

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

CR NO. 777/22

R

v.

OSWELL METUA TUNUPOPO

Hearing: 13 to 15 March 2023

Appearances: L Annandale (Acting Solicitor-General) & Ms M Pittman for the Crown
T Clee for the Defendant

Ruling: 14 March 2023 (orally)

Reasons: 20 March 2023

REASONS FOR RULING OF TOOGOOD, J (NO. 1)

[Refusing to permit examination in chief on Police statement]

[0125.ds2]

[1] While leading Mr Tunupopo's evidence of the events that gave rise to the charge of injuring with intent to injure, Mr Clee sought to put in front of Mr Tunupopo a copy of an unsigned record of a statement he was said to have given to the police at the time of his arrest. There are disparities between evidence given at the trial and some of the statements about Mr Tunupopo's recollection of events as shown in the statement.

[2] The relevant passage in the transcript of the evidence given at trial reads:¹

“Q. Jess told the Court that you had pushed her and I put it to her that you had fended her. What do you remember happening in this first physical contact between you and Jess?”

¹ Transcript, p90, 91 and 95.

- A. I think she had a grasp on Max, so I was trying to stop her from keep coming to grab more of him. But I had already got Max into the door by then I think.
- Q. So can you describe in your own words how you used your hand to touch Jess or how, I should say, how was your hand positioned or your arm positioned when you made contact with Jess?
- A. I think it was just around her chest or something.
- Q. She said that it was a push. What do you say about that?
- A. I don't think it was a push just by looking at the video. No, I don't know, I don't think it's a push. It was just to stop her coming towards me.
- Q. And what is the next thing you remember happening after that first physical contact between you and Jess?
- A. I hit her.
- Q. Okay, we heard from Jess that you had pushed her and that in response she had pushed you.

THE COURT: Mr Clee, you are trespassing on leading questions, putting the questions in that way. You asked a perfectly proper question, "What happened next", and an answer was given, and now you're wanting to explore other possibilities through leading questions. Not permitted.

MR CLEE: Thank you sir.

EXAMINATION CONTINUES: MR CLEE

- Q. So what can you tell us about what you recall now about when you hit Jess?
- A. I know I reacted – she either hit me or pushed me, I don't know which one it was. That's when I reacted with the punch.
- ...
- Q. So just in that period of time, what do you recall?
- A. I get pushed back and then I punch, with my right hand.
- Q. Do you recall – can you tell us more about when you say you were pushed back, what do you recall specifically now about that?
- A. I think she just pushed me. I think she still had a hand on Max at the same time. She was like close up to the middle of the car.
- ...
- Q. I'll just take you back. We've had a break from what happened at the date so we'll just go back to this again. Back to the hit. Do you recall having any particular thought of where you wanted to hit Jess?
- A. Nah.
- Q. Now just on the final point, Mr Tunupopo. We heard your statement to the Police being read out and in the statement you have given an explanation of what happened at the time and I just want to ask you about that. You had said to the – I'm happy to read it out, your Honour –

THE COURT: Except that would be a leading question, wouldn't it? You can identify the topic. It's all in the way you handle this Mr Clee, but just putting the statement and asking him to comment is a leading question, is it not? If you're

dealing with things that are material to what happened at crucial times, that wouldn't be permissible. Would it?

MR CLEE: Sir, I would be asking him to comment on that particular paragraph.

THE COURT: Yes but this [statement] isn't evidence of what happened.

MR CLEE: That's correct.

THE COURT: This is evidence of what he said. So are you wanting to put to him a contrary statement? Or what is it you are wanting to do?

MR CLEE: I wanted to see if he agrees with –

THE COURT: I think we'll deal with this in the absence of the jury."

[3] I was concerned that, having led evidence from Mr Tunupopo about his state of mind at the time he punched Ms Mataroa, Mr Clee then wished to invite Mr Tunupopo to read passages from the police statement which may either have been consistent or inconsistent with the evidence given before the jury, and that doing so would amount to asking leading questions. In my view, if Mr Clee had wished to establish only that there were differences between the evidence given at trial and the contents of the statement, he could have asked general questions without referring the contents of the statement to Mr Tunupopo in a way which might lead him to resile from or alter the evidence already given. It would have been acceptable for Mr Clee to simply ask, in a general sense, whether Tunupopo's evidence to the jury was inconsistent in any respect with what he had told the police as recorded in the statement. Mr Tunupopo could then have given an explanation. To understand the context of my ruling it is necessary to understand the circumstances in which Mr Tunupopo's police interview took place.

[4] It was not disputed at the trial that a few seconds after Mr Tunupopo punched Jessica Mataroa, the scuffle continued and she said she picked up a heavy porta filter from a coffee machine and struck Mr Tunupopo on the forehead causing him to bleed. Mr Tunupopo was examined by a doctor who attended the police station to examine Ms Mataroa's injury. The doctor, Dr Mafi, said:²

"Q. Do you remember that afternoon also attending to another patient named Oswell Tunupopo?

A. Yes.

Q. What was your medical assessment for him?

A. He came in as a bit drowsy and he also had a temperature on that day, feverish as well. I learned that he fainted during consultation at the police station. So I did took that on board thinking that there might be something serious about him. Also, apart from that, he also had a injury as well to his forehead. He sustained about 2cm by 2cm blunt wound on a haematoma base on the right temple skull. However,

² Transcript, p63-64.

other findings are that including the pupils neurological findings were all normal, as well as others.

So we run through a routine test that we normally do for people who fainted including ECG, all the examination for the heart and electrolytes and blood, they all turned out to be normal on him on that day, including hearing test as well, yeah, if I may go on, there were also suspicion of drug-

Q. Doctor, I'll stop you there. So I'll go back to the other symptoms that you assessed about Oswell. What was your assessment of those symptoms, did you come to any finding?

A. Yes, at the end we concluded that he had a viral illness prior to the alteration that happened on that day and together with the pressure I suppose of the alteration that happened, the event that happened amounted to that fainting at the station, and also amounted to the fact that he appeared to be a bit drowsy. We also included thinking that there might be alcohol in his system, we tested him for alcohol and it turned out negative, and so as drugs as well."

[5] Dr Mafi was not cross-examined on his medical examination of Mr Tunupopo.

[6] Mr Tunupopo was interviewed by the police on 10 July 2022. Although a written statement was prepared based on what he told the interviewing officer, Constable Makitae, Mr Tunupopo refused to sign it.

[7] In my discussions with counsel in the absence of the jury, I told Mr Clee that he would be permitted to re-examine Mr Tunupopo on the detail of any differences between his evidence-in-chief and the contents of his statement if the Crown sought to cross-examine him on those disparities or rely on them on the basis for undermining the credibility of his evidence. When I invited Ms Pittman to say whether or not it was her intention to use any disparity between the evidence and the statement for cross examination, or otherwise to refer to them in addressing the jury, she indicated she would be cross-examining on any disparities for the purpose of undermining Mr Tunupopo's credibility. I then said to Mr Clee that such cross-examination would entitle him to re-examine by reference to the statement. I said that, if the Crown did not cross-examine Mr Tunupopo on the disparities, it would not be open to the Crown to then rely on the disparities in addressing the jury in closing.

[8] In the event, Ms Pittman did not cross examine Mr Tunupopo on the police statement. In the presence of the jury, I indicated to Ms Pittman that we had discussed in chambers a matter that I had understood she intended to explore in cross-examination and asked her if she had changed her mind about that. When she affirmed that position, I asked her to confirm that she understood what I had said about the way in which I would respond; that is, by directing

the Crown it could not rely on the statement to impeach Mr Tunupopo's credibility. Ms Pittman did so.

[9] In my summing up, I emphasised that Mr Tunupopo had not signed the written statement to verify its accuracy, nor been asked in evidence to confirm that it was an accurate account of what he said to the police officer. I expressed my view that the statement would not assist the jury at all to determine Mr Tunupopo's credibility and I directed them to disregard the statement (copies of which had been given to them at the time the exhibit was produced) for that purpose.



C H Toogood, J