**THE SUPREME COURT OF TONGA** **AM 08 of 2013**
**APPELLATE JURISDICTION**
**NUKU'ALOFA REGISTRY**

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**BETWEEN: THE POLICE - Appellant**

**AND : 1. FATAI FALETAU**
**2. MANU TU'IVAI**
**3. TEVITA TALI VAKALAHI**

**- Respondents**

**BETWEEN KELEPI HALA'UFIA - Appellant**

**AND THE POLICE - Respondent**

**BEFORE THE HON. JUSTICE CATO**

## JUDGMENT

[1] The respondents were charged jointly with manslaughter together with the appellant, Kelepi Hala'ufia, Salesi Maile and Semisi Manu and, in the alternative, causing grievous bodily harm to Kali Fungavaka on or about the 18th August, 2012.

[2] The alleged homicide arose out of an incident when the deceased, who had been drinking with his cousin after attending a funeral for his grandfather, had been arrested by members of the Tactical Response Group in the Tongan police outside a bar in Nuku'alofa in the early hours of the 18th August, 2012. He had been arrested by officers Faletau and Maile and taken on foot back to the Central Police station which is in the vicinity of the bar in down town Nuku'alofa. It was alleged by the Crown that, prior to taking him to the police station, Maile was seen to produce an instrument (probably a torch) and strike in a downwards motion with it. This may have caused a fracture of the deceased's skull. However, subsequent acts of alleged assault at the police station may have caused such an injury, or contributed to it.

[3] A cousin of the deceased was also taken back to the police station. He had also been drinking with the deceased but, unlike the deceased, he does not appear to have attempted to resist arrest or in any way been verbally abusive or aggressive as the evidence suggests the deceased was.

[4] The cousin was arrested by other members of the Tactical Response Squad who had been, as had been Faletau and Maile, in a police vehicle which had parked in the vicinity of the night club. Later, the cousin had been taken back in this vehicle to the Central police station. The senior officer in charge of the Tactical Response Group was Inspector Kelepi Hala'ufia who also was responsible for taking the cousin back to Central with other police officers.

[5] It seems that the deceased, who was a serving New Zealand police officer visiting Tonga for the funeral of his grandfather, did not announce this fact to members of the Tongan police. Although his belt, a NZ issue police belt and an identification document taken from him when he was searched may have suggested this, Tongan police do not seem to have been alerted to the fact that he was a New Zealand police officer. There was evidence that the cousin apologized for the deceased's conduct at the station.

[6] The evening ended in tragedy. There is evidence that when taken back to the police station various of the

officers before the Court were seen to assault him. Most of the action at the police station took place either in or around the vicinity of the watch house and adjacent cell block area. After allegedly being assaulted in the watch house by various officers, the deceased was dragged to the cells. Various other assaults by police were alleged to have taken place before he was placed in the cells. After being taken to the cells, the accused was further allegedly assaulted by one Semisi Kalisitiane Manu when he was punched by him. Manu was also later charged with manslaughter and grievous bodily harm. The deceased was later found unconscious and taken to hospital where he died.

**Joint Enterprise**

[7] The Crown case is that the police officers involved at the police station in the alleged action around or in the watch house and in later taking him to the cell were all involved in an unlawful joint enterprise namely in an assault. It was alleged that each effectively aided and abetted the other in a joint assault which went well beyond anything required to effect a lawful arrest or in lawfully subduing the deceased.

[8] The Crown case was that the joint enterprise commenced at the police station and not earlier, when he was allegedly assaulted outside the night club when first arrested. The Crown case was that the common unlawful object was to be inferred from the concerted nature and number of different assaults that were perpetrated on the deceased over this period. There was no evidence of any overt utterances or earlier conduct which would suggest that those charged proceeded with any preconceived plan to assault the deceased before arriving at the station. Although it could not be shown conclusively which act caused the death of the deceased, the Crown argued all were guilty of manslaughter because they were parties to a joint enterprise to assault the deceased and in such circumstance his death, even if unintended, was a real or substantial risk within the contemplation of each individual accused. Alternatively, if his unintended death was not foreseen as a real or substantial risk they were guilty of causing grievous bodily harm which the Crown would argue was an obvious risk in an enterprise of this kind.

[9] Acting Chief Magistrate Mafi in reviewing the evidence concluded, however, that it was not established to his satisfaction beyond a reasonable doubt there was evidence of any plan or common unlawful object. Mr Sisifa contended that he was plainly wrong to have come to this conclusion because the evidence when taken together proved combined assaults of such intensity and number that a common unlawful purpose could be inferred.

[10] In so far as joint enterprise is concerned, I approach the case on the basis of those generally well known cases cited to be by the Crown namely R v Anderson and Morris [1966] 2 QB 110; Varley v The Queen [1976] 12 ALR 347; Gillard v The Queen (2003) 202 ALR 202; Hui Chi – Ming v The Queen [1985] AC 148; McAuliffe v The Queen [1995]183 CLR 108; R v English [1991] 1AC 1 and F v Fakatave [2001] Tonga LR 76. I do not propose here to review these cases, except to say I accept that they all adopt the approach that at common law each party to a common unlawful enterprise is guilty of the commission of crimes which he or she can foresee as a possible consequence of the common unlawful purpose sometimes defined as a

real or substantial risk. I did not find the case of R v Swindle and Osbourne (1846) 2 Car & KI 230 mentioned by the Magistrate and Mr Sisifa as being very helpful. Not only is it a very old case but the more recent cases mentioned encapsulate the principles contended for clearly.

[11] For the purposes of the present appeal, however, Ford J in Fakatava [2001] Tonga LR 76 put the issue of inferred joint enterprise in this context clearly when he said;

> "it is not necessary that there should be any kind of elaborate pre-arrangement to constitute a joint enterprise - Hunter v Sara [1999] 105 A Crim R 241, but the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that was their common intention R v Peters and Parfitt [1955] Crim LR 501. The common intention or agreement is gauged from their conduct."

[12] If it were the view of a jury that there was indeed an agreement to assault the deceased then, those found to have committed acts of violence against him could be found guilty of a manslaughter if the jury were to

conclude beyond any reasonable doubt that he must have foreseen an unintended death as a real or substantial risk. Further those, who deliberately assisted or encouraged the unlawful enterprise by lesser acts of violence or even by their deliberate presence (see R v Clarkson 55 Cr App R 445), could be found guilty of causing the death of the accused or grievous bodily harm also if the jury were to conclude they must also have appreciated that there was a real risk that an unintended death or, if not death, then at least serious harm could result.

[13] If the jury, however, were not so satisfied that there was a common unlawful purpose or enterprise then they would have to consider whether individually any of the officers committed a discrete offence which was the approach adopted by the Magistrate. The crime, in the case of an act or acts which was found to have caused or contributed to an unintentional death would be manslaughter, but lesser acts not found to be causative of death could justify verdicts of grievous bodily harm, or possibly a lesser offence depending on the nature of the act involved.

[14] I consider, for reasons which I will summarise later at para 41 that Mr Sisifa is correct and the Magistrate was wrong to conclude there was insufficient evidence of a joint enterprise at the station. Having reviewed the relevant evidence, I consider there was evidence from which a properly directed jury could infer beyond a reasonable doubt that the actions of the police officers evidenced an unlawful joint enterprise at the station to assault the deceased. Only if there was no evidence from which the inference could be drawn was it open to the Magistrate to make the finding he did.

[15] The Magistrate having found that an unlawful joint enterprise was not established then proceeded to consider on an individual basis the sufficiency of the evidence by reference to the actions of that defendant. Before considering his findings further, it is appropriate to consider the state of the medical evidence, at committal.

**The Medical Evidence on Cause of Death**

[16] The medical opinion of a New Zealand pathologist, Dr Fintan Garavan, who had examined the body after an

autopsy carried out in Auckland, was that he was unable to consign the death to any discrete act. His view was that, if the initial blow to the head allegedly delivered by officer Maile caused the skull fracture, then, had he received early medical attention, he may have survived but he could not be sure of this. Other evidence, which he defined in his report as a choke hold incident at the station to the point of causing unconsciousness and a later punch delivered in the cell, may have compounded his problems and contributed to his death which he considered was from blunt force trauma.

[17] In his report, he considered, however, that neither the choke hold nor a later stomp to his head in the passage way to the cells caused the skull fracture to the head. The fracture was to the vertex of the head. He said in his report, however, that if any new or further information was brought to his attention he would reassess his opinion. His view did not seem to materially change when he gave verbal evidence at the depositions. What was not it seems put to the Doctor at the committal, however, was additional evidence led by the Crown from a witness, Onitulei Manu, that one of

the men, allegedly Inspector Hala'ufia, had hit the deceased with a torch on the head at the police station with sufficient force for him to hear a crackling noise. Although there is a clear skull fracture evidenced in photographs, it is consequently unclear when this arose that is at the scene of arrest or later, or possibly in combination or with other acts. It would seem that other acts such as the throat hold also attributable to Hala'ufia which caused the thyroid cartilage to be fractured, and stomping allegations to the head which allegedly arose prior to admission to the cells, did not independently cause death although the Doctor considered they may have contributed to it. The Doctor's evidence for trial should be reviewed in the light of the additional evidence, and a further report obtained and disclosed to the defence prior to trial.

**The Magistrate's findings**

[18] Faced with this state of the medical evidence before him, the Magistrate ruled that there was evidence to commit Mr Hala'ufia, Mr Maile and Mr Semisi Manu for trial on charges of manslaughter and or grievous bodily

harm. He, however, discharged Mr Faletau, Mr Tu'ivai and Mr Vakalahi.

**Threshold Issues**

[19] Before I consider the evidence, there are threshold issues relating to jurisdiction and the validity of the appeal process adopted here that were advanced by Mr Pouono for his client Mr Vakalahi. There was no representation for the respondents Mr Faletau and Mr Tu'ivai who did not appear on the hearing of the appeals, but the issues raised by Mr Pouono apply also to them. In any event, I must consider on this appeal, their cases individually since they were discharged by Mafi ACM and it is against their discharges that the Crown also brings this appeal.

[20] The argument presented by Mr Pouono was that the appeal had not been properly instituted. He contended that the amendments to the Magistrates Court Act which as the Magistrates Court (Amendment Act) 2012 came into force on Monday 17th December 2012 (Tonga Gazette no 55 of 2012) did not apply because the proceedings or prosecution had been initiated or

commenced earlier. He argued that the Magistrate had adopted the old form of procedure for preliminary hearings under 32 of the Magistrates Court Act which he contended it was incumbent on him to do, and it followed also that the appeal procedure should be that which applied before the amendment. I shall return to this submission below at para 25.

[21] The preliminary hearing had commenced on the 25th February 2013 that is after the amendments had come into force and several months after the defendants had been subject to charge in or about September, 2012. Mafi ACM had ruled that the old procedure for preliminary hearings should govern this committal hearing and not the new procedure introduced by amendment because the amending legislation only applied to charges laid after the amendment had been signed by the King. He considered the Amendment in relation to section 20 of the Constitution Act which provides;

> "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws"

He held that by using the old form of procedure there was no retrospective application of the Amendment Act. By implication, he must have considered that to have adopted the new procedure would violate section 20 of the Constitution.

[22] Section 9 of the Amendment Act introduced a new procedure for the conduct of preliminary hearings in Tonga. It completely eliminated cross-examination of witnesses. The procedure is that the Crown case will be presented by way of a paper committal only. This consists of a copy of a fair summary of the statements of the prosecution witnesses, a copy of the list of exhibits and a copy of the documentary exhibits. Copies of these documents are given to the defendant at the preliminary inquiry. If the magistrate considers that the documents disclose a sufficient case to put the accused upon trial before the Supreme Court then the defendant is committed for trial. Unlike the old committal proceeding, which provided for an oral committal hearing where evidence was adduced and a defendant could cross-examine witnesses and call evidence on the inquiry, the issue of sufficiency is decided entirely on

the documents produced by the Crown. There is no room at all for a magistrate to decide whether to commit or not other than on the documents advanced at the hearing by the Crown.

[23] The obvious purpose of the new procedure is to avoid lengthy committals and delay in having cases remitted to the Supreme Court for trial. I consider that the preliminary hearing in this case should have followed the new and not the old form of procedure which Mafi ACM partly followed. Adopting the old form of procedure meant that the preliminary hearing was unnecessarily lengthened because a large number of witnesses were called to give oral evidence and cross-examined. This had the effect of considerably delaying the transfer of the proceedings to this Court.

[24] I consider that the new committal procedure was a procedural reform only. As such, adopting it would not violate any principle of retrospectivity. Halsbury, vol 44 (1) 4th ed, 1237, paras 1237, 1287. In this regard, para 1287 provides;

> "Procedural enactments thus affect proceedings pending at their commencement unless the contrary intention appears whilst the applicability to pending proceedings of a provision altering the structure of appeals may depend on whether it increases or reduces rights of appeal."

In Rathbone v Munn (1868) 18 LT 856, at 857 Blackburn J held that a provision concerning a new right of appeal was of a procedural nature, and that it must therefore be presumed to have been intended to apply to a judgment given after its commencement in proceedings previously instituted.

[25] I do not consider Mr Pouono has any complaint about the new procedure of appeal either. By virtue of section 19 of the Amendment, section 74(1) of the Act is amended to repeal "triable summarily". The effect is now that any party may appeal to the Supreme Court from "the judgment, sentence or order of a Magistrate". Prior to the Amendment, only the Crown had an appeal against the decision of a Magistrate not to commit a defendant for trial under section 37 of the Act which has now been repealed. This was by way of a procedure whereby, if the Attorney-General considered that there was sufficient reason for the defendant to be

committed, he could apply to the Chief Justice for a warrant of arrest and committal for trial. If the Chief Justice considered there was sufficient reason for the defendant to be committed, he could grant a warrant for his arrest. The defendant would then be dealt with as if he had been committed for trial. Under the present procedure, there is no requirement for the Attorney-General to intervene; however, in practice, it would be unthinkable that matters of this kind would not be undertaken without serious consideration by the Solicitor - General as to whether there should be an appeal. In my view, the new procedure does not prejudice a defendant who has been discharged at the preliminary hearing. For the first time, it allowed a defendant to appeal a committal for trial of which the appellant Mr Hala'ufia has sought take advantage here.

[26] Mr Pouono, however, also argued that section 15 (c) Interpretation Act (Cap 1) meant that any court proceedings that are part heard or adjourned must follow the procedure that applied when the proceedings were commenced and not the new form of procedure. He submitted that the appeal had not been properly instituted because the Attorney-General had not

remitted the matter to the Chief Justice as required by the now repealed section 37 of the Magistrates Court Act. However, examination of section 15 (c) indicates that Mr Pouono put the matter too high because the section provides;

> "Whenever any Act repeals either in whole or in part a former Act the repeal shall not in the absence of any express provision in the contrary, affect or be deemed to have affected -
>
> (c) any action, proceeding, or thing pending or in completed when the repealing Act comes into operation; but every such action, proceeding or thing may be carried on and completed as if there had been no repeal."

In my view, the section is permissive. A proceeding may be carried on as if there had been no repeal - it is not a mandatory requirement. Plainly, if a proceeding is very well advanced, it may be considered appropriate to carry on with the old procedure; however, in other cases as here, where the hearing had not commenced and the Amendment had come into force several months before the hearing commenced, there is much less reason for not adopting the new procedure. In not

providing a transitional period, plainly Parliament intended the new procedure to come into effect and be applied immediately. This provision was not cited to the Magistrate. Accordingly, I also reject this submission.

[27]On the issue of the regularity of the committal proceeding, Mrs Taufateau for Mr Hala'ufia contended that the Magistrate, although it seems in her view correct to adopt the old procedure for the committal, did not follow that faithfully. He did not, she argued, apply the provisions of section 34 fully in that he did not follow the procedure set out in subsections 4-6, namely at the conclusion of the prosecution evidence give the defendant the opportunity to answer the charge and call evidence. Only then, she argued, could the Magistrate make his decision under subsection 6 to determine whether the defendant should be committed for trial. In this case, Mafi ACM, having heard 23 of the 32 witnesses Mr Sisifa had indicated he would call, closed the hearing and gave the defendants the opportunity to make written representations. This was after Mr Sisifa had indicated that he considered he had sufficient evidence for committal.

[29] Plainly, if the old procedure under s 34 of the Act were the correct procedure, then it should have been followed. The Magistrate should have given the defendants the opportunity to answer the charge and call evidence irrespective of whether the Crown chose to call no further evidence. However having said that, I asked Mrs Taufateau whether she had in fact brought this to the attention of the Magistrate at the hearing. She said she had not but had made the point in her written submissions. She did not provide me with a written copy in English of her submissions. I note that the Magistrate in his judgment said only that Mrs Taufateau had submitted that the charge form /ticket was never read to the defendants and clarification was never made as to what Act or Law the preliminary inquiry was based on. There was no mention made by him of any request by the defendant that he should be able to give or call evidence before a determination on his committal was made. Mafi ACM in answer noted that, although the charges had not been read out as required, the Crown prosecutor had proceeded to open on them, and so there was no prejudice in his view. In my view, if there had been a serious request for evidence to have been advanced by the defendant, a

procedure very rarely adopted at a preliminary hearing, then Mafi ACM should have been put plainly on notice of this before the hearing was adjourned. I do not accept, however, that the Magistrate was put on notice of the defendant's desire to give or call evidence on the material I have seen.

[30] I consider the fact he did not invite the defendant to give or call evidence or to afford him the opportunity to answer the charge and adjourned the hearing to consider the sufficiency of the evidence was in breach of the old form of statutory procedure under section 34, but in the absence of a plain demand, this was a deficiency of form rather than substance, and not a matter which would justify me upholding the Appeal and remitting the matter back to Mafi ACM for evidence to be heard and a determination made in accordance with the old statutory procedure. This would be made all the more artificial considering that, in my view, he should have in any event applied the new procedure which would not have given Mr Hala'ufia the opportunity to answer the charge or give or call evidence before a decision was made whether to commit him for trial.

[31] I note also that under section 81 of the Magistrate's Court Act, I am not entitled to reverse or vary, for any defect in form, and can only decide a matter on its merits. I intend to consider his appeal on the basis of whether there was sufficiency of evidence to put Mr Hala'ufia on trial; that is on its merits.

**Issues of Credibility**

[32] Before I proceed to consider the evidence upon which the Crown relies to contend that the respondents should be committed for trial it is necessary to refer to another aspect of the inquiry where Mafi ACM I consider further erred. In this regard, I consider he adopted the wrong approach to the evidence of Crown witnesses Sione Vaomotou, Penisimani Tupou and Taniela Vaka and others in similar category. These were Crown witnesses all of whom were in police custody for various reasons on the evening in question and all said that they witnessed assaults being perpetrated by various police officers on the deceased.

[33] The evidence of Sione Vaomotou was that he was serving a term of imprisonment for a serious crime. He was allowed to go outside his prison cell and was on the night in question. He was outside talking with Penismani Tupou who was in his cell when he heard a sound and saw the deceased being taken over to be searched. He said when he looked he was being beaten. He said there were four prison officers cramming inside. He watched from outside prison cell no 3. He saw another officer Fua standing at the entrance to the office. He described the assault as going on for over ten minutes. He said he saw Hala'ufia strangle this person and Male and Faletau held him. He said he saw Maile stomp on him. He was dragged over and left outside cell no 6. He said he saw 5 officers conducting the beating. He also saw Manu Tu'ivai punching the chest of the deceased whilst this was going on. Later he went back to his cell and he heard the deceased making a rattling noise so he told the police officers to take him to hospital. He then later went and gave a bottle to the many to use as a pillow and he saw the injury to his face.

[34] Penisimani Tupou was also a serving prisoner who had been remanded to Central. He was in custody in cell four. He had been told by Sione Vaomotou that something was going on at the front. He used a mirror and by holding it out of his cell he was able to see part of what was going on in the watch house area. He said he saw one officer strangling the young man whilst he was being searched and his belt being pulled off. He saw a punch being delivered by a person whom he said had "kelokelo" hair translated as blondish light or reddish and whom he later identified at the hearing as Mr Vakalahi. He was also assaulted a second time this time rendered unconscious, by it seems Vakalahi before Faletau kicked him when he was dragged to the cells. Faletau was dressed in black. He saw an action like a foot being lifted and kicked as he was being dragged to the cells and saw Faletau engaged in this. He said he could not see where the punches landed but there was one big punch where the young man had fallen down. He said Vakalahi had come into his presence near his cell when the dragging had taken place.

[35] Taniela Vaka was another prisoner. He was in cell 3. He heard arguing with police officers coming from the

search room. He also used a mirror and saw four police officers and a police woman. He saw two people holding the deceased. He saw a police officer strangling the man who had gone down into a kneeling position. He said the young man had struggled up so two police officers had punched him. He did not know where they landed. He fell and was dragged to the prison cells by two officers. He identified the person who did the strangling as having grey hair. The other two who did the punching were Faletau and Maile. He said the two officers whom he did not identify grabbed his hands whilst he was on his back. He shouted something. One police officer stomped on his cheek and he heard the crashing down of his head. He said he saw Mr Faletau and Mr Vakalahi drag him to an area near cell 3. He said the deceased was standing until he was punched down.

[36] Deion Ngininginiofolanga whose evidence also was dismissed was also a serving prisoner. She was aged 19 and had been remanded at Central in cell one. She heard noises like someone being beaten. Someone was shouting verbal abuse. She could not see the action. She said the sounds came from the search room; the

sound of beating, punches and someone crumpled down. She saw the deceased dragged to the cells. He was dragged in by about 4 persons. She saw him punched and fell down at the entrance to where the cells were. She saw him punched and stomped on the neck. He was still talking before he was punched. When he was dragged by her he did not talk anymore.

[37] Mafi ACM dismissed the evidence of these witnesses. He said their evidence was inherently weak, vague and inconsistent. He had himself gone to the police station to sight the area of the cells when Tupou and Vaka had been and was critical of the fact that the Crown had not produced a mirror in evidence. He made adverse findings of fact relating to the ability of witnesses to see details of the cells although he conceded from it seems his own view of the cell area that it was possible to see the watch house through a mirror.

[38] Mr Sisifa strongly criticized the Magistrate's approach. He submitted that that much of the evidence given by these witnesses was in fact supported by other evidence. I do not propose here to go through that evidence, except to say I am satisfied that, not only

was there some supporting evidence which would put Faletau, Maile, Hala'ufia Tu'ivai and Vakalahi in the watch house, but in my view Mafi ACM was wrong to approach this evidence in the way he did. He cited in his judgment the case of the Court of Criminal Appeal in R v Galbraith [1981] 73 Cr App R 124 but seemed to disregard the approach laid down in that case for the resolution of evidence. In Galbraith, the Court observed;

> "How then should the judge approach a submission of "no case to answer?"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness, or vagueness, or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest is such that a jury properly directed could not properly convict upon it is his duty stop the case. Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses; reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a

jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by a jury."

[39] The witnesses whose evidence he dismissed were typically witnesses whose reliability should have been left for assessment by a jury in accordance with the direction given in Galbraith. On a sufficiency standard, their evidence could not be described as tenuous. Whilst the reliability or cogency of their testimony may be dismissed for a variety of reasons by a jury, on a sufficiency argument it was inappropriate for Mafi ACM to disregard their evidence, as he did.

**The Sufficiency of Evidence in this case.**

[40] I will consider whether there was sufficient evidence to have committed the respondents and Mr Hala'ufia for trial.

1. As to Mr Faletau, I consider there was evidence sufficient to place him on trial.

a. A number of witnesses saw Faletau struggling with the deceased outside friend's café. He was seen during this altercation to punch hard the deceased by Hauoli Vi. This was about the time Vi also said he saw Maile use some object in what appeared to be an assault to the head of the deceased by the witness using an instrument of some kind.

b. Susana Langi a police officer describes Faletau and Maile with Mr Tu'ivai nearby and as they came in they released the deceased and he fell and crashed his head as he fell backwards in the hallway. Later, a number of witnesses identify Faletau as being involved with the deceased at the police station and in the watch house when he was being searched.

c. Witness Lolomana'ia gave evidence that Faletau stepped and stomped on the deceased's genital area to raise his legs to take off his boots.

d. He was also identified by Penisimani Tupou and Taniela Vaka as one of the officers that punched the deceased at or about the time the search was taking place.

e. This punch or punches took place at or around the same time the deceased was being held in a stranglehold with such force that his thyroid cartilage was fractured.

f. It is about the time that other officers namely Manu Tu'ivai and Tevita Vakalahi were also allegedly involved with punching the deceased, and there was independent evidence that both of these men were in the watch house at the time. Susan Langi also said that Hala'ufia, Vakalahi, Faletau Maile and Tu'ivai were in the Watch house at the time.

g. Further, there was evidence from Pensimani Tupou that Faletau was later seen kicking the deceased or stomping him as he took him or dragged him to the cells.

h. He was in the vicinity of Maile it seems who allegedly was seen to stomp on the deceased head prior to his being put in the cells according to officer Tongamoa.

i. Witnesses such as Sione Vaomotou and Deion Ngininginiofolanga gave evidence of a period of sustained violence in the watch house area. Sione Vaomotou gave evidence of the assaults lasting there a period of about 10 minutes. Deion gave evidence of hearing a beating involving punches and a man fall down. She later saw man stomped and punched as he was taken to the cells. One of the men involved in taking him from the watch house was Faletau.

j. In my view, there was plainly sufficient evidence to commit Faletau. He was involved allegedly in assaults from the beginning to the end of this tragic episode. There is evidence from which a jury could infer that he was a willing participant in a group assault and if so he could be found guilty of manslaughter or grievous bodily harm on this basis. Further even if not a party to a joint enterprise, there is evidence that he individually committed assaults of the kind that may have at least contributed to death (heavy punching, stomping or kicking), grievous bodily harm or some lesser offence.

2. In relation to Manu Tu'ivai I also find there is sufficient evidence to place him on trial for manslaughter and or grievous bodily harm on the basis of joint enterprise and or individual responsibility for a lesser assault.

a. He was seen by Sione Vaomotou to punch the deceased on the chest at the watch house in the ten minute period where Vaomotou describes various assaults as having taken place, and during the time the deceased was at least partially disabled in the headlock.

b. He was identified by Susana Langi as being one of the officers inside the watch house.

3. In relation to Tevita Vakalahi I consider there is also evidence for him to go forward for trial on the same basis as Manu Tu'ivai.

a. He was seen by Penisimani Tupou as delivering one if not two forceful blows to the deceased in the watch house about the time he was being held in a stranglehold and restrained by other officers.

b. There was evidence from Susana Langi that she saw Vakalahi together with other officers inside the watch house at this time.

4. In relation to Kelepi Hala'ufia, I agree with the Magistrate that there was sufficient evidence for him to be placed on trial. Unlike Mafi ACM, I consider there is evidence from which a jury could infer that his actions were part of a concerted assault on the deceased and he could be liable for manslaughter or causing grievous bodily harm on that basis. Again, his individual actions if the jury so find that he hit the deceased with his torch on the head, or was responsible for the injuries caused by the stranglehold, could amount to manslaughter if they were found to be a material contributing factor to death or had caused grievous bodily harm.

[41] Finally, having set out the principal areas of alleged complicity, it is my view as I have said before that

there exists a sufficient foundation for a jury to infer that the various actions of the police officers at the central police station taking into account also their involvement as members of the Tactical Response Squad amounted to unlawful joint enterprise and that they all agreed to assisted each other in various ways that went beyond lawful police action that could be said to be reasonably required to suppress resistance to arrest. These actions consist of;

1. The alleged use of a torch as a baton to the head of the deceased by Mr Hala'ufia who was the senior officer in charge of the tactical response group that evening at or about the time of entry into the station, when he was in the presence of Mr Faletau who with Mr Maile had arrested the deceased and taken him to the station. Mr Onitulei Manu observed this and heard a cracking sound. The witness also gave an emphatic account of hearing beating to the extent that he approached a police officer outside he said to stop the beating because it had gone on too long. He said there were five police officers; two had come with the

deceased and two had come from the police car with Hala'ufia.

2. The subsequent strangle hold placed on the deceased allegedly attributable to the actions of Mr Hala'ufia was with sufficient force to cause a fracture of his thyroid cartilage.

3. The actions of various officers punching him to the head or body about the time he was searched in the watch house. In at least one case there was evidence of a punch of sufficient force to make the deceased fall to the ground.

4. Kicking and stomping to the head as he was taken to the cells by Mr Faletau and Mr Meile.

5. The evidence of witnesses such as Sione Vaomotou and Deion Ngininginiofolanga, Onitulei Manu and others who gave evidence of assaults and beatings before he was taken to the cells over a sustained period.

[42] I emphasise, however, that my rulings in this case and treatment of the evidence are only in relation to the argument whether there was sufficient evidence considered at its highest for the respondents and Mr Hala'ufia to be committed to the Supreme Court for trial. The reliability and cogency of that evidence at this stage is not in issue but is a matter for trial.

**Consequently I make the following orders.**

1. **The Crown appeal is upheld and under the power conferred on this Court under section 80 of the Magistrates Court Act the respondents are committed for trial in the Supreme Court.**

2. **The appeal by Kelepi Hala'ufia is dismissed.**

**DATED:** 5th **JULY 2013** C.J.T. **J U D G E**