IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CRS 1/18, 266/18**

R

v

PERA PERA

Date: 3 December 2018

Counsel: Ms K Bell for the Crown
Mr D McNair for Defendant

JUDGMENT OF THE HONOURABLE JUSTICE COLIN DOHERTY

The Application

[1] Pursuant to Section 3 of the Evidence Act 1968 (the Evidence Act), the Crown seeks the admission of evidence obtained from a post mortem examination including:

a) the results of a post mortem report;

b) the results of a toxicology report;

c) the evidence of an expert commentator (Professor John Duflou) relating to the results from the above reports.

[2] The defendant seeks the exclusion of this evidence.

The Facts

[3] The defendant is charged with murder and in the alternative, manslaughter.

[4] The Crown alleges that on 30 December 2017, the defendant assaulted a Mr Taru at an address in Rarotonga by administering punches and kicks to Mr Taru's head; the kicks while wearing steel-capped boots. A short time after the alleged assault, Mr Taru was found to be in physical difficulty. An ambulance and police were called and when they arrived Mr Taru was unresponsive. He was subsequently pronounced dead at the Rarotonga Hospital.

[5] The defendant admitted punching Mr Taru but denied kicking him. The Crown will adduce evidence from two witnesses who claim to have seen the defendant kicking Mr Taru.

[6] A post mortem examination was authorised by the Coroner pursuant to the Coroners Act 1979-80 (the Coroners Act). Under the Coroners Act, the Coroner can authorise a post mortem examination for two reasons. First, to determine whether a post mortem examination may prove an inquest to be unnecessary. In that case, a Coroner may "authorise any registered medical practitioner or Crown pathologist to hold a post mortem examination of the body and to report the result thereof to him in writing" under section 6(1). The second reason is to assist the Coroner at any time before the termination of an inquest. In that case the Coroner may "authorise any registered medical practitioner or Crown pathologist...to perform a post mortem examination of the body of the deceased person" under section 10(1) (emphasis added in both cases).

[7] It is not clear which of these sections was utilised by the Coroner. The authorisation of the Coroner dated 12 January 2018 is headed "Authority to Make Post Mortem Examination" and refers in its intituling to "an inquest into the death" of Mr Taru. Therefore, it is likely that section 10(1) was the statutory genesis.

[8] In any event, the Coroner "authorised and requested" a New Zealand registered medical practitioner and qualified forensic pathologist Doctor Kesha "to make a post-mortem examination of the body [of Mr Taru]...and to send [the Coroner] a report in writing of the result of the examination" (emphasis added). In doing so, the Coroner followed a practice that has been ongoing since 1994.

[9] The authorisation is signed by the Coroner and the seal of the High Court of the Cook Islands is affixed to it. The intituling of the authorisation refers to the "Coroner's Court of the Cook Islands".

[10] On 12 January 2018, Dr Kesha performed a post mortem examination on Mr Taru's remains and produced the reports referred to above.

[11] Section 3(1) of the Coroners Act provides:

"The Minister of Justice may from time to time appoint any medical practitioner (being a medical practitioner registered to practice in either the Cook Islands or in New Zealand) to be a Crown Pathologist."

[12] While Dr Kesha is a medical practitioner registered in New Zealand and appropriately qualified there to conduct post mortem examinations, he was neither a medical practitioner registered to practice in the Cook Islands under the Medical and Dental Practices Act 1976 nor had he been appointed a Crown Pathologist by the Minister of Justice.

[13] The issue to be determined is whether because Dr Kesha was not appointed a Crown Pathologist, his evidence (upon which Professor Duflou opined) is unlawful and therefore inadmissible at the defendant's trial.

[14] It is common ground that without this evidence the Crown will be unable to prove both the cause of death of Mr Taru (Dr Kesha) and the mechanism of the assault alleged to have been committed upon him (Prof Duflou).

The Law

[15] Section 3 of the Evidence Act provides:

> Subject to the provisions of this Act, a Court may in any proceeding admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law.

[16] Thus there is a broad discretion to admit evidence regardless of the principles of the common law.

[17] The defendant submits that because Dr Kesha was not appointed a Crown Pathologist pursuant to section 3(1) of the Coroners Act, the authorisation of the Coroner for the post mortem to be conducted was made without jurisdiction. He relies upon the decision of the

Privy Council in *Descendants of Utanga and Arereangi Tumu v Descendants of Iopu Tumu* [2012] UKPC 34 (Privy Council Appeal N0. 0083.2010 (22 October 2012).

[18] *Utanga* concerned the effect of orders of the Land Titles Court had made in 1905, later amended by further orders in 1912 and subsequently purported to have been validated by this Court in 2008. The Board held that the original 1905 orders as amended in 1912 were made without jurisdiction, as the Judge exceeded his powers in making the 1912 orders, and therefore the orders were invalid.

[19] The Board considered whether section 416 of the Cook Islands Act 1915 could be applied to rectify the invalidity. Section 416 provided that when any question arose as to the validity of an order made by the Cook Islands Land Titles Court before section 416 came into effect, then the Land Court (as the Land Titles Court is known post the 1915 Act) could apply an "equity and good conscience" test to validate the order in question. The Board held that the Land Court did have jurisdiction to validate the 1912 order applying equity and good conscience principles and that in doing so was not confined to errors of practice or procedure as had been posited by this Court in its 2008 decision. Thus, the Board held that section 416 allowed validation of orders made outside the jurisdiction of the Land Titles Court but (unlike the finding of the Court of Appeal) that the equity and good conscience threshold had not been reached. Therefore, the orders remained invalid.

[20] *Utanga* can be distinguished from this case. Here the Coroner had jurisdiction to authorise that a post-mortem be conducted whereas in *Utanga* the Judge making the orders in 1912 did not. In this case the unlawful status of the evidence arises not because of the authorisation of the post mortem, but because it was carried out by a pathologist who had not been appointed a Crown Pathologist pursuant to the Coroners Act.

[21] The defendant submits that unlike a procedural flaw, this jurisdictional flaw cannot be cured by section 3 of the Evidence Act. However, *Utanga* supports the proposition that a statutory "rectification" can be applied.

[22] In *Utanga* the jurisdictional flaw could be rectified by the application of s 416 and "equity and good conscience". In this case, can the application of s3 of the Evidence Act effectively do the same?

[23] Although section 3 enables the Court to receive such evidence as it thinks fit notwithstanding its admissibility or sufficiency at common law, the Crown relies on the common law position as applied in the judgment of the New Zealand Supreme Court in *Queen v Shaheed* (2002) 19CRNZ165. *Shaheed* canvassed the development of the common law in several pertinent jurisdictions.

[24] *Shaheed* explained the approach adopted by the English courts as follows (at [62]):

> [62] At common law evidence which had been obtained improperly or even unlawfully remained admissible, subject to the power of the trial judge to exclude it as an exercise of discretion.... In England the discretion to refuse to admit evidence applied only: (a) where in the Judge's opinion the prejudicial effect of the evidence outweighed its probative value or (b) in the case of admissions, confessions and like evidence unfairly obtained from the accused after commission of the offence. There was no further discretion to refuse to admit relevant admissible (non-confessional) evidence merely because it was obtained by improper or unfair or even illegal means....

[25] Thus, in England there is a prima facie inclusion rule subject to a discretion to exclude.

[26] *Shaheed* summarised the Australian common law approach (paras [66-67]):

> [66] In Australia, where the common law continues to be unaffected by a domestic Bill of Rights, the High Court of Australia has recognised a discretion to exclude unlawfully obtained evidence. It involves more than a simple question of ensuring fairness to the accused, and requires the weighing against each other of two competing requirements of public policy -'the desirable goal of bringing to conviction the wrong-doer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct to those whose task it is to enforce the law'... Factors relevant to the exercise of the discretion include (i) whether the police mistakenly believed that their conduct was lawful; (ii) whether the cogency of the evidence is affected by the police misconduct; (iii) the ease with which the law might have been complied with in procuring the evidence; (iv) the seriousness of the offence; (v) whether, if the police have breached legislative provisions, those provisions were intended to circumscribe police powers....

[27] Thus, in Australia there is a prima facie inclusion rule subject to a discretion to exclude.

[28] Most pertinent to the Cook Islands position, *Shaheed* summarised the New Zealand common law (paragraphs [63] - [65]):

> [63] Prior to the enactment to the Bill of Rights, the New Zealand courts exercised the common law discretion in a somewhat less constrained manner than the English courts. As summarised ... the principle emerging from the New Zealand cases, ... was that evidence obtained by illegal searches and the like was admissible subject only to a discretion, based on the jurisdiction to prevent an abuse of process, to rule it out in particular instances on the grounds of unfairness to the accused. ...
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> [64] ... this Court recently remarked that at common law the courts of New Zealand have a discretion to exclude legally admissible evidence on the ground of unfairness. An obvious example, the courts said, is where voluntary admissions or confessions are made in circumstances rendering the use of the evidence unfair. In other situations, not involving admissions and confessions as such, the discretion exercisable on policy grounds is concerned about the quality of the conduct of those who obtained the evidence. ...that enquiry involves weighing the need to bring to conviction those who commit criminal offences and the public interest in the protection of the individual from unlawful and unfair treatment; and that the foundation of the discretion is that it relates to the rejection of the evidence where its admission will be calculated to bring the administration of justice into disrepute.
>
> [65] ... the Court has noted the consistency of a common law balancing test with international human rights obligations, in particular with art. 9(1) of the International Covenant on Civil and Political Rights.

[29] Thus, in New Zealand prior to the New Zealand Bill of Rights Act 1990, the general common law position was that illegally obtained evidence was admissible. That is, like both England and Australia, a prima facie inclusion rule. In the mid-1970s, New Zealand judges had a jurisdiction to exclude improperly obtained evidence based on either or both a discretion to exclude and the power of the court to address abuse of its process. "The way in which the principles were applied focused very much on fairness considerations assessed in the context of the particular trial in question." (*Marwood v Commissioner of Police* [2016] NZSC 139, at [21]).

[30] After the New Zealand Bill of Rights Act 1990 and until *Shaheed* there had developed a prima facie exclusion rule; that is, evidence should be excluded unless there was a good reason to the contrary. *Shaheed* redirected the focus to the effect of evidence on the rights of the individual. "The prima facie exclusion rule was abandoned in *Shaheed* in favour of a balancing exercise to be carried out with a view to determining whether exclusion of the evidence in question is necessary to vindicate the right was breached." *Marwood* (paragraph [26]).

[31] In *Police v Timoti* [2015] CKHC 25, this Court adopted the *Shaheed* approach in the face of a procedural flaw in the process used by a medical practitioner in taking the blood sample of a driver suspected of driving with an excess concentration of alcohol in his blood in contravention of s28(1) of the Transport Act 1966. The blood alcohol regime under the Transport Act impacted the privacy rights and rights against self-incrimination of the individual by providing that citizens must submit to invasive practices to allow evidence to be taken from them and used against them. In *Timoti* the Court ruled the evidence admissible.

[32] The defendant submits that *Timoti* can be distinguished because in this case the acts which are sought to be admitted by the Crown follow from a want of jurisdiction rather than the conduct of crown agencies such as the police. In other words the unlawfulness of the acts are paramount and cannot be cured by the exercise of the discretion under section 3.

[33] Section 3 of the Evidence Act places no fetter on the admission of evidence regardless of its genesis. Nor do the common law cases differentiate between evidence unlawfully obtained by virtue of want of jurisdiction or from breach of statutory procedure.

[34] Applying the primary inclusion rule of the common law in England it is difficult to detect any specific unfairness to the defendant that might be marshalled so as to require the evidence to be excluded. The Australian common law allows an assessment to include not just unfairness but also consideration of the competing interests of the public policy inherent in the tension between the rights of the individual and the wider interests of the public in bringing wrong-doers to justice.

[35] It seems to me in considering the exercise of the discretion under Section 3, the common law balancing regime of *Shaheed* is an appropriate method of balancing the competing interests of justice in this case and should apply regardless of whether the unlawfulness of the evidence was occasioned by lack of jurisdiction or a procedural deficit in the application of the law.

[36] The Crown submits that there are a number of factors which are relevant to the exercise of the discretion.

Balancing factors

Probative value

[37] The post mortem evidence was obtained by a person with the appropriate qualifications from a medical point of view; Dr Kesha is a registered practitioner and forensic pathologist in New Zealand and has commensurate qualifications with that required under the Cook Islands legislation. The only deficit was that he had not been appointed a Crown Pathologist by the Minister of Justice. There is no reason to believe he would not have been appointed by the Minister if the Minister had been asked to do so. Thus, there is no question of the probative value of the information gained and the evidence available to assist the Coroner in his later decision making. There is no challenge to the forensic probity of the evidence itself; in the sense that it has been obtained from the remains of Mr Taru in accordance with anything other than accepted pathology practice. Similarly, the qualifications of Professor Duflou are unchallenged and his opinion on the evidence gleaned from the post mortem examination are probative, particularly when his expert opinion has been provided in the shadow of the expert witness guidelines that apply to expert evidence given before the courts in New Zealand.

Good faith

[38] There has been no suggestion that there was any bad faith on the part of the Coroner. The Court was informed from the bar that the practice of using New Zealand qualified pathologists without them being authorised under the Coroners Act adopted by the Coroner had been used since 1994 but has now been rectified. There is no impropriety alleged on the part of Police whose role it is to assist the Coroner. The outcome which resulted from the authorisation of this post mortem examination is unlikely to be replicated.

Public interest

[39] The defendant is charged with murder, one of the most serious charges on the statute books. It is in the public interest that such serious allegations be brought before the Court and determined in accordance with the law. No one has argued otherwise.

[40] The Crown submits it would be an affront to justice to exclude this evidence in these circumstances. The interests of the community were identified in *Shaheed* albeit in the context of the breach of a right enjoyed by an accused person:

> "Importantly, a prima facie [exclusion] rule does not have the appearance of adequately addressing the interests of the community that those who are guilty of serious crime should not go unpunished. That societal interest, in which any victim's interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights - particularly one which is deliberate or reckless on the part of law enforcement officers. But where the disputed evidence is strongly probative of guilt of a serious crime, that factor too must be given due weight. A system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. The vindication will properly be seen as unbalanced and disproportionate to the circumstances of the breach."

[41] The Cook Islands Constitution provides in Article 65(1)(d) that in the construction of legislation there must be no abrogation or infringement of the fundamental human rights and freedoms as promulgated by Article 64 so as to "deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially." The defendant says that to exercise the discretion would impinge upon his fundamental right to a fair trial.

The defendant's interest

[42] The exclusion of this evidence will not prevent a trial. If were to be excluded, I imagine the defendant would face trial on other serious charges alleging an intent to cause serious injury to Mr Taro, but falling short of murder or manslaughter. The fact that evidence was obtained from the post-mortem examination carried out upon the Mr Taru's remains does not impinge upon the defendant's constitutional right to a fair trial. He is represented by counsel. He has the right to put the Crown to the proof of the charge and can elect to present positive defences. He has the ability to obtain his own expert evidence to counter that of the Crown. No other right available to the defendant and preserved by the Constitution is in jeopardy.

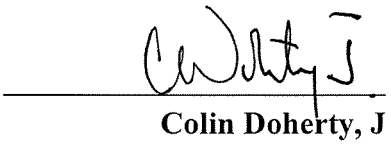
Outcome

[43] The balancing exercise comes done in favour of the admission of the evidence.

[44] The evidence obtained from a post mortem of the remains of Mt Taru including:

- the results of a post mortem report;
- the results of a toxicology report; and
- the evidence of Professor John Duflou relating to the results from the above reports

are admissible in the trial of the defendant for murder/manslaughter.



Colin Doherty, J