

**IN THE SUPREME COURT OF TONGA**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CR 35,36,91,92,93 of 2013**

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**R E X**

**V**

**1. KELEPI HALA'UFIA**

**2. SALESI MAILE**

**3. FATAI FALETAU**

**4. MANU TU'IVAI**

**5. TEVITA VAKALAHU**

**BEFORE THE HON. JUSTICE CATO**

Mr. Kefu, Ms. Puloka & Ms. Moa for the Crown

Mrs. Taufateau for Mr Hala'ufia

Mr. Pouono for Messrs Maile, Tu'ivai, Vakalahi

Mr S. Fafita for Mr Faletau

**JUDGMENT AND VERDICTS**

[1] On the 17<sup>th</sup> August, 2012, the deceased Karly Fungavaka and a relative known as Tavake had been drinking in the Time Out Bar situated in the main street of Nuku'alofa. The deceased, a Tongan, who at the time was living in New Zealand, was a police officer in New Zealand. However, I am satisfied that the fact he was a police officer was not appreciated by any of the

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Tongan police officers, who stood trial before me in relation to charges arising out of incidents that occurred that evening. At no time during the evening, did Mr Fungavaka make this fact known to Tongan police.

[2] Mr Fungavaka had been in Tonga attending the funeral of his grandfather. After the funeral, about midnight on the 17<sup>th</sup> August, 2012, he was drinking with Tavake in the front veranda area of the Time Out Bar, when members of the TRG (Tactical Response) group of the Tongan police arrived and parked nearby. This group arrived in a police vehicle. Amongst them was the officer in charge, at the time, Inspector Hala'ufia together with the other accused. Also present were two other officers PC Vi and PC 'Aho whose evidence I will refer to later. The Tactical Response Group were members of the Tongan police who would become involved in difficult and more dangerous policing situations such as armed offender arrests when called upon, but also were responsible for policing bars and nightclubs in Nuku'alofa.

[3] Mr Fungavaka and Tavake were intoxicated. Not much is known from the evidence as to why they were arrested or indeed what led up to their arrest, aside from the fact that both were arrested and removed from the Time Out Bar. Mr Fungavaka may have been involved in a skirmish prior to police arriving because Tavake was seen to be holding him back in the area of the front verandah. The TRG vehicle stopped near the Time Out bar and soon after officers alighted from the vehicle. Fungavaka and Tavake were placed under arrest for drunkenness. Mr Fungavaka questioned his arrest and resisted so that he was not placed in the police vehicle but taken across

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Taufa'ahau Road to the Central police station which is a reasonably short distance from the Time Out Bar.

- [4] I am satisfied on the evidence that I have heard that it was the accused Mr Maile and Mr Faletau who were responsible for escorting him back under arrest to the Central Police Station. Shortly before arriving at a café, known as "Friends", the Crown alleges serious assaults took place in regard to Mr Fungavaka. The Crown alleges that Mr Maile struck Mr Fungavaka on the head with an undefined object, possibly a torch, and Mr Faletau, shortly after, punched him. I shall refer to this period as the First Stage of the incident, which ultimately led to Mr Fungavaka's tragic death as Mr Kefu put it in his closing submissions. He also said this case was a profound prosecution for law enforcement in Tonga involving the prosecution of five police officers.
- [5] Shortly after, Mr Fungavaka arrived back at the Central police station escorted by Faletau and Maile. The evidence is not altogether clear as to what happened to him when he got back to the police station and was taken into the front room known as the charge room. I accept, however, from the evidence that I have heard that he was drunk, abusive, and plainly very indignant at having been arrested, questioning police why this was so. Indeed, that was his attitude throughout the events of the evening. At no stage was he handcuffed. Shortly after he had arrived at the station by foot, the police vehicle came to the station with Inspector Hala'ufia and several other TRG officers with him, bringing Tavake. In this second stage, the Crown alleged a heavy blow was struck by Mr Hala'ufia to the back and top of Mr Fungavaka's head with a torch, as he was being taken by Maile and Faletau into the watchhouse from the charge



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room area. It is the Crown's case that he incurred a very serious injury, a fractured skull, either solely as a consequence of this blow, and, or as a consequence of a combination of this blow and the earlier blow alleged to have been delivered by Maile as Fungavaka was being brought back to the police station. The charge room incident is stage 2.

- [6] Present at the Police Station were a number of police officers who gave evidence in these proceedings. Senior officers were Assistant Deputy Police Commissioner Ashley Fua, who was at the time in command of the Central police Station, and Sgt Lose Blake who was in charge of aspects of operations in the station namely the charge office and the watch house. Other more junior officers were PC Susana Langi and PC Hina Tufuele, who were assisting Sgt Blake in the charge room office when Fungavaka and Tavake were brought into the station.
- [7] Adjacent to the charge room office is a smallish room known as the watchhouse in which WPC Takau, PC Lolomana'ia, and PC Tongamoa were on duty; the former, Takau and Lolomana'ia, for all or for much of the time Fungavaka and Tavake were in the watchhouse and Tongamoa for some part of that time. All gave evidence. The watchhouse is known as stage three. Those arrested are brought into the watchhouse through doors leading into the charge room and from there they enter the watchhouse via a small hallway adjacent to the charge room office and an entrance that is nearby. All the areas are close and confined. In the watchhouse those arrested are subject to procedures such as the removal of clothing and possessions before being taken to nearby cells along a short passage way that leads

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from the watchhouse to the cell area. During this time, details are obtained as to the names of those arrested by officers either of the arresting team or those working in the watch house. The Crown alleged a number of incidents involving various kind of assaults all constituting excessive force took place in the watchhouse as Fungavaka was being processed. It was also alleged by the Crown that during this incident, Hala'ufia applied his hands to Fungavaka's neck effectively strangling him. There was also evidence of Fungavaka being held in chokeholds by Hala'ufia as police attempted to subdue him and remove his clothing prior to being taken to the cells. Other evidence suggested also that he grabbed his shirt and forced his neck and head up against the wall.

- [8] From the watchhouse to the cells, as I have said, there is a short passage, with a stair case leading to offices in the upper part of the building and then a barred entrance gate to the cells. It is alleged by the Crown that after a period of what was only probably about 15 minutes, he was dragged by two officers to the cells. He was still conscious and abusing police at that stage. He had also, at various stages, voiced his concern at being arrested, asking the reason for this. By this stage, certain of his clothing had been removed, and his details obtained from a card taken from him. He was dragged facing up, by it was alleged Faletau and Maile, to the cells by way of the passage leading from the watchhouse to the cell area. Still abusive, it is alleged that Maile stomped on him heavily with his boot, resulting in his raised head hitting the floor and as a consequence he appeared to become unconscious. This was another significant assault, the Crown alleged, which along with the earlier blows to the head contributed materially to his death.

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- [9] Mr Fungavaka was dragged into the cells, by it was alleged Faletau and Maile first in to cell 7 which, at that time after midnight, was occupied by other intoxicated persons. During his period in cell 7, which is stage five, Mr Fungavaka became involved in a fight with a third party civilian Mr Manu who had been arrested for drunkenness and it was alleged he suffered further injury. Mr Fungavaka later was taken to cell 6 where a witness who gave evidence, Heamani Lopeti, was on remand. He gave evidence that he was concerned about Mr Fungavaka's condition and, on several occasions, called officers for assistance. Eventually, assistance was forthcoming and Fungavaka was taken at about 5.30 in the morning to the hospital where, after unsuccessful surgical procedures to ease the pressure and swelling of his brain, he subsequently died on the 23<sup>rd</sup> August, 2012.
- [10] On entry to the hospital, he was operated on unsuccessfully by Dr Viliami Tangi, Lord Tangi, who attempted to reduce the pressure and swelling of the brain. He died on the 23<sup>rd</sup> August, 2012. Later his body was taken to Auckland for examination by a pathologist, Dr Fintan Garavan. Dr Garavan gave evidence of the various injuries to the brain including the fractured skull, subdural haemorrhage and bleeding in the brain, which, in his view, led to death. He opined that the injuries were consistent with multiple traumas to the head contributed to by pressure to the brain caused by strangulation. There was evidence of the thyroid cartilage in the neck being broken.
- [11] The Crown's case is that there were multiple assaults to the head by certain police officers, and later by Manu

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that caused the death of Mr Fungavaka. The Crown alleges also there was a common unlawful purpose or joint enterprise to unlawfully assault or beat up Mr Fungakava as the Crown put it, that commenced on his arrest when he was abusive to police and had resisted arrest outside the Time out Bar. This, the Crown alleged, carried on to various incidents at the station. Consequently, the Crown contends that all the accused, who in various ways, assaulted and used excessive force before he was placed in the cells are guilty of manslaughter, or alternatively grievous bodily harm for his death, it being contended that his death or grievous harm was a contemplated consequence of their common unlawful purpose. It was not suggested by any of the accused, who did not give or call evidence, that what occurred in the cells, as a consequence of an alleged assault by the third party, amounted to a break in the chain of causation of death or a novus actus interveniens. I pause here to say I have directed myself that the failure of the accused to testify or call evidence is not a matter about which I draw any adverse inference against that accused.

**Manslaughter**

[12] In order for an accused to be convicted of manslaughter I must be satisfied beyond any reasonable doubt on the evidence considered separately;

- a. That the accused did an act on or about the 18<sup>th</sup> August 2012 that caused harm to Mr Fungavaka;
- b. that the act was a deliberate act; and



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c. that the act was an unlawful and dangerous act;  
and

d. that the act caused Mr Fungavaka's death.

In this regard, I follow the approach of Webster CJ in R v Vi [2005] Tonga LR 291

[13] I direct myself also in this regard that;

- (1) The act has to be a material cause of death. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause of death, or a major or substantial cause of death. It is sufficient if it is a material cause and not one that is insignificant or inconsequential.

In this regard, I had some misgivings about the suggestion advanced by Mr Kefu in his closing submissions that liability depends upon proof that the act was a substantial cause of death based on New Zealand authorities such as R v McKinnon [1980] 2 NZLR 31(CA) Rv Kuka [2009] NZCA 572, and in the absence of more recent English or Tongan authority, I intend to follow the statement of Parker CJ in R v Hennigan [1971] 3 All ER 133 (CA) adopted by Webster CJ in R v Vi [2005] Tonga LR 291 that in order to find liability I have to be satisfied beyond reasonable doubt that an act has to be a material cause of death, and something more than de minimis. In Vi, Webster CJ said that criminal liability for a blow would attach if it were a cause of death- meaning more than a minor cause; the incident need not be the sole cause of death, nor even a substantial cause, but it must be one of the causes and something more than de

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minimis. I note that Smith and Hogan, 10<sup>th</sup> ed, 2003, at page 44 say that it may be a misdirection to direct a jury that liability does not attach unless a substantial cause is proven. Simester and Sullivan, 2<sup>nd</sup> edition, 2004, at p 89, however, say for liability to attach the cause must be not insubstantial or not insignificant. In R v Cheshire [1991] 3 ALL ER 671 the Court of Appeal, Criminal Division, said that the task of the jury on the issue of medical negligence as a cause of death was to decide whether the cause made a significant contribution to the victim's death. My concern is that, whilst in many cases, it will not matter whether the expression substantial, significant or material is used, that may not always be the case. A material cause of death may be one that is not a substantial cause as Hennigan illustrates, but is nevertheless one that cannot be dismissed as de minimis, minor, insignificant or of no consequence. Hence I intend to direct myself following the approach of Webster CJ in Vi. However, as I indicate later in my reasons, the blows to the head and the strangulation for which I attribute responsibility to certain of the accused were in my view substantial causes of Mr Fungavaka' death, in any event.

- (2) Whether or not an act was deliberate requires an examination of the accused's state of mind at the time when he did it. That state of mind may be demonstrated by the circumstances in which that act was done including the conduct of the accused (and any statements he made) before, at the time, and after he did that act.

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- (3) An act is dangerous if it is such that a reasonable person in the position of the accused would have realized that, by that act, the deceased was being exposed to an appreciable or significant risk of harm.
- (4). An act is unlawful if it involves a deliberate application of force to another person without that person's consent.
- (5) Where, as in this case, an assault takes place in the context of the use of a police power under section 100 (1) of the Police Act, 2010, a police officer is entitled, when attempting to exercise a power under the Act , in this case a power of arrest to use reasonable and proportionate force.
- (6) Under section 100(2) of the Act, a police officer may not use force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to that police officer or another person.

[14] Likewise, in the event I do not convict an accused of manslaughter I have to consider the alternative count of causing grievous bodily harm in regard to that accused, the evidence being considered in relation to each separately. In this regard, I direct myself that the essential elements the Crown must establish beyond a reasonable doubt are;

1. The accused on or about the 18<sup>th</sup> August, 2014 did willfully;

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2. and without lawful excuse,

3. Cause grievous bodily harm to Mr Fungavaka.

[15] In this regard, I direct myself that;

- (1) Grievous bodily harm means in this context harm that endangers life.
- (2) Wilfully means the accused intentionally did the act or acts causing grievous bodily harm.
- (3) I direct myself that the act has to be established beyond a reasonable doubt to be a material cause of grievous bodily harm. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause or even a major or substantial cause. It is sufficient if it is a material cause and not one that is de minimis, minor, insignificant or inconsequential.

**Common Purpose**

[16] I also direct myself on what I have to find beyond a reasonable doubt to satisfy myself that there was established in fact a joint unlawful enterprise or a common unlawful purpose to which the accused was a knowing party. The law is set out for Tonga by Ford J in Fakatava [2001] Tonga LR 76 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

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their common intention R v Peters and Parfitt [1955] Crim LR 501. The common intention or agreement is gauged from their conduct."

The Crown case here was that the accused formed a common unlawful intention or joint enterprise, after Mr Fungavaka's arrest at the Time Out Bar, to beat him up for his conduct and abuse when resisting arrest.

[17] If I am satisfied beyond a reasonable doubt that there was such a common purpose, I must approach the case on the basis of those generally well known cases cited to me by the Crown on accessorial liability, in Tonga namely R v Anderson and Morris [1966] 2 QB 110; and F v Fakatava [2001] Tonga LR 76 that at common law each party to a common unlawful enterprise is liable for acts done in pursuance of the joint enterprise [ and ] this includes liability for unusual consequences if they arise from the common purpose. In recent years, however, the Anderson v Morris approach has been revised so that at common law, accessorial liability lies only for a crime that is subjectively foreseen or contemplated beyond reasonable doubt by a secondary party as a possible incident falling within the scope of the common unlawful enterprise. I refer to the passage cited by Smith and Hogan, 10<sup>th</sup> ed, 2003, Criminal Law, at p 162 said to be the approach advanced by the Privy Council in Chan Wing Siu v R (1985) 80 CR App Rep 117, at 122-123 per Sir Robin Cooke, and approved by the House of Lords in Powell and Daniels v R [1999] AC with the leading judgment delivered by Lord Hutton.

" The principle] turns on contemplation ...it meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

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**Uncharged Alternative Counts**

[18] Before I proceed to consider the individual cases, there is one further matter that requires consideration. During the course of the early part of the trial, I inquired of Mr Kefu whether he maintained I could find verdicts on unindicted offences as alternative offences. He replied that he contemplated that would be the case, although he had not opened on this point. He inquired that one alternative would be actual bodily harm as an implied alternative to causing grievous bodily harm, but that another would be common assault under section 112 of the Criminal Offences Act.

Section 42(3) of the Criminal Offences Act provides;

"Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or by implication an allegation of another offence falling within the jurisdiction of the Court of trial, the jury may find him guilty of that offence, or of an offence of which he could be found guilty on an indictment specifically charging that other offence. "

[19] In my view, the provision is wide enough to include not only an alternative such as causing bodily harm which is a lesser offence than that charged but any offence that fairly falls within the allegations in the indictment. In this case, there could not be any prejudice. The various assaults were all denied be it on the basis they did not occur, or as mistaken identity.

[20] Mr Pouono, in his submissions, contended it was not open to me to return a verdict of common assault as an alternative because that was a summary offence under

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section 112 of the Criminal Offence Act and a defendant could only be found guilty of a summary conviction to a fine. Section 11 of the Magistrates Court Act as amended in 2012, provides that;

'An offence within the jurisdiction of the Magistrates Court arising from the same facts of an offence triable in the Supreme Court may be committed and heard together in the Supreme Court.'

A similar procedural provision was contained within section 11 of the Magistrates Court Amendment Act, 2012. In my view, the intention of Parliament in section 11 as legislated for in the Magistrates Court Act, and as amended in 2012 was that, where jurisdiction was given to the Magistrate's Court to hear offences, and that offence arose from the same set of facts as an offence for which an offender was to be committed for trial to the Supreme Court the offence, ordinarily summarily triable in the Magistrate's Court, could be the subject of committal also to the Supreme Court. Mr Kefu also directed me to section 4 (1) of the Supreme Court Act which provides relevantly, that;

"The Supreme Court shall have jurisdiction to hear any proceedings, other than proceedings which -

- (a) Are excluded from the jurisdiction of the Supreme Court by the Act or Constitution of Tonga; or
- (b) By law, are within the exclusive jurisdiction of another court or tribunal.

Provided that a summary offence arising from the same set of facts of an offence triable in the Supreme Court may be heard together in the Supreme Court."

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[21] In my view, section 4 is sufficiently broad a provision for me to infer that Parliament intended this Court to be able to enter verdicts for charges which, although, being summary charges, were available as an alternative to the indictment because of the operation of section 42 (3) of the Criminal Offences Act. Had the provision been limited to the determination of summary offences that had been the subject of a charge and formal committal by the magistrate under the Magistrates' Court Act, then the section would have provided for this limitation. I am satisfied that this interpretation enables this Court to sensibly resolve cases on their merits. This means that I regard myself as able where appropriate to return verdicts of common assault under section 12 of the Criminal Offences Act, as an alternative.

[22] I direct myself, accordingly, that any assault considered as an alternative must establish beyond reasonable doubt that the accused hit another person with his hand, or with some object held by him, or pushed kicked or butted another person and must also beyond any reasonable doubt negative lawful force within the provisions of section 110(1) of the Police Act, 2010.

**Identification**

[23] All counsel emphasized the importance of identification in this case. In each case, a common theme was that the accused had not carried out the crimes he was alleged to have committed, if indeed those crimes occurred at all. Plainly central to the determination of the issues, I have to deal with is identification. In considering the case of each accused, separately, on the issues of identification, I remind myself of the warning given by Lord Widgery CJ



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in Turnbull v DPP [1977] 1QB 225, and in particular these;

(1) I must remind myself of the special need for caution before convicting the accused in reliance on the correctness of an identification or identifications;

(2) I remind myself a mistaken witness may be a convincing witness and that a number of witnesses can be mistaken where there is more than one witness.

[24] Factors which are important to consider also are whether the witness knew the accused (and if so, for how long), the opportunity for observation, the distance, the light available in the area, whether there was any impediment to observation, the period of observation, the time lapse between the original observation and any subsequent description given to the police, and any material discrepancies in the statements given to the police of the offender and any other specific weakness.

[25] Where the evidence is in the nature of a fleeting glimpse, it should not be relied upon as identification unless there is supporting evidence. In this regard, I should remind myself that, even in cases of recognition, mistake can be made of even close relatives or friends.

[26] In this case, features of relevance on the issue of identification were the state of the lighting outside or in the vicinity of Friends café and Longafanua where it is alleged the original assaults took place; in the station itself, where a significant number of identifications took place of incidents that occurred allegedly in the

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watchhouse and in the passage way leading from the cells to the watch house. I took the opportunity accompanied by counsel and accused to visit the station on two occasions at night. The lighting in the cells was better than on the evening in question where there were only two lights operating in the area outside of the watchhouse and in the relevant cells area. The lights operating on the night of the incident were in an area above cell one and above cell 3. The lights in the area of cells 2 and 4 were not working that night. I consider, however, that even so the lighting in the cell way passage would have been adequate for witnesses to view activity in the watchhouse or passage way to the cells from the cell area. An indication of the lighting at the time is seen in photograph 18. Also of relevance was distance. All the witnesses, who made identifications of incidents that occurred in the watchhouse or in the passage way beyond that from the cells, aside from two, Mr Vaomotou and PC Tongamoa, were persons on remand in the cells. They observed activity in the watch house or in the passage way to the cells through pieces of mirror of various sizes and shapes held out from cells 3 or 4, a distance measured as about 13.35; 16.65 metres to the watchhouse and 8-9; 12 metres to the passage way. I consider that, because of the difficulties inherent in achieving focus, the use of mirrors, was a far less reliable means of visual identification in this case, than ordinary visual identification. Although Deputy Commissioner Fa'aoa, the officer in charge of this case, said that he had used a mirror that had been produced in evidence from an eyewitness and was able to see into the various areas by holding a mirror through the bars of the cell, and viewing along the passage way, the reliability of an identification by this means was far more problematic, and required a very cautious approach.

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[27] Further, as photograph 18 also illustrates when viewed from the cells, the effect of the lighting in the watchhouse meant that it was difficult to clearly discern facial features of those in those in the watch house. The lighting from the watchhouse gave a silhouette effect to a person in the watchhouse when viewed from the cells. As well, during the period when relevant action in the watchhouse was being viewed from the cells, the cell door which separated the cell area from the passage from the watchhouse was in place. That was a door which was barred. Although that door was unlocked later by the time that Fungavaka had been brought into the passage way and stomped on, the evidence does not clearly reveal whether the door was ajar or not. Finally, in relation to the watchhouse, there was evidence that the width of the entrance door was about a metre, and that there were two officers positioned looking into the watchhouse from the sides at times which may have further restricted the view into the watchhouse, at times from the cell area.

[28] Also of relevance is the fact that most of the witnesses, who were on remand in the cells, did not at the time know the accused. The accused were not asked to participate in formal procedures such as an identification parade and nor were any photo montages shown to them.

[29] All had been asked to give dock identifications in the Magistrates Court and before this Court without any formal identification procedure being undertaken. I accepted dock identification in this case it being a Judge alone trial, with the qualification that the weight was a

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matter for me to consider. The issue of admissibility may well have been much more contentious had the trial been before a jury. Archbold 2001, para 14-86 says of dock identifications, that the practice of inviting a witness to identify a defendant for the first time when the defendant in the dock has long been regarded as undesirable. Where an offender is unknown to a witness prior to an incident, it is unlikely that dock identification will be sufficient of itself to establish a conviction where identification is an issue.

[30] Also of concern was that witnesses variously testified to having learned of the name of an accused from a newspaper report, or recognized an accused from a newspaper photograph, or viewed him at the station after the incident when he was under arrest. Evidence was given that Faletau and Maile were together on arrest at the Nuku'alofa Police Station shortly after the incident and had been placed in the cells at the Nuku'alofa Police station.

[31] Indeed, Deputy Commissioner Fa'aoa rightly acknowledged that those arrested should have been taken to separate stations and not placed in the cell areas where other potential eyewitnesses to the incidents were. The importance of fair identification procedures has been emphasized by courts for many years since Turnbull and before. The serious risk of contamination of an eyewitnesses' evidence, sometimes referred to as the displacement effect if the witness is exposed to a sole photograph or individual exposure of a suspect, was discussed in Alexander v The Queen (1981) 145 CLR 404, at 400 per Gibbs CJ and at 409 per Stephen J and much earlier in relation to individual exposure in Davies and Cody v The King (1937) 57 CLR 170; also R v Kern [1986] 2 Qd R 209. The New

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Zealand Evidence Act, 2006 section 45 lays down formal procedures for identification, which are aimed at reducing the risk of mistake.

**A Lie as Supporting Evidence**

[32] In this case, an issue arose as to the effect a possible lie in the record of interview of Mr Maile could have as supporting evidence of identification. In his case, this arose in relation to the stomping incident in the passage way beyond the watch house. I shall discuss this evidence later but I record that before a lie can be taken into account as strengthening the evidence of identification, following R v Lucas [1981] QB720, and Edwards v R (1993) 178 CLR193, it must satisfy three conditions;

- a. It must be deliberate.
- b. It must relate to a material issue.
- c. The motive for the lie must be a realization of guilt and fear of the truth.

[33] In addition, I must direct myself that there must not be any reason why the lie has been told such as fear or panic, to avoid an unjust accusation to protect another person or to avoid a consequence extraneous to the offence or out of forgetfulness. If that were so, I could not rely on any lie as strengthening the Crown case because it could not be regarded as evidence of consciousness of guilt.

**The Evidence**

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**Stage one**

- [34] At approximately, on the 17<sup>th</sup> August, 2012, members of the TRG, Corporal Faketeli, PC Aho, PC Tu'ivai, PC Faletau, and Inspector Hala'ufia came to the area known as the Time Out Bar in down town Nuku'alofa. There, members alighted from the police vehicle they were in. They observed some kind of skirmish involving Mr Fungavaka and his cousin Tavake. PC Inoke Vi, also a member of the TRG, saw Fungavaka being taken across the road by Faletau and Maile. Fungavaka was upset. He swore at the officers. He was walked to the front with an arm lock to both arms. PC Vi saw them walk across the road; proceed on to the front of a building known as Langafonua, past Friends café where he lost sight of them. He said he did not notice them stop. At the time, Inspector Hala'ufia was standing with Tavake at the vehicle. It had been determined that it would be easier for Fungavaka to be taken back to the station by foot. PC Vi later went back to the Police station. During the course of the time he saw Fungavaka with the officers before losing sight of him at Friends, he said he did not see Maile strike Fungavaka.
- [35] PC Aho gave evidence of initially being involved in a skirmish possibly in the arrest of Fungavaka and injuring his foot. He saw his colleagues in the immediate front of Friends café. He said vehicles were obstructing his view. He never saw anybody stopping or falling to the ground. Maile, he said, was the officer closest to the Taufa'ahau road. He said he walked back to Central about five minutes after Maile and Faletau. He said that he could see only the top half of people because of cars parked along the roadside. He said lights were on in the entrance of Friends. He said he did not see Maile with a

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torch. He thought Maile and Faletau were wearing hats. He said no one was carrying a torch that night when they left the station at Longolongo.

- [36] Ms Hauoli Vi was sitting in a car when she notice three officers crossing the road. She said she was parked before the gate to Langafonua. She said the light was bright. She saw two officers struggling as they came towards her. She moved to the left side of the car. The man she saw with the officers had his face forward and was bending over. She saw the police officer closest to her raise his hand and the reflection of an object of some kind. She saw Mr Fungavaka go to the ground. He fell on his knees and the other officer threw a punch. She could not tell where the punch landed. She said Fungavaka stumbled forward and almost hit the fence at Langafonua. She heard him say what I have done. She said the incident occurred about 10 to 15 metres away from her. She recognized the man that had used an object as Maile whom she had seen twice before at the airport and more than ten times in his vehicle. She did not know Faletau before but identified him as the other officer in court. She said she could not tell what the object was – it was black nor could she say whether the blow with the black object was on the head or back.

**The second stage**

- [37] Faletau and Maile proceeded to take Fungavaka back to the Central Police Office which was a short distance from the Friends' café. PC Aho said he walked to the station about five minutes after seeing Fugavaka with Maile and Faletau in the Taufa'ahau road. He said when he entered the station, Fungavaka was seated at the back wall where the complaint's office was. He said he

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stood at the counter area. He said Maile and Faletau left as he came in to the station. Fungavaka was mumbling and swearing. He said he sat in the counter area for about 15 minutes. He said he saw Hala'ufia bring Tavake in. Maile and Faletau came in and entered the watch house. He said he commenced to fill out documents with PC Vi in this area, that is the front area of the charge office. He said he saw Maile and Faletau about 5-6 minutes enter the watchhouse after Tavake had been taken in by Hala'ufia. He said a witness known as Onitulei Manu was sitting outside when he was in the charge room filling out papers. He said also no one was carrying a torch that night. He said he heard no beating from the watchhouse.

- [38] Assistant Deputy Commissioner, Ashley Fua, who was the station commander at the time, said he was outside with Onitulei Manu when he heard swearing. He saw two officers escort a person to the station. They went into the station by the western entrance. He said he did not see Fungavaka, at any other time. He said later Hala'ufia came with Tavake shortly after Fungavaka had been brought into the station with other members of the TRG team in the vehicle. Hala'ufia explained why they had been arrested. Hala'ufia went in and moments later returned. He heard swearing coming from inside the complaint's office but that he said was not unusual. He could not recall whether Onitulei Manu had gone into the charge room office or not. He said he remained where he was and did not go back into the office until after the men had left. He said he had no reason to go into the office. Nobody had approached him for attention. He could hear swearing but that was normal. He heard no sounds like beating. He could not recall whether Manu had a conversation with him outside. He said Hala'ufia went inside for about 5-10 minutes. He



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talked with him later outside until the other members came out and left.

[39] 'Onitulei Manu was at the police station because his son had been earlier arrested for drunkenness and he was waiting to take him home. He said he was sitting on a bench outside the charge office and talked to Ashley Fua, at about 11.30. He said he saw a person being escorted in who was asking why had he been arrested. He went into the office (the charge room area) from the eastern entrance and sat down. He said he was curious to see what happened because the man looked uncomfortable. He stood next to the counter entrance. He saw the officers enter and then other police officers arrived and Tavake was with Hala'ufia. He said they escorted Tavake in and he was taken into the watch house.

[40] He said the two officers, he had seen earlier, were standing at the area of the partition to the watchhouse on the charge room side of this partition. Hala'ufia came out of the watchhouse and, at that time, Maile and Faletau were trying to handle the detainee. Hala'ufia came back and stood at the counter area. He said Fua was there by the counter by the west door. Hala'ufia told the officers to hurry up, and take him in. Fungavaka was still struggling. They could not take him in. He saw Hala'ufia use a torch he was carrying which he said was about one and half feet, and approach Fungavaka and struck him demonstrating on the top but towards the back of the head from behind, as he was held upright by Maile and Faletau with this head bowed slightly forward. He said Hala'ufia had been talking with Fua before this, at the counter. He said Sgt Blake was standing there and she ran outside. He said Fua was standing with him at the counter. He said after

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this, Hala'ufia used a torch to poke Fungavaka in the front of his chest area. He said that the torch was a big torch and demonstrated contact with a sound of a slap. He denied under cross-examination he was motivated by malice towards the police. He said Fungavaka was not seated down when he saw him. He admitted he had been convicted of drugs charges and indecent assault, assault and swearing. He denied he was motivated by a desire to<sup>1</sup> assist his son who had allegedly been responsible for a later assault on Fungavaka in the cells and was facing a separate trial. He said, if his son had done what he was charged with, he should face the consequences.

- [41] Sgt Lose Blake was the officer in charge of the watchhouse and the charge office. Officers Tongamoa and Takau were in the watchhouse on the night in question. She confirmed that Manu came to the watchhouse looking for his son. He had stood outside the counter at the charge office. At her desk, she heard shouting and saw Fungavaka struggling and dropped on the floor, inside the wall to the charge office near the watchhouse entrance. He was still swearing. She tried to stop Maile punching him. When Hala'ufia arrived he asked why Fungavaka was still on the floor. He had come in with Tavake and another police officer. She was still in her seat when this happened. She confirmed that Fua and Manu were at the counter in the charge room. She could see the counter area. She said that Maile and Faletau lifted Fungavaka and put him in the watchhouse. She never saw Hala'ufia with anything in his hands. After Fungavaka had been taken into the watchhouse, she went outside. When she did this Fua was standing there as well.

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- [42] She said she saw Manu talking outside with Fua before Fungavaka was taken into the watchhouse. She said she saw Aho go into the watchhouse before Fungavaka was taken in. Officers Langi and Tufulele were in her office when Fungavaka was on the floor. Fungavaka and Tavake were no longer in the watchhouse when she returned from her smoke. She said she did not receive any report about Fungavaka and was later told by PC Loloman'ia that he had a small amount of blood on his face but he was all right when he shifted him from cell 6 to cell 7. She said the time when Fungavaka was brought in until the time she went for her smoke was about 12 minutes. She said that from the time he was brought in to the time she finished her smoke was about 20 minutes.
- [43] She said to Mrs Taufateau for Mr Hala'ufia that it was a lie Hala'ufia had hit Fungavaka with a torch. There had been no assault in the charge office. She said she could not see anybody through the window to her part of the charge office when sitting down. However, she said she could see the area about where Fungavaka was allegedly hit by Hala'ufia near the partition to the watchhouse. She went outside to have a smoke after Tavaki and Fungavaka had been placed in the watchhouse, and not as a consequence of seeing an assault.
- [44] PC Susana Langi said that Maile and Faletau had arrested Fungavaka and, as he came in, he fell on the floor and got up and swore at the officers. He struggled back and the back of his head hit the floor. Maile approached him and tried to punch him. He had been stopped by Blake. Hala'ufia had arrived with Tavake. PC Aho had brought him in. Tavake had told Fungavaka to be quiet. Maile and Faletau had dragged him into the watchhouse. She then continued her work sitting on

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the desk opposite Sgt Blake in the charge room office. She saw Tavake inside first with Aho and Hala'ufia. She said that when Hala'ufia went in he had a torch. It was black and the torch she considered was about 1 foot five and a half inches. She had seen one before at the station. She has seen a torch only when on night duty. She said after Fungavaka had been taken in she looked over the partition wall into the watch house. When she did Sgt Blake was present. When she returned to her desk, Blake was not present. She later said that Fungavaka had a bruise on top of his chest.

[45] Under cross-examination, she said she did not see Fungavaka hit on the head by Hala'ufia. She said that Fungavaka had been dragged backwards into the watchhouse with two officers holding him. She maintained she had seen a torch. She also said that Maile had thrown Fungavaka against the wall and Blake had stopped him punching Fungavaka.

[46] PC Hina Tufulele an assistant, also in the charge office, who was also sitting opposite Sgt Blake confirmed that Maile had tossed Fungavaka into the watchhouse. Aho and Hala'ufia had brought Tavake in and she said, she thought Maile and Faletau went in the watchhouse first and then Tavake with a minute separating them. She did not see Hala'ufia carrying anything. She did see something on his belt but she could not confirm whether it was a torch or a baton. She confirmed that after Tavake had been brought in Blake went outside. She confirmed she saw Langi looking over the partition. She did not see any assault in the area. She said Faletau had been at the partition when Maile had tried to punch him.

**The Third Stage – the watchhouse**

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There were various accounts of what went on in the watch house.

- [47] PC Inoke Vi said he looked over the partition dividing the charge room and the watchhouse and saw Fungavaka lying against Tavake. Tavake was holding him. Fungavaka was in disagreement with taking off his clothes. He was abusive. He saw Hala'ufia in the watch house. Many officers were present. He wanted the names of those arrested and they had refused to give their names. He returned to the counter area and had a discussion with PC Aho there. He returned again to the partition area and asked officer Takau for their names which she did not have. He saw a belt that he thought was a NZ police belt that had been taken off Fungavaka. He got Fungavaka's name from a card that had been obtained. He said he never saw any blood on Fungavaka in the watch house. He never heard any sounds that suggested a beating. He did not see Hala'ufia doing anything in the watchhouse or any officer carrying a torch. He said he never saw Maile strike Fungavaka.
- [48] Constable Aho, he said, had been filling out documents with Vi in the charge room. He heard Fungavaka swearing in the watchhouse when Hala'ufia was inside. He said that in the watchhouse were Faletau, Maile, and Vakalahi. Tu'ivai was also in the watchhouse but he appeared under cross-examination to express some uncertainty about this.
- [49] Acting Deputy Commissioner Fua said he never went into the office but was outside the station, and he heard no sounds like beatings.

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- [50] Mr 'Onitulei Manu, who was in the charge room area by the counter, said he could see a beating going on – the officers were standing up to the left of the door of the watch house. He could make out only Hala'ufia but he knew there were other officers there. He heard thumping sounds and Fungavaka was screaming abuse. He said he told Ashley Fua to stop the beating. He said he went and sat on a bench and Fua went in and climbed the stairs. The stairs in question lie off the passage way that links the watchhouse with the cells.
- [51] Sgt Bake said, before she went outside for a cigarette, she could hear Tavake talking about an apology. She heard someone say hurry up and take off his shoes. Fungavaka was talking loudly and she heard an object being shifted. There was about 10 minutes of noises and then she went outside. Fua was, she said, there when she went outside still in the counter area. She says she saw Vakalahi in the watch house. When she returned Fungavaka and Tavake were no longer in the watch house. She admitted she had heard something that might indicate a beating when Tavake yelled out that Fungavaka was too drunk. She admitted when she went outside she was aware of the possibility of something going on inside. She said she did not intervene because other more senior officers were present such as Hala'ufia and Fua. She maintained Fua had stood at the entrance door watching what was going on for about five minutes.
- [52] PC Susana Langi when she looked over the partition into the watch house, after she had heard a thumping sound and suggestions of something being smashed into the wall, said Tavake was kneeling in the left corner of the watchhouse. Hala'ufia was lying on Fungavaka and had grabbed him by the shirt and was pushing his neck

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against the wall. Maile and Faletau were nearby. Fungavaka still had his shoes on. She said Vakalahi was present. Tu'ivai was also present. She did not see Fua but other officers were standing by the entrance to the watchhouse but she could not say who. She said Fua was at the entrance door at some time. She said Vakalahi bent down and took Fungavaka's shoes off. She said Fungavaka had been placed outside the watchhouse for about 4-5 minutes before he was taken in. She said Blake, although present when she had gone to look over the partition, was not present when she returned. She also said that thumping sounded like someone was being smashed against the wall.

[53] PC Hina Tufulele, who was also in the charge office, said she thought something was going on because Tavake was begging the other officers to handle his brother properly because he was too drunk. She said she thought there was a beating and Fungavaka stopped swearing. She said she heard him putting down officers and asking why he had been arrested.

[54] PC Takau said that Tavake came in first and was telling those outside his brother is too drunk. Faletau and Maile brought him in. He was placed against Tavake's chest. Both officers dragged him in. Fungavaka was swearing. Hala'ufia told them to take off their property. She looked and saw PC Vi wanted their names. Hala'ufia, Maile, Faletau searched Fungavaka. His shoes were pulled off. After that Maile and Faletau dragged Fungavaka to the cells. She said he was still swearing and struggling when taken out. Tavake said please bro shut your mouth. He was being dragged face up. She got up to collect his shoes and his belt and when she came to sit back down, Fungavaka was lying on the floor of the hallway to the prison cells, with his head

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closest to the cells. He was no longer struggling and swearing. Maile and Faletau were standing there. She said she thought he may have passed out. They were still standing in the same manner as when they dragged him out. PC Aho came and told them to continue dragging him to the cells because Tongamoa and Lolomana'ia would not be able to take him to the cells. The times she recorded when Fungavaka entered the station was 12.30 and 5.30 when he was taken to the hospital. She said Tu'ivai was in the watch house. She said Fungavaka was in the watchhouse for about ten minutes.

[55] PC Paula Falevai, who had only been with the police a few months, came down stairs and saw police officers take Fungavaka into the watchhouse. He said he heard him swearing. He saw Fungavaka sitting by the partition outside the watchhouse. He said Maile took him into the watch house. There were a number of other officers in the watchhouse. He thought Tavake had been brought after Fungavaka. Tavake tried to stop Fungavaka swearing. He was sitting behind Fungavaka and holding his chest with one hand and his mouth with the other to stop him swearing.

[56] He said he looked over the partition wall about a minute after Fungavaka was brought in. He was present there for about five minutes. He saw Fungavaka raise his finger to Hala'ufia and then saw Hala'ufia press a torch down on the upper part of Fungavaka's chest for about five seconds, twice. He did not see where he got the torch from. Fungavaka was swearing and he saw Hala'ufia grab his throat and he stopped swearing. He described how Hala'ufia strangled him for about 20 seconds and he showed signs of stress and discomfort. His skin turned red and his eyes went wide. He said as



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soon as he took his hands away the swearing commenced immediately.

[57] He swore at Hala'ufia and indicated he wanted a clean one on one fight. He abused the police. He said the incident with the torch occurred when Fungavaka was in the middle of the floor. It was put to him by Mrs Taufateau, that Hala'ufia said there never was any torch with him that night. The witness maintained he had seen a torch in Hala'ufia's hand when he was using it to push down against Fungavaka's chest. He said when the stranglehold was applied, Fungavaka was seated with his back against the door. Hala'ufia was standing, bending and holding Fungavaka's neck. He said he knew Hala'ufia because he had seen him frequently at the Longolongo police station when he was at a recruit camp. He maintained that he could see clearly in the watchhouse that night.

[58] Sione Vaomotou was a prisoner aged 41. Although a serving prisoner for manslaughter he was a cleaner and freely able to move around the station. He had served 6 years of his ten year sentence. His normal cell was cell 5. He was outside cell 4 talking with a person on remand in cell 4, Penisoni Tupou, when he saw Fungavaka in the watch house. He said Fungavaka was beaten for approximately ten minutes. He had watched first from cell 4 in the corridor and then he had moved adjacent to cell 3 and then to the right of the corridor. He saw officers bending down and beating him up. He saw all of them join in. Tu'ivai, Hala'ufia, Faletau and Maile were punching his body. He said Fua was standing in the doorway when this was going on. He saw Hala'ufia coming out with him in a neck lock. Under cross-examination, he confirmed he had only mentioned Tu'ivai in the lower court. He was quite clear he saw

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them all beating him up even though he admitted he only mentioned Tu'ivai in the lower court. He said the only reason he did not name them all was because they had been sitting in the front looking at him. He said he knew them well. He also maintained he could see clearly into the watch house although Officer Fua was present, looking on. He confirmed there were two lights on in the cell area.

- [59] PC Lotu Lolomana'ia was in charge of the watch house. He saw Tavake enter the watchhouse firstt. Fungavaka was lying on the floor beside the wall outside abusing TRG members standing around. They were arrested at about 12.30. He had been concerned with searching Tavake. Tavake was shouting out to treat Fungavaka properly because he was too drunk. He did not see how Fungavaka got placed into the watch house. He did not see any punching of Fungavaka. He was swearing and aggressive. Tavake was on the floor. He gave PC Tongamoia the keys to open the cells to receive these arrested as soon as the commotion started. He saw Hala'ufia put Fungavaka in a chokehold in the vicinity of the partition wall to stop him swearing and trying to seat him down. He and Vakalahi tried to bring Tavake from where he was to the other side of the room and some understanding was reached with him and he sat down. That did not take long. He was in a squat position and Fungavaka got back up. He also said he saw Hala'ufia kicked in the stomach by Fungavaka whilst he was on the floor. Then he saw Hala'ufia place his foot on Fungavaka's chest to keep Fungavaka down. Faletau tried to get his belt and shoes and was unable to do this. He saw Faletau stomp down in Fungavaka's groin area. He then was no longer aggressive and they were able to take off his shoes and belt. He saw

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Hala'ufia leave and Maile and Faletau take Fungavaka from the watchhouse to the cells.

[60] Fungavaka continued to be vocal and then all of a sudden he did not hear any more. He heard Takau tell the officers not to leave him in the area of the entrance to the cells. He said he had not seen Hala'ufia strangling Fungavaka or pushing him against the wall. To Mr Pouono he said there had been no beating only stomping around the genitals and chest. He did not see punching to the body. He said that the chokehold was not a normal technique. He did not see Hala'ufia being poked with a torch. He saw no injuries to Fungavaka when he was taken from the watch house.

[61] PC Tongamoa, who was in the watchhouse for a short time before being sent to unlock the cells, said Fungavaka was very drunk and behaving aggressively and it was difficult for police to restrain him. They were already in the watchhouse when he came into the area. He said that Hala'ufia got Fungavaka in a chokehold. His skin started to change before returning to an aggressive manner. He saw Hala'ufia commencing the search assisted by other officers. He, at the time, was looking after paper work with Takau. Hala'ufia was trying to take his shoes off. He was given keys to go away and unlock cells. He did so. He did not see anybody poking Hala'ufia with a torch and he did not see Faletau stomping on Fungavaka's groin area or trying to take off his shoes.

[62] Taniela Vaka was a remand prisoner at the time in cell 3. He is now a prisoner serving a sentence of five and half years for robbery. He also has a serious conviction overseas for armed robbery. As had a number of other prisoners in the cells, he said he had seen events as a

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consequence of using a piece of mirror and holding it out through the bars of the cell. When he looked out to see if there were any officers he could attract to have a bathroom break, he saw a fight going on in the watch house. He saw officers, not in regular uniform but in overalls, having trouble restraining somebody who appeared very drunk. He saw one of the officers with Fungavaka in a chokehold standing behind the person and strangling him. He saw two others standing behind the officer punching him. The officer, with the chokehold, was facing towards him. The others were facing away from him. Gradually, Fungavaka went into a kneeling position. He heard one of the officers tell him to lie down and Fungavaka swore at them asking why he was being beaten up. He heard one of the officers say drag him to the cells. He then heard a female voice. He then noticed two officers in overall uniforms hold on to his hands and drag him to the cells. He was asked by Mr Kefu if the person who did the chokehold dragged Fungavaka into cell no 7 and he said no. He dock identified Hala'ufia but had said he knew him prior to that evening because he had been kept in police custody at the central station for about four months. The only other time he saw him was at the preliminary hearing. Under cross-examination, he said there was sufficient light to see into the watchhouse.

- [63] Filomila Kaufusi was another prisoner on remand in cell no 4. He has now a conviction for manslaughter. He said he looked out of his cell with the assistance of a mirror and saw four police officers with overalls fighting with a person he knew now as Fungavaka. Three had their backs towards him. One was facing him. He saw strangling of Fungavaka and punching of him. One of the officers with his back to us was doing the punching. The strangling he said took approximately 5 minutes.

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Fungavaka, he said, lay down and was dragged from the watch house. He had not seen the man who did the strangling prior to this time. He dock identified the man as Hala'ufia. He described the man who did the punching as having blonde hair which the evidence established in Tongan meant ginger coloured hair. Again, he gave a dock identification of Mr Vakalahi. Under cross-examination, he said the light was bright. He did not accept his view into the watchhouse would be affected by the fact that the cell door was closed. He insisted that he could see three officers in the door space. To Mrs Taufatehau, he admitted he had never been a witness in the lower court. He had seen photographs of the accused after the lower court appearance in newspapers. It was put to him in his statement he had said he saw a drunk person being punched on a table by two officers.

- [64] Penisimani Tupou was also on remand in cell 4 and had convictions for housebreaking. He looked through a mirror also he says into the watchhouse. He said this was as a as a result of being told about fighting by prisoner Vaomotou who was outside prison 4. He saw four police officers, and a woman police officer. He saw a police officer hold Fungavaka in a chokehold. He was initially partially obscured but later moved to a point where he could see him. Another had Fungavaka by the neck, held him up, and affected a search. He pulled off his belt. Two persons were standing watching with their backs to him. The searching officer punched Fungavaka. He said the person conducting search was the blonde haired person. He dock identified Hala'ufia although cross-examination would suggest he had not done this in the lower court. He also dock identified Vakalahi. He said he had not known him before the incident. He said he had seen him around the police station,

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subsequently. He also said Vakalahi was one of two who dragged Fungavaka out of the watchhouse to the cell area. Two other people present had their backs to him. He could not see the person holding Fungavaka in a chokehold – which was blurred or blocked by a post. He denied he was prevented from seeing into the watchhouse by the other two officers who were present nearby.

**The Fourth stage – after the watchhouse and in the passage to the cells**

- [65] Witnesses observed Mr Faletau and Mr Maile drag Fungavaka still conscious and swearing out of the watchhouse and to the cell area. PC Takau said he was still swearing and struggling when taken out. Tavake said please bro shut your mouth. He was being dragged face up. She got up to collect his shoes and his belt and when she came to sit back down, Fungavaka was lying on the floor of the hallway with his head closest to the prison cells. He was no longer struggling and swearing. Maile and Faletau were standing there. She said she thought he may have passed out. They were still standing in the same manner as when they dragged him out. PC Aho came and told them to continue dragging him to the cells because Tongamoā and Lolomana'ia would not be able to take him to the cells. It was not suggested in cross-examination that PC Takau was incorrect in her observation about this or any suggestion that a third person was involved other than Faletau or Maile in dragging him from the watch house.
- [66] PC Lolomana'ia, who was in the watch house, had said Faletau tried to get his belt and shoes and was unable to do this. He said he saw Faletau stomp down in Fungavaka's groin area. He then was no longer

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aggressive and they were able to take off his shoes and belt. He saw Hala'ufia leave and Maile and Faletau took Fungavaka from the watch house. He only saw those two at that point. He continued to be aggressive, and then all of a sudden he did not hear any more. He heard Takau tell the officers not to leave him in the area of the entrance to the cells.

[67] PC Tongamoa, who had been to open up cell 7, saw on his return, from a position near cell 4, Mr Fungavaka being dragged by two officers of the TRG who, he said, were Faletau and Maile. They had not passed into the prison area, where he saw Maile, who he said was closest to the stairs, stomp on Fungavaka's head with his face up and his head hit the floor. Although Fungavaka had still been vocal, he said, after the stomping, he passed out, he thought, drunk. He was then dragged to cell 7 and placed in the cell by Faletau and Maile. The only cross-examination on this point by Mr Pouono was that Maile would say he was never beyond that iron bar door to the hallway and never stomped on Fungavaka to which the witness responded, that was what he had seen.

[68] Sione Vaomotou, who had given evidence as to his position from an area about cell 3 or 4 said he saw Hala'ufia coming out with him in a neck lock and dumping him around the area of the stairs. Fungavaka lay down and Faletau and Maile took one hand each and held his head up and Maile then with all his might stomped his foot on Fungavaka's face. They left him there and were called back by PC Takau to take him to the cells. He said Fungavaka had been face up and his head towards the iron bar door. Faletau had taken his left hand and Maile his right. He said Faletau was the closest to the stairs. Maile had pushed his left leg hard

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against his head with all his might. He later said his head was about a foot and half off the ground and it was a big bang. Maile was angry and he could see that was all the power he had. Mr Kefu later asked the witness whether it was Maile that was closest to the stairs and he said yes with Faletau closest to the iron door to the left. He said he had returned to his cell 5 when they passed him taking Fungavaka to the area adjacent to cell 6, where he was put into cell 7 by Tongamoa and Lolomana'ia.

- [69] Mr Pouono referred to his earlier statement that he had said Faletau was closest to the stairs, and asked him if that was the case how Maile could have stomped on Fungavaka with his left foot. He maintained that is what he saw. He was asked if Maile was to come and give evidence and say he never stomped on this person what would you say. He said he will come and lie and what I have said I saw that he stomped on the face of this person with all this power.

There were other witnesses to this incident.

- [70] Siaosi Langi was in remand and has since been convicted of manslaughter. He was in cell 3. He heard some banging and looked out using a small piece of mirror so as to be able to see down the corridor. There was an overhead light in the hallway above and adjacent his cell, as is seen in photo 18. He saw a person falling down on the floor towards the area of the iron cell door. When he tried to get up he saw someone stomp on his head. That person he said was Faletau whom he knew. Others using mirrors were Sione Mafi and Taniela Vaka from cell 3. He said that this person was standing on the right side when you enter the



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hallway. He denied Mr Fifita's proposition that the person he saw was not Faletau.

[71] Sione Mafi Lolohea had a larger mirror - about 13cm in diameter more the shape of a disc. He thought that Vaomotou was about the area of cell 4. He was 10-12 metres from the stomping incident which he says he saw. His identification of Faletau as the man doing the stomping was a dock identification. It was put to him that two people Tongamoa and Siaosi Langi had identified the man on the right as doing the stomping. It was put to him by Mr Fifita that he had not named Faletau in his statement and he admitted he only found out the name because he saw his face in a newspaper report at the depositions hearing. He admitted he had not known Faletau before that. He could not recall when he had seen the newspaper.

[72] Taniela Vaka also saw the stomping area from cell 3. He said he heard one of the officers say drag him to the cells and Fungavaka say is that the way you serve our people. He said he was swearing and trying to struggle up. One of the officers stomped on him. He said he was on the same side as they were. That is the right hand side as one went into the cells viewed from the watch house. He said Fungavaka became quiet. Another officer called out to take him to the cells. He said Lolomanai'a opened the barred entrance to the cells. Fungavaka's head was hanging loose. He said that the man that came closest to his cell was Maile and he had been involved with the stomping. He had not known Maile before that night. He had seen him later in custody at the police station with another officer. He dock identified him and said he had also identified him in the lower court. He said he saw Tongamoa standing at the watchhouse when Fungavaka was being stomped. He

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saw Vaomotou at the location of cell 4 and did not see him move closer. He said the first time he had learned his name was Maile was in the lower court when Mr Pouono had referred to him. He said he and Lolohea were watching the incident at the same time. He maintained he was not mistaken in his recollection.

- [73] Filomila Kaufusi also gave evidence about the stomping incident from cell 4. He said the stomper was closest to the prison cells that are on the right hand side as viewed from the watchhouse to the cells, and closest to the stairs. Another officer dragged Fungavaka on left hand side. The door to the cells were open he said. They dragged Fungavaka and put him in cell 7. The stomping officer was the one that came closest to him. They dragged him facing up past them. He had no shirt on. Lolomana'ia accompanied them. He was drunk or totally unconscious. He said he knew the stomper from having drunk Kava with him. He came to know him in 2012. He had also seen him driving his vehicle. He also dock identified Faletau. He did not know the other person prior to the incident. That person was closest to the wall. He dock identified Maile as the other man. He said Vaomotou was outside his hallway. He stood there before going back to his cell later. He did not see Tongamoa that night. He had not given evidence before. He had a conviction subsequently entered for manslaughter. He maintained in cross-examination from Mr Fifita that the man who did the stomping was standing on the right and not left hand side of the hallway. He said under cross-examination that the stomper was Faletau although it was put to him others had said Maile. He admitted he had not nominated Faletau in his first statement because he was scared but had done so in his second statement. He later seemed to say he did not know why he had not nominated

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Faletau in his first statement. He denied that he could be mistaken.

[74] Penisimani Tupou was also in cell 4 and has convictions for housebreaking. He said he was told about the beating by Vaomotou who was in the hallway outside cell 4. He had a triangular shaped mirror. He said a big build person with a hat dragged Fungavaka and he was on the left of him. Another person with blonde hair, whom he had said was Vakalahi, had also dragged him into the passage and was on the right of Fungavaka. The big build person was closest to the stairs and the blonde haired person was closest to the walls opposite the stairs. The big build person did the stomping and he dock identified Faletau. After that, he said a woman called out and another officer came and stood closest to the wall and that, he said, was Maile. He said the big build person came closest past him. He accepted that he had not known Faletau or Maile before the incident but had seen them later at the station. He said the person who joined Faletau did not have a hat when he came past. He said it was after the stomping that the prison door to the cells was opened. He could see all the way to cell 7 and they dragged him to cell 7. The person doing the stomping came past him. He had not known the person who did the stomping before that night, but he had seen him later at the station. He did not know his name. He said he had seen the boot come down and then had to focus his mirror up and that is where he could see the appearance of the person doing the stomping. He said then heard the woman say take him to the prison.

[74] Deputy Commissioner Fa'aoa said on 21<sup>st</sup> August, Faletau and Maile were together in a prison cell. He said standard uniform includes belt handcuffs and torch. He

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said torches were taken from the residence of Mr Hala'ufia and forensically examined but nothing was found. A mirror was taken from Taniela Vaka.

**Reasons and Verdicts**

**Joint enterprise**

[75] Mr Kefu strongly contended in his lengthy submission that I should find beyond any reasonable doubt that there was a common purpose; a joint enterprise, in his words, to beat Mr Fungavaka up. He contended that this arose when all police officers from the TRG arrived at the night club in the car and saw Fungavaka and Tavake drunk outside. He said the police were annoyed at the conduct of Fungavaka and Tavake when they came to arrest them. He pointed to the fact that there was a scuffle leading to one police officer falling to the ground and another spraining his ankle. He submitted that Fungavaka was taken across the road behind cars lining Taufa'ahau road so that Maile and Faletau could assault him, as he submitted, they did. He submitted that the unlawful common object was formed outside the nightclub, and carried on at the station and was evidenced by Hala'ufia hitting Fungavaka with his torch. Maile and Faletau dumped him in the corner of the charge room and Maile attempting to punch him before he was taken by them into the watchhouse. He said that was a small room, and there, a beating took place which was heard by various police witnesses. He submitted that certain witnesses such as assistant Deputy Police Commissioner Fua and PC Aho been less forthcoming than they should have been, and that what occurred in the watch house, the chokehold and the strangulation by Hala'ufia, the pushing of Fungavaka's neck and head

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against the wall, his use of a torch to the chest, the punching by other officers, the standing on Fungavaka's groin by Faletau all pointed to the picture of a determined beating.

- [76] He submitted also that the fact that Tavake was apologizing for Fungavaka's drunkenness was further evidence that a beating was going on. After they had attempted to subdue him and had taken his possessions, Mr Fungavaka was taken to the cells. He alleged that when he was further vocal and abusive in the hallway area, Maile stomped down on his raised head, and this was a further demonstration or manifestation of a group desire to beat and effectively punish Fungavaka for his abuse and resistance. As such, he submitted there was evidence that established beyond reasonable doubt that all of the accused were involved in this joint enterprise and were liable for his death.
- [77] The thrust of the defence for each accused was that the allegations of assault attributable to them individually were denied. All submitted that Fungavaka was very difficult and abusive and that he was difficult to restrain and indeed arrest. All, where relevant, made the point for their clients that the identifications were unreliable, for various reasons; lighting and distance being factors, identifying witnesses had criminal convictions or were on remand, and with some accused it was suggested evidence had simply been fabricated. There was no direct submission that any of the actions fell within the provision of section 160 of the Police Act, 2010 that is used reasonable and proportionate force with the exception of Mrs Taufateau who seemed to make this submission in relation to any chokehold applied by Hala'ufia to Fungavaka during the search in the

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watchhouse. She made other submissions which were not relevant to any of the issues before me namely the fact she contended the indictment was deficient and unclear, that there were defects in the Magistrates procedure and that there had been no inquest. In my view the pleadings were perfectly clear, and none of the other complaints had any substance.

[78] If I am not able to conclude beyond a reasonable doubt that there was a common unlawful enterprise to beat Mr Fungavaka up, as alleged, then the complicity of each accused must be judged solely on his actions alone and not by virtue of any principles relating to common purpose. The Crown case was that the common unlawful object was to be inferred from the nature and number of the assaults that were perpetrated on the deceased over this period.

[79] I have little doubt that from the Time Out Bar to the watchhouse Mr Fungavaka was difficult for police to control. Whilst on the evidence I have heard, I have no doubt that certain of the accused acted well in excess of what was reasonable and proportionate force, the difficulty I have is finding beyond a reasonable doubt that there was an overall common unlawful purpose, to beat Mr Fungavaka up as Mr Kefu submitted. Whilst I consider the Crown case to be reasonably advanced on this basis, care must be taken with inferring joint enterprise because of the effect such a finding can have on secondary parties who may have complicity for other's actions otherwise unfairly imputed to them. In this case, I have concluded that the assaults which involved excessive force of various kinds were individual acts concerned with trying to control and perfect the arrest, rather than acts demonstrating a group intention

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to beat him up, although individual officers may have had that in mind.

[80] It is very unclear to my mind what occurred at the Time Out bar, before his arrest. I do not consider I can draw any adverse inference or inference of a sinister purpose, as the Crown invited me to do, in taking Fungavaka back to the police station by foot rather than in the police vehicle, as Mr Kefu suggested. The reason given was that he might have proved difficult or even damaging to the vehicle. The actions, to my mind, attributable to Maile and Faletau when taking him to the station are as consistent with excessive force in effecting a difficult arrest, rather than any part of an overall plan to beat him up. It was only during the period in the watchhouse that the evidence suggests that Fungavaka was the subject of some truly concerted group action involving the use of excessive force. That period did not last for very long, a matter of a few minutes, and the evidence as to what occurred is not very clear, and rather difficult to piece together. The police, however, were attempting to search him and remove his clothes. That involved the application of a chokehold, some punching but not it seems to the head, an act of standing on the area of Fungavaka's genitals, and other roughhouse, clumsy and inept acts of assault. That evidence did not in my view provide a sufficiently sound foundation to establish beyond reasonable doubt that a common plan was formed at the Time Out bar or at any time to beat him up, as opposed to simply effect and perfect an arrest albeit that involved excessive force. The later act of stomping attributable to Maile in the passage way to the cells, I consider also consistent with his individual anger and lack of control.

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**Cause of death**

[81] I am satisfied from the evidence I heard concerning Mr Fungavaka's injuries from Dr Tangi and Dr Garavan that it was as a consequence of more than one significant act of trauma to the head that Mr Fungavaka died. I am satisfied beyond any reasonable doubt that those injuries were materially and substantially caused by the use of a torch to the head in the charge room area, and contributed to in a material significant or substantial way by the stomping action on the deceased's head as he was taken to the cells. I also consider the act of strangulation witnessed by PC Falevai materially contributed to and exacerbated the existing trauma. The use of a torch to the head and the act of stomping down on a raised head to my mind, having heard the evidence of these incidents, were brutal acts. Similarly, the strangulation with force enough to cause a fracture was a very violent act, associated in my view with a total absence of control.

**Stage one Langafonua – Friends**

[82] I find both Mr Faletau and Mr Maile guilty of assaulting Mr Fungavaka; Mr Maile with a weapon of some kind in the area of Langafonua, and Mr Faletau punching him soon after. I consider that the evidence establishes plainly that both Maile and Faletau took Fungavaka across the road from the Time Out bar and had difficulty with his arrest. Mr Fungavaka was plainly annoyed at the fact he was arrested, was questioning the reason for this, and became difficult to restrain. PC Aho, present at the arrest of Fungavaka said that the officer closest to Taufu'ahau road was Maile. Faletau was closest to the fence or building. I am satisfied that the lighting in the area was adequate for Ms Hauoli Vi to see clearly what



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was happening. There was lighting from a lamp post close by which happened only a few metres away from her. She had moved to the left hand side of her vehicle. There was no suggestion she was drunk. I had no basis for believing she was other than a credible witness or any reason in the circumstances to consider she may have been a mistaken witness in what she saw. She quite fairly said she could not be sure what Maile had in his hand but it was dark and it seemed to reflect in the light. She quite fairly also told the prosecutor that she was unsure whether the weapon he used hit the upper shoulder or the back of the head, and on this basis all that could be said of Mr Maile is that he assaulted Mr Fungavaka, in the area of Langafanua, with a weapon of some kind, but I do not find that this act was to the head and caused or contributed to his death in a material way. Further, she said she knew Maile from previously seeing him on two occasions at the airport, and driving around in a car. She had seen him driving a police car, on about ten occasions.

**Stage two - the charge house office**

[83] I find, on the evidence of Mr 'Onitulei Manu whose evidence I accept that Mr Hala'ufia hit Mr Fungavaka across the top back of the head with a large torch with considerable force whilst he was being held with his head forward by Mr Faletau and Mr Maile. I also find he used the torch to poke Mr Fungavaka in the front chest. Manu said the blow to the head was a big force and demonstrated hitting his hand with a slap. He was able to see the assault from a few metres away positioned as he was at the counter in the charge room, very close by. It was submitted by counsel for Mr Hala'ufia, Mrs Taufateau, that I should not accept the evidence of Mr

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Manu because he had criminal convictions the most serious for drugs, and because his son had in fact been charged with manslaughter arising out of the incident, and had a motive to give false evidence.

[84] I have considered all these criticisms and I approach his evidence with caution as I have done in relation to other witnesses who have criminal convictions. However, having done so, I considered that the evidence of Mr Manu was without any doubt reliable. There was no evidence he was badly disposed towards Mr Hala'ufia or that he bore him any bad will. On the question of favouring his son, he had denied this and said that his son should be punished if he had done wrong. I heard no evidence which suggested he was trying to ingratiate himself with the prosecution to gain advantage, or that any arrangement or inducement existed between he and the prosecution either. He happened to be present to assist his son who was in the cells for earlier drunkenness. He had a good view of the incident from where he was standing and the charge house was well lit. Sgt Blake placed him at the counter at the relevant time. He knew Mr Hala'ufia and there was no suggestion he was mistaken; simply that he was lying, which I do not accept.

[85] Further, Manu's evidence and demonstration as to where the blow landed and its force was consistent with the medical evidence from the pathologist Dr Garvan regarding the point of impact and the badly fractured skull, a factor which in my view strengthened Manu's account, and his demonstration of the blow being to the top area of the head. There was no suggestion he had known about the contents of the pathologist's report concerning the significant skull fracture in this area. Dr Garvan gave evidence of a very large fracture caused by

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a blow to the top of the head. He said that could be consistent with a blow from a torch. He spoke of a depression at the point of intersection which was pushing down the brain. He said the main cause of death was the fracture and the brain swelling.

[86] Dr Garavan said the fracture he saw could not have come from trauma to the back of the head. Hauoli Vi said she was unsure whether Mr Maile had hit the back of the head or the shoulder. I feel able on this evidence to reject any possibility that the blow Maile is said to have delivered even if to the back of the head could have caused the fracture. Dr Garavan also gave evidence that the accused had bruising on the left and right side of his chest that could have been caused by a blow using a torch to the chest. That is also consistent with Manu saying he saw Hala'ufia use a torch to poke him in the front, after he had hit him over the head.

[87] Criticism was also made of Manu's evidence on the basis that other police officers, Assistant Deputy Commissioner Fua who was in charge of the station, PC Inoke Vi and PC Aho both officers who were present at the Time Out bar earlier, and, who were at various times in the charge room, had not seen Mr Hala'ufia assault Fungavaka with a torch. Both Aho and Vi, I considered were rather vague about what they saw and both said they were filling out documentation in the charge room. Mr Kefu went further and submitted Assistant Deputy Assistant Commissioner Fua had not been frank in his evidence and that he had seen more than he was prepared to admit. Fua said that he was outside the station during all the relevant period, whilst Sgt Blake placed him in the charge room at the time when Manu was present there, and later it seems inside the station watching some of the events that took place

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in the watch house. Sgt Blake in her evidence said that she saw Fua and Manu in the counter area before she went out to have a cigarette. She said she went for a cigarette after Tavake and Fungavaka had been placed in the watch house. She said that she suspected at the time something was going on in the watchhouse but she did not intervene because other more senior officers were present, Hala'ufia and the other being Fua, who she said, was standing in the door of the watchhouse watching what was going on for maybe five minutes. Constable Langi also confirmed his presence there, as did Mr Vaomotou. Assistant Deputy Commissioner Fua was not cross-examined or given an opportunity to contradict these observations, he being called early by the Crown so I make no finding on this aspect. As I have said, however, I have no difficulty accepting the evidence of Manu as to what he saw and the fact that other police officers did not give evidence that they saw this incident does not persuade me that I should treat Mr Manu as an unreliable witness.

- [88] Further, two officers saw Mr Hala'ufia with a torch, although there were others who said they did not see he or Maile earlier with a torch. PC Blake, a young constable, who was also in the charge room, said she saw Hala'ufia with a large torch go into the watch house. PC Falevai also a young officer, who had looked over a partition dividing the charge room from the watchhouse saw Mr Hala'ufia press a torch down on the chest of Fungavaka. I accept both these officers as reliable. They were uninfluenced by any association with members of the TRG group, whose actions were under scrutiny for the part they played in the death of Mr Fungavaka.

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[89] There is some confusion about the sequence of events as Tavake and Fungavaka were brought into the watch house. Officers Blake, Langi, and Tufuele, gave evidence of Maile throwing Fungavaka in the area of the corner of the charge room before he was taken into the watchhouse where Maile was stopped by Blake from punching Fungavaka. The evidence would suggest that, although he had arrived back in the police vehicle with Hala'ufia and other TRG officers shortly after Fungavaka arrived at the station with Maile and Faletau, Tavake was taken first into the watchhouse by Hala'ufia and other officers, probably PC Aho. Hala'ufia then came out according to Mr Manu and told Faletau and Maile to hurry up and take Fungavaka into the watch house. Manu says that Fungavaka was upright at that point with Faletau and Maile holding him by the arms when Hala'ufia assaulted him with the torch from the rear. After that he was taken into the watchhouse.

[90] The fact that other officers in the charge office did not see such an assault I do not consider surprising because the charge office has a restricted view of the rest of the charge room and two of the officers Langi and Tufuele had their backs to the charge room facing Blake as Tavake and Fungavaka came in. I am satisfied beyond any reasonable doubt for reasons I have given that Manu was well placed to see what he did, and I accept his evidence that Hala'ufia struck Fungavaka before he was taken into the watchhouse with a heavy blow from a torch that fractured his skull. I consider that, after Tavaki had been taken into the watchhouse, Hala'ufia came back out as Manu says and made a remark to Faletau and Maile, who had left him near the door of the watchhouse asking why was he still there. Sgt Blake gave evidence of this remark also. I accept Manu that Fungavaka was upright and held by Faletau and Maile

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when Hala'ufia struck him with the torch, in my view to hasten his passage into the watchhouse. Nor do I find it concerning that Manu said Blake saw the incident and left which Blake denied, because she plainly left soon after Mr Fungavaka was placed in the watchhouse to have her cigarette. I do not consider that Manu was lying about his observation, rather if Blake is correct then he is mistaken about when he saw her leave.

**Third Stage – the watchhouse**

[91] I accept that during the period in the watchhouse that Mr Fungavaka was exposed to various acts which involved excessive force. I accept the evidence of PC Hina Tufulele that she heard what she considered to be a beating going on. I also found concerning the evidence of Sgt Blake that she suspected something was going on but even so in spite of being the officer in charge of the watchhouse took no action, but went outside for a cigarette, because she said others more senior such as now Assistant deputy Commissioner Fua and Mr Hala'ufia were present and more senior than her. I also accept from all the evidence I heard, including from bystanders such as Onitulei Manu, Sione Vaomotou a prisoner with free access in the hallway to the cells, and other inmates that during this period Fungavaka was exposed to police action that even given his resistance plainly involved the use of excessive force.

[92] More difficult is the individual liability of officers for acts that are alleged to have occurred in the watchhouse. I find all the accused were in the watchhouse during what was a period of no more than 10 to fifteen minutes. As Mr Kefu said much of the evidence is snapshot in nature and it is difficult to get a clear overall picture of what occurred. I will deal first with Mr Hala'ufia. He is seen

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by more than one witness holding Mr Fungavaka in a chokehold when he is standing upright. The evidence would suggest that this was during the period when police were trying to remove items of clothing such as a belt and shoes. I am unable to say with what force the chokehold was applied or for how long and for that reason I cannot say in all these circumstance that was unreasonable force, although one witness PC Lolomana'ia said it was not police practice. More serious, however, are allegations that he was standing astride of Fungavaka, grabbed his shirt and was pushing him against the neck into the wall, evidence given by PC Langi; and, by PC Falevai, that he grabbed Fungavaka's throat when he was swearing and used both hands to strangle him for about twenty seconds. He said Fungavaka showed signs of stress and discomfort and his facial skin turned red and his eyes went wider. I have no doubt this was excessive force and that it was a material contributing factor exacerbating an already serious head injury incurred earlier when Mr Hala'ufia had struck Mr Fungavaka with his torch.

- [93] The strangling incident is consistent with the evidence of Dr Garavan that there was a broken bone in the throat consistent with strangulation. Further, he said this could have, when taken with the pre-existing trauma, been a contributing factor to death because it would have stopped the supply of oxygen to the brain. I find that beyond reasonable doubt, accepting PC Falevai's evidence, that Mr Hala'ufia did strangle Fungavaka during this period, and during this incident, he broke a bone in Fungavaka's throat in an effort to control and subdue the latter. The first of the two incidents may have also contributed to death if the head had been heavily pushed into the wall worsening the already serious head injury, but I do not find that this beyond a

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reasonable doubt was so. I also accept that during this period, Mr Hala'ufia used a torch by pressing it against the chest of Fungavaka and again an example of excessive force, but an assault and no more. These were further illustrations of his loss of self control, and in my view his intense anger.

[94] Evidence was given by Mr Vaomotou that he saw from the area of no three cells all of the officers, whom he named as Tu'ivai, Hala'ufia, Faletau and Maile punching and kicking the body of Fungavaka. He said this went on for about 10 minutes. Mr Vaomotou would have been at a distance of 13.3 metres - 16.65 metres from the watch house. Further, as he admitted, there was another police officer Fua standing around the area of the door, which, although he said he could see into the watch house, may have impeded part of his view. Also at the relevant time, the cell door was certainly closed. I have also indicated that the lighting in the watchhouse had the effect of creating a silhouette of people in the watchhouse making features difficult to discern. It appeared also, under cross-examination from Mr Pouono, that he had mentioned only Tu'ivai in the lower court as being involved, his reason in not naming others he said because they were sitting looking at him.

[95] Although I have little doubt that the witness did see some punching in the watchhouse, that is not the same as accepting beyond a reasonable doubt that a particular accused was involved. I consider that the view of Mr Vaomotou, from either cell three area or cell 4 into the watchhouse, would have involved much less than ideal conditions. Further, the actions of individual officers would have been quick movements and in a group situation there is an obvious risk of an incorrect identification. I also am concerned at his ability to see



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clearly because his view was possibly partially blocked by Fua or some other officer and at least impaired by the bars in the cell door and the lighting. I am concerned that the features of persons in the watchhouse would not be readily discernible because of the lighting and affect, I have described. In short I consider that, in the absence of some supporting evidence applying the warning in Turnbull, I would not beyond reasonable doubt find any of the officers mentioned guilty of assault in the watchhouse on the basis of his evidence, alone. This means because the only evidence of punching by Tu'ivai comes from Vaomotou, he will be totally acquitted of involvement in the events of that evening. I add that Mr Tu'ivai had a legitimate reason for being in the watchhouse at the time being associated with the arrest of Tavake.

[96] In relation to Mr Faletau, PC Lolomana'ia, observed Faletau trying to take his belt and shoes off and he could not do so. He said he saw Faletau stomp on his groin. Fungavaka was no longer aggressive and they were able to take his belt and shoes. I accept beyond reasonable doubt that this occurred. The watchhouse is a confined space and the witness obviously knew Faletau so there is no room for mistake. Plainly, this is an excessive use of force and involves beyond reasonable doubt another act of assault, effectively a kick to the body by Faletau.

[97] The only other issue of relevance in the watchhouse concerning assaults delivered there involves Mr Vakalahi. He also had a legitimate reason for being in the watchhouse being also involved with Tavake. The only allegation against him arises out of evidence involves his punching Fungavaka whilst he was held in a chokehold by a third person probably Mr Hala'ufia.

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Fungavaka fell to the floor and was allegedly punched again by Vakalahi. It was also alleged that he held Fungavaka up, and pulled off his belt. Evidence suggested that, at this time, there were two persons standing with their backs around the area of the watchhouse hallway, as well. The only witnesses, who implicated Vakalahi were Filomila Kaufusi and Penisimani Tupou both of whom were in cell 4.

- [98] Neither witness knew Vakalahi before the incident and both gave dock identifications. Mr Kaufusi said he had seen photographs in newspapers after the incident. He did not give evidence when he came after the incident to the Nukunuku Police Station where he was on remand. He said he was with others. Nobody else much better placed, identified Vakalahi in this way as being involved in any assault although there is no doubt he was present in the watch house. Both of these witnesses referred to the person as having blonde hair. I ascertained that, in the Tongan context, this meant ginger hair which Vakalahi has rather than black hair. However, from a distance of about 16 metres, that is from cell 4 to the watch house, with the silhouette effect I have spoken of I am extremely doubtful that the distinction between a dark ginger colour which Vakalahi has, and dark brown or black hair would be readily discernible. There was nothing otherwise remarkable given about Mr Vakalahi's appearance. I have serious scepticism also of the accuracy of identifications from this or any distance through pieces of mirror of fast moving scenes because of the need to focus a mirror in order to observe the action, as I have said. In short, without supporting evidence of these possibly doubtful identifications I cannot convict Mr Vakalahi either of any offence. There is no supporting evidence and two doubtful identifications cannot support each other and

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so he will be acquitted of any charge arising out of this incident, also.

**Stage 4- the hallway to the cells.**

[99] The evidence, in my view, established beyond reasonable doubt that those responsible for taking Mr Fungavaka from the watchhouse into the passage area before taking him into the cells were Mr Maile and Mr Falatau. This was probably very shortly after a search had been completed. The evidence concerning this comes from police officers who were in the watch house, PC Takau and PC Lotu Lolomana'ia. PC Takau said he was still swearing and struggling when taken out. Tavake had said please bro shut your mouth. Fungavaka was being dragged face up. She got up to collect his shoes and his belt and when she came to sit back down Fungavaka was lying on the floor of the hallway to the prison cells. He was lying with his head closest to the prison cells. He was no longer struggling and swearing. Maile and Faletau were standing there. She said she thought he may have passed out. They were still standing in the same manner as when they dragged him out. PC Aho came and told them to continue dragging him to the cells because Tongamoa and Lolomana'ia would not be able to take him to the cells. PC Lolomana'ia said he saw Hala'ufia leave and Maile and Faletau take Fungavaka from the watch house. He only saw those two at that point. He continued to be aggressive, then all of a sudden he did not hear any more. He heard PC Takau tell the officers not to leave him in the area of the entrance to the cells.

[100] Sione Vaomotou who had given evidence that he was in the area of cell 3 said he saw Hala'ufia coming out with him in a neck lock and dumping him around the area of

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the stairs, Fungavaka lay down and Faletau and Maile took one hand each and held his head up and Maile with all his might stomped his foot on Fungavaka's face. They left him there and were called back by PC Takau to take him to the cells. He said Fungavaka had been face up and his head towards the iron bar door. He later said his head was about a foot and half off the ground when he was stomped and his head hit the floor with a big bang. Maile was angry and he could see that was all the power he had. It was not suggested to Mr Vaomotou that he did not know Maile. I consider that even though the barred cell door although unlocked may have been closed at the time, taking into account the distance ( about 8-9 metres) and the lighting, the witness would have been able to see what had occurred in the passage way.

[101] I have taken into account consistently with Turnbull the warnings I have mentioned above and that a mistaken witness may appear as one who is convincing. I have also taken into consideration that Vaomotou has been convicted some years ago of a serious crime, to suggest he had any motive for giving false evidence and dishonestly implicating Maile. I accepted him as a credible witness. His evidence was also supported, by a similar to my mind, convincing identification by PC Tongamoa from the area of cell 4 ( about 12 metres) and also Mr Maile's denial in his record of interview of being responsible with Faletau of taking him to the cells which I will turn to, shortly.

[102] PC Tongamoa, who had been sent from the watchhouse to open up the cells to place Fungavaka and Tavake in them, saw Fungavaka being dragged by two officers of the TRG who he said were Faletau and Maile. They had not passed into the prison area, when he saw Maile,

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who he said was closest to the stairs, as you exit the watchhouse to go to the cells, stomp on Fungavaka's head, with his face up and his head hit the floor. Although Fungavaka had still been vocal, he said after the stomping he passed out, he thought, drunk. He was then dragged to cell 7 and was placed in the cell by Faletau and Maile. He had opened the cell by drawing the bolt.

[103] The only cross-examination on this point by Mr Pouono was that Maile would say he was never beyond that iron bar door to the hallway and never stomped on Fungavaka to which the witness responded that he saw what he saw. Again I consider that applying Turnbull warnings, PC Tongamoa was a reliable witness in his identification and would have been able to see from the area of cell 4, Maile, commit the stomping. As with Mr Vaomotou's evidence I have taken into account, distance, the state of the lighting and the fact the cell door was barred and probably closed at the time. I consider, however, having viewed the area twice it was perfectly possible for these witnesses to see and discern who was involved in this incident. I had no reason to believe that he was not where he said he was. The fact that inmates on remand may not have confirmed his position is of no moment if, as they said, they were busy looking through their mirrors.

[104] I consider also that Mr Maile in his record of interview deliberately lied in a material respect when he said that, although he and a number of other officers including Faletau, Hala'ufia, and Tu'ivai were present in the hallway, it was Faletau and a third officer who had been involved in dragging Fungavaka into the cells, and it was not he, who had been involved in dragging Fungavaka to the cells. He said he did not know

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anything about Faletau and another officer taking Fugavaka to be placed in the cell. He said only in response to a question where were you and Hala'ufia when he was taken to the cell, that he had taken him with Hala'ufia and Faletau and one other person to the steps at the entrance to the cells, and Hala'ufia and he had returned to the person who had been arrested together with Kali. He said that they had held him. He said Fungavaka could not walk into the cells and Faletau had lifted him by the armpits and dragged him into the cell because he had passed out drunk. He knew he had passed out drunk because he was not restless he said. He said further in answer to a question whether he believed it was possible for a person to pass out drunk whilst being restless, yes because he twisted around and made a go to punch Faletau but he fell down and passed out. He was there with Hala'ufia and one other person. He denied he was involved in any stomping. He did not know who took Kali to the cell with Faletau.

[105] I am satisfied not only was this explanation at odds with the evidence of Takau and Lolomana'ia, who both said it was Faletau and Maile and not any other officer or officers who dragged him from the watchhouse to the cells, but it was a deliberate lie, because Maile knew full well that it was when he and Faletau had dragged Fungavaka, face upwards from the watchhouse to the area of the cells, that the stomping took place. Both were seen standing by Fungavaka as he lay motionless by Takau, whose evidence I accept, and both had later taken him to the cells after having been told by Takau to do so after Fungavaka had been left lying on the floor. Maile nominated other officers, Hala'ufia and a third person, as being involved also in taking Mr Fungavaka from the watchhouse to the passage way by the stairs but I am also satisfied on the evidence from

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Takau and Lolomana'ia that those responsible for dragging him out of the watchhouse were he and Faletau. I am also satisfied that it was only Faletau and Maile who were standing around Fungavaka when he was apparently unconscious or motionless on the ground and not some third party. I am satisfied also it was he and Faletau who took Fungavaka on to the cells, and not any other officer. I see no other reason why he would lie on these aspects of his dealing with Mr Fungavaka other than to distance himself from the stomping.,

[106] I do not see Maile as lying to protect anybody else other than himself either. Maile mentioned Faletau as being one of the officers and an unknown third party as the other who was involved in dragging Fungavaka to the cells. Accordingly, he cannot be said to have told a lie to protect Faletau out of collegiate loyalty. There is other evidence from PC Tongamoa and Vaomotau that Maile was the only other officer involved in this, as well as Takau's instruction to both these officers to do so. The interview took place about three days after the incident. Being a police officer, I dismiss any suggestion that he would have easily been overcome by panic or fear in the process of interview. Had he not been involved in the stomping, I see no reason why he would not have simply admitted he dragged Fungavaka from the watchhouse with Faletau and then taken him into the cells, as the evidence plainly reveals. I am satisfied that his account was a deliberate and material lie told to distance himself from the stomping. I would however, add because I accepted the evidence of both Vaomotou and Tangamoa standing alone that Maile was responsible for the stomping. I am satisfied beyond reasonable doubt of the reliability and accuracy of their

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accounts. I consider that the lie is additional supporting evidence that Mr Maile was the stomper.

[107] In arriving at this decision, I have not overlooked that some but not all the remand inmates in cells three and four using mirrors named Mr Faletau and not Mr Maile as having done the stomping. I have set out the nature of their evidence above. I have already said, however, that whilst I do not dismiss entirely the fact that it is possible some of them may have seen the stomping incident, I am not satisfied that the process of viewing fast moving action with the assistance of pieces of mirror of different sizes gives me any basis for doubting that Mr Maile was the stomper, or raises a possibility that my conclusion is wrong. Aside from Mr Siaosi Langi, none of the witnesses said they knew Maile or Faletau before the incident but had come to know them by various means none of which I found an acceptable basis for a certain identification.

[108] None of the witnesses who made dock identifications had been involved with any formal identification procedures such as a parade or photo montages, and some had been exposed to photographs in newspapers, or presence of officers at the central police station. Identification procedures in my view need to be revised in Tonga. I did not consider that their identifications of Faletau were reliable or detracted from the evidence I regarded as convincing that the man responsible was Maile. In the case of Mr Langi who said he knew Faletau, the mirror he said he used, as the drawing he made which was exhibited illustrates, a very small triangular piece of mirror. I do not regard his evidence, as reliable of Faletau being the stomper. Nor have I overlooked some uncertainty as to whether the stomper was closest to the stairs area in the passage way or on the left. To my mind, what was much more important in relation to



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observation is the fact that both Vaomotou and PC Tongamoa knew Maile (it was never suggested otherwise), and had in my view, taking into account the condition of lighting and distance, a good opportunity to identify the stomper. Nor have I overlooked the fact that the cell door may have been closed giving a view through bars.

**The final stage - arrival in cell 7.**

[109] I am satisfied that Mr Fungavaka was dragged and deposited in cell 7 by Maile and Faletau and by that stage he was in a very serious condition. No counsel suggested that what may have happened in cell 7 had any bearing in their respective cases, or that there was a novus actus interveniens arising from any other third party assault, as I have said.

**Verdicts**

[110] As a consequence of the findings I have made and in particular, the finding that Mr Hala'ufia was responsible for causing the skull fracture and brain trauma with a torch, together with secondary trauma caused by the act of strangulation (as opposed to the chokehold or the pushing of the neck against the wall) means that beyond any reasonable doubt I find him guilty of manslaughter. I have no reasonable doubt but that his deliberate act of hitting Mr Fungavaka with the torch with such force that it fractured his skull, was a lethal blow and was a very material, and indeed, a substantial cause of his death. The strangulation was a further trauma that disrupted the blood flow and oxygen to his brain being a secondary factor also materially contributing to his death. There can be no lawful excuse for these actions

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or any justification of them within the provisions of section 160 of the Police Act, 2010. I convict him accordingly of manslaughter under sections 85, 86(1) (a) and 92 and 93 of the Criminal Offences Act.

[111] I also find Mr Maile guilty of manslaughter beyond any reasonable doubt and convict him, under sections 85, 86(1) (a) and 92 and 93 of the Criminal Offences Act. I find beyond reasonable doubt that he deliberately stomped on Mr Fungavaka's head with considerable force with his face uppermost and off the ground so that his head impacted with the floor in the hallway to the cells with sufficient force to cause him further serious head and brain trauma and was a material and, indeed, a substantial, additional cause also of Mr Fungavaka's death.

[112] I acquit Mr Faletau of manslaughter and or grievous bodily harm but I find him guilty of assault under section 112 of the Criminal Offences Act. I do this on the basis that his actions beyond any reasonable doubt involved a punching of Mr Fungavaka outside the Langafonua Centre, and his act of applying downwards force with his foot to the genital area of Mr Fungavaka during the search in the watchhouse involved a kick to that area. Both I am satisfied were acts that involved excessive force by him after the arrest of Mr Fungavaka and did not fall within any defence of reasonable or proportionate force under section 160 of the Police Act, 2010, and hence were unlawful and without justification. I view both acts as part of one overall transaction in the arrest of Mr Fungavaka, an approach which Mr Kefu confirmed in his view was available to me and accordingly I convict him of assault under section 112 of the Criminal Offences Act.

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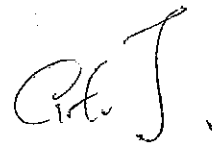
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[103] In relation to Mr Tu'ivai and Mr Vakalahi, I acquit them both of manslaughter and causing grievous bodily harm. In their cases, I do not find beyond any reasonable doubt any other alternative charge established and they are accordingly both acquitted and discharged.

**DATED:** *6th June* 2014



**JUDGE**