

**IN THE HIGH COURT OF
NIUE (CRIMINAL DIVISION)**

BETWEEN

LIONEL TAHEGA
DESMOND TOGIAKONA
SIONE LAPONI TOGIAKONA
Defendants

AND

NIUE POLICE
Informant

Judgment: 1 December 2011

DECISION OF HIS HONOUR JUSTICE W W ISAAC

[1] This decision deals with several charges made in relation to an incident which occurred at the residence of Martin Matakapea on the night of the Niue election. The police made the following charges:

- a) Sione Laponi Togiakona (Laponi) was charged under section 206 of the Niue Act 1966 (the Act) with making an oral threat to kill or do bodily harm to a person namely Martin Matakapea. Laponi pleaded not guilty to this charge.
- b) Lionel Tahega was charged under section 213 of the Act with causing wilful mischief to property being a TV set and the Matakapea family residence. He admitted causing wilful mischief to the TV set but pleaded not guilty to causing wilful mischief to the Matakapea family residence.
- c) In addition, Lionel Tahega was charged under section 157 of the Act with assaulting Doreen Matakapea. He pleaded guilty to this charge.
- d) Desmond Togiakona was charged under section 152 of the Act with causing actual bodily harm to Doreen Matakapea. This was subsequently reduced to a charge of assault, to which the accused pleaded guilty.

[2] I must decide whether the accused are guilty of charges a) and b) as set out above.

Factual background

[3] On the night of 7th May 2011, Martin Matakapea was at this home in Vautuku, Hikutavake with his wife Doreen and several friends and members of his family, including his three year old son. They were drinking and celebrating Martin's father's election to the Niue Parliament. Several people, including Desmond Togiakona, Laponi Togiakona, Ian Hipa, Pamela Togiakona and Lionel Hahega were at the Togiakona family residence next door. It was generally agreed by those who presented evidence that Pamela started yelling at Martin through her kitchen window. Desmond and Laponi then confronted Martin and Doreen outside the Matakapea residence. Heated words were exchanged and punches were thrown. It was during this exchange that Desmond assaulted Doreen. Then Desmond and Laponi chased Martin through the Matakapea house. At this time it is alleged that Laponi made an oral threat to Martin that he would kill Martin' son.

[4] Martin ran and got in a van Alisha was driving to Matapa. Lionel chased after the van and punched the side of it but did not catch them. However, Lionel returned to the house and punched Doreen who was in the car with her son about to drive away. Doreen and her son then drove away. At about 10.08pm the police station received a call that an incident had occurred at the homes of the Matakapea family and the Togiakona family. The police arrived at the scene at about 10.25pm. After assurances from Pamela to the police that there would be no further incidents, they left the residence at about 10.45pm. Between 11.05 and 11.15pm the police received a call informing them that Martin's house was on fire. Several police constables arrived at the house between 11.15 and 11.25pm. However, by this time, the house was engulfed in flames and was not able to be salvaged.

Law

[5] Section 157 of the Act states that everyone who commits an assault on any person is liable to imprisonment for a term no exceeding one year. Desmond and Lionel have pleaded guilty to this charge.

[6] Section 206 of the Act holds that someone who makes an oral threat to kill or do bodily harm to any person is liable to imprisonment for a term not exceeding 5 years.

[7] Section 213 of the Act states:

Wilful mischief to property



(1) Everyone is guilty of an offence who wilfully and without lawful justification and without bona fide claim of right destroys or damages any property, whether movable or immovable.

(2) Where the act done results in the destruction of or any damage to anything in which the person accused has an interest, whether total or partial, the existence of that interest shall not prevent his act being an offence if it is done with intent to defraud or to cause loss to any other person. For the purposes of this subsection, where any property is subject to any mortgage or charge, each of the parties to the mortgage or charge shall be deemed to have a partial interest in that property.

(3) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 years if the damage done or intended to be done by him amounts to \$20 or more, and to imprisonment for a term not exceeding 6 months in any other case.

[8] The criminal standard of proof requires the prosecution to prove that the defendant is guilty *beyond reasonable doubt*.¹ In the well-known case *Woolmington v DPP* Viscount Sankey LC stated, in the course of expressing the unanimous opinion of the House of Lords:²

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject ... to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

[9] This obligation on the prosecution to prove guilt beyond reasonable doubt means not only that all the elements of the offence must be initially proved beyond reasonable doubt, but also that any reasonable doubt as to the existence of a defence recognised at common law, (as opposed to "statutory defences") must be negated by the prosecution in order to secure a conviction.³ No statutory defences or statutory exceptions to the standard of 'beyond reasonable doubt' are relevant in this case.

A) Oral threat

[10] I can easily deal with the charge against Laponi of making an oral threat to "kill or do bodily harm to a person namely Martin Matakapea". A natural reading of the charge must mean that Laponi threatened to kill Martin Matakapea. However, the prosecution case

¹ *Woolmington v DPP* [1935] AC 462 (HL).

² *Woolmington v DPP* [1935] AC 462 (HL) at 481.

³ *Rameka v R* [2011] NZCA 75 at [68]

throughout the hearing was that Laponi threatened to kill Martin's son. This, of course, would be a different charge, which was not officially laid against Laponi. There is no evidence to even suggest that Laponi threatened to kill or do bodily harm to Martin Matakapea. Therefore, this charge must be dismissed.

B) Wilful mischief

[11] I now turn to the wilful mischief charge. Lionel has accepted that he wilfully caused mischief to property, being the TV set, however he pleads not guilty to causing wilful mischief to the Matakapea residence, by way of setting the house alight. In an oral statement to police, Lionel admitted that after the fight, when Martin and his family had left, he threw a rock at Martin's TV set, smashing the screen. He states that the TV was still on when he came in and the rock was lodged inside the TV box before he left. He claims that after this, he returned to Pamela's house to have dinner, and from there saw the house on fire. Ian Hipa, who arrived at Pamela's house as the argument broke out, states that once he realised the fire had started, he alerted Desmond and Lionel, who ran to the front of the house to stop the fire but it was soon too dangerous to do anything.

[12] The Chief of Police collected pieces of debris from the fire on the night and sent it to Institute of Environmental Science and Research Limited (ESR) in New Zealand the next day for analysis. Unfortunately, as outlined by the Dr Sally Anne Coulson of the ESR the fire debris sample was packaged in a tin that contained many rust holes which meant that if any hydrocarbon fuels were present in the sample they could have been lost. No hydrocarbon fuels were found in the sample. As stated by Dr Coulson, this could mean either there were none present in the sample, or they were consumed in the fire, or they subsequently evaporated.

[13] Also, the police found a rock in the remains of the TV set. This was also sent to ESR. In the expert opinion of David Peter Neale, the possibility of the rock cracking the TV and causing it to implode, thereby starting a fire, is very small. He does note however, that other possibilities may have occurred, such as a short circuit or component failure, caused by damage to the TV, igniting the TV casing or any build up of dust inside the TV casing. This scenario, or others similar, could have led to the ignition of the TV casing because of an internal failure and started a fire within the reported time frame.

[14] Police constable Hiki Puheke was employed as an electrical trainee for two years before joining the police. The Chief of Police directed him to examine the electrical box that fed power to both Martin and Doreen's house and Pamela's house the morning after the fire.

He did not identify any obvious faults. His brief of evidence noted that as power was still working to Pamela's house, faulty power lines or the power box did not contribute to the fire. On Tuesday 1 November, at the request of the Chief of Police, the Head of Department at Niue Power Corporation Hetututama Speedo Hetutu also examined the power box. He found no fault with the power box and his brief of evidence states that if there had been a fault, it would have tripped the circuit breaker in the transformer which would have cause power outage to several properties in the area. This did not occur.

[15] Chris Glasson, Television and Electronics Specialist in New Zealand provided his opinion that whether the TV was on or off, it is highly unlikely that a penetration of a rock of a CRT television could cause a fire.

[16] Counsel for the defendant noted the time between when the Police left and the call regarding the fire came in. In this 20 – 30 min gap someone other than Lionel could have easily set fire to the Matakapea residence. There were seven people at the house, anyone of whom could have started the fire. He noted the previous involvement of Desmond in arson, and Desmond's claim to police on the night that he caused the trouble and so the others ought to be released by the police. Finally, counsel noted that accelerants may have been used.

[17] In relation to these submissions I also note from the evidence that Desmond later denied that he committed arson and that in the back of Pamela's car were a mosquito coil and a cut up bottle used as a funnel for petrol.

[18] In my view, the evidence is not sufficient to remove any reasonable doubts that Lionel Tahega cause wilful mischief to the Matakapea residence. The first ESR report found no hydrocarbon fuels present in the sample from the house. This result is of course inconclusive because of the faulty vessel chosen to hold the sample. Significantly, the ESR report in relation to the rock found in the remains of the TV concluded that there was a very small chance the rock could have caused the fire. Mr Glasson arrived at a similar conclusion, stating it was 'highly unlikely' the rock could have caused the fire. It seems clear from the evidence of Mr Hetutu that the fire was not caused by an electricity fault. Thus, the cause of the fire is unknown. It is possible that someone else caused the fire. There was a significant period of time, between 20 and 30 minutes, when the police were not at the site. In this time someone other than Lionel could have started the fire. In short, taken together, the prosecution has not proved, beyond reasonable doubt, that Lionel Tagega caused wilful mischief to the Matakapea residence. Therefore, this part of the charge is dismissed. However, the part of the charge of wilful mischief pertaining to damage to the TV set stands.

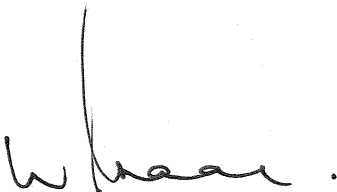
Sentencing

[19] Therefore there are three charges to be sentenced. The first two are the charges of assault against Doreen Matakapea by Lionel Tahega and Desmond Togiakona, to which they have pleaded guilty. The third is the charge of wilful mischief by way of damage to the TV set, to which Lionel Tahega has also pleaded guilty.

[20] I invite the Chief of Police and Counsel for the defendant to file submissions with the Niue High Court within 14 days from the date of this decision in relation to sentencing.

[21] A copy of this direction is to go to all parties, including Counsel for the defendants.

Signed at Wellington on the 1st day of December 2011.

A handwritten signature in black ink, appearing to read 'W W Isaac', with a small dot at the end.

W W Isaac

JUSTICE OF THE HIGH COURT