a particular offence."

[10] The duty to put the defence case is fundamental, even if that case is weak and improbable: *R v Campbell* [1954] NZ LR 22. In *R v Miratana* (NZ Court of Appeal 4/12/2002 at para 26) it was said that a judge must be scrupulous in maintaining balance and presenting the issues to the jury. The balance referred to is not an artificial equalising of the competing cases, which are likely to be of different weight, but providing a careful synopsis of the major points advanced on each side. It is no part of the judge's task to summarise the whole of counsel's submissions, which in many cases will be lengthy. The responsibility is to distil and express the major points so that the collision between the cases is seen by the jury in sharp focus when they retire to consider their verdict.



[11] The 2009 edition of Archbold makes the point at paragraph 4–376 that brevity in summing up is a virtue not a vice; there is no obligation to rehearse all the evidence or all the arguments but a judge cannot abandon his responsibility to marshal and arrange the facts issue by issue.

[12] We complete this section of the judgment by referring to a passage from the judgment of Lord Hailsham LC in *R v Lawrence* [1982] AC 510 at 519:

“It has been said before but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of the judge’s notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.”

### **The summing up**

[13] There is one primary deficiency in the summing up which has led us to the conclusion that the appeal must be allowed. The judge in his summing up referred to the appellant’s confession statement where he apparently admitted that he had committed murder. The full confession statement read as follows:

“I fully regret the punishment that I had given, and I have truly learned from this mistake, and I wish and am satisfied to accept any punishment that would be sentenced towards me, up to the punishment of death in order to exchange for what I had wrongfully done. The truth is, is that I did not expect my son to die but I was trying to teach him a lesson and I truly am full of regret for my crime. I apologise to the family of my wife and to my family that I ask for forgiveness, also to the chairperson and

the government to forgive me also. My crime was murder and killed someone. I'm sorry"

[14] At one point in his summing up the judge set out the statement in full. At another point he gave a direction on direct evidence which included this statement:

"If there is reliable evidence of the defendant himself having admitted the offence, (as alleged in this case by the prosecution) then, these would all be good examples of what is known as direct evidence—as against a defendant"

[15] Towards the end of the summing up in referring to Crown counsel's address the judge said:

"the defendant went on to say—I apologise to the family of my wife and to my family that I ask for forgiveness, also to the chairperson and the government to forgive me also.. He said my crime was murder and I killed someone. I'm sorry."

[16] At another point the judge set out six questions and answers from the appellant's record of police interview. There were a total of 36 questions and answers in the record of interview. They tended to be answers which supported the prosecution case. Given the nature of the charge, question 26 and its answer was very significant but was not specifically referred to by the judge. It read:

"Q 26: Sione the beatings that you did to your son, do you think that punishment can cause and can lead to someone's death?

Answer: No I believe that if I knew this I would not be doing it."

[17] In his full confession statement set out above the appellant made a similar comment when he said "the truth is that I did not expect my son to die". At no stage did the judge, when he was referring to the so-called



confession of murder, point out that the appellant had made this comment on two occasions. The significance of this issue is that one of the elements of the charge brought against the appellant is that he caused bodily injury to his son "which you knew was likely to cause death". The passages to which we have been referring go to the issue of knowledge and should have been highlighted by the judge. The judge failed to point out that the apparent confession of murder was not a true confession because the appellant denied the element of knowledge of a likelihood of death.

[18] Another related deficiency in the summing up was the judge's failure to refer to two of the important elements in the murder charge brought against the appellant. The particulars of the offence as set out in the indictment provided as follows:

"Sione Talia'uli of Popua, on or about the month of September 2009, at Popua, you did, with intent to do so, cause bodily injury to Tevita Talia'uli which you knew was likely to cause death and was reckless whether death ensued or not when you repeatedly hit him with a stick and an electrical appliance cord causing him injuries which led to his death"

[19] The judge did not direct the jury on the elements of knowledge of likely death or recklessness in relation to murder. Had he done so, that direction combined with reference to the statements in the record of interview and the confession may have been of considerable relevance to the jury in its deliberations as to whether the appellant was guilty of murder.

[20] The New Zealand jury trial bench book contains a useful model direction for use in cases like this one where the murder charge is based on intention to cause bodily injury. The direction reads as follows:



"You would also find that the accused had a murderous intent if you are satisfied that he intended to cause the deceased bodily injury (harm that is more than trifling or transitory), which he knew to be likely to cause death and was reckless whether death ensued or not. To find the accused guilty of murder on this basis, you must be satisfied that he had in his mind an actual and conscious appreciation that his act of [beating] the deceased meant that there was a real and substantial risk of the deceased dying, and that he showed that he was prepared to run that risk by nonetheless [beating] him."

[21] There were some other elements of the summing up which while less likely to lead to a miscarriage of justice were unnecessary and may possibly have caused confusion. It is unusual in the experience of this court to give an illustrated direction on what constitutes direct evidence. In this case a direction on circumstantial evidence was unnecessary. There is a lengthy direction on the issue of chastisement of children which includes references to an English case from 1860 and a 1999 decision of the European Court of Human Rights. These references described the cases and what was decided. This was followed by a lengthy reference to portions of the UN Convention on the Rights of the Child, a convention to which Tonga has acceded but which has not been incorporated into its domestic law. The task of the judge as is apparent from some of the cases referred to earlier is not to give a disquisition on the law but to tell the jury after undertaking such research as the judge considers necessary what the law is.

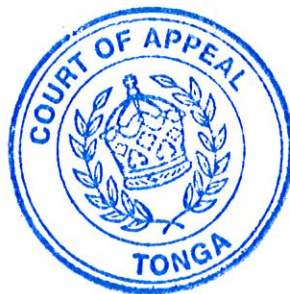
[22] It will be apparent from what has been said earlier that we do not think that the defence case was fairly or adequately put and indeed the most important aspect of that case was not put at all in any proper fashion.

## Conclusion

[23] The result is, as mentioned above, that there has been a miscarriage of justice. The appeal is allowed, the conviction and sentence are set aside and the case is remitted back to the Supreme Court for retrial.

## Addendum

[24] It is not of course necessary to determine the appeal against sentence. We note however that both counsel submitted that it was constitutionally unsound for a Judge to recommend the serving of a minimum term of imprisonment. This can be seen as an interference with the royal prerogative of the King to grant pardons. We are of the opinion that there is merit in this submission.



  
Burchett J

  
Salmon J

  
Moore J