# R v Kitekei'aho & Tonga

Supreme Court, Nuku'alofa
Webster J
Criminal cases No. 59 – 64, 116 – 118, 137/1990

6, 7, 8, 12, 13, 14, 16 November 1990

*Criminal Law – manslaughter by negligence – duty of care must exist*

*Manslaughter by negligence – duty of care must exist*

*Evidence – fact that evidence against accused is almost entirely from the record of police interview and own evidence to the court does not prevent conviction*

*Evidence – record of interview – fact that not signed by accused does not prevent it being used as evidence*

*Evidence – confession by woman accused – fact that policewoman not present does not of itself render it unfair*

*Evidence – confession – fact that accused was frightened or hoped that confession would lead to lighter sentences does not of itself render confession unfair*

The first defendant was charged with incest, concealment of the birth of her baby, and infanticide; the second defendant was charged with manslaughter by negligence and concealment of birth. The first defendant pleaded guilty, but the second defendant denied the charges which were heard in the Supreme Court without a jury.

**HELD**

Convicting the second defendant on both charges:

1. Although the evidence against the second defendant consisted almost entirely of her interview and confession to the police and her evidence to the court, this could support a conviction;
2. Although the record of interview had not been signed by her, this did not prevent it being given in evidence;
3. Although no policewoman had been present at the interview this did not of itself prevent it being given in evidence;
4. The fact that she had told obvious lies tended to show that she was guilty;
5. The second defendant could be guilty of manslaughter by negligence only if she was under a legal duty to take care of the baby; she was under such a duty because she was one of the principal occupiers of the house in which the baby was born, she had freely chosen to act as midwife to the first defendant, and there was no other adult in the house to protect the baby from being suffocated by the first defendant;

6. The second defendant assisted with the concealment of the birth since she had held the bag in which the dead baby had been put and which she knew was being taken by the father to be buried.

N.B. On 7th June 1991 the Court of Apeal set aside the conviction for concealment of birth but confirmed the conviction for manslaughter. See [1991] Tongan Law Reports.

Counsel for prosecution : Mr K. Whitcombe
Counsel for the second defendant : Mr L. Veikoso

**Judgment**

This case concerns the death soon after her birth in December 1988 of the baby girl of Lasimei Kitekei'aho. The birth and death occurred at the house in Houma, Tongatapu where the accused Fahiva Tonga was staying as mistress of Sione Kitekei'aho, who was the father of both Lasimei and the baby.

Sione pled guilty to incest and concealment of birth and has been sentenced and gave evidence in this case.

Lasimei pled guilty to incest and concealment of birth, and on this indictment to infanticide, and awaits sentence.

At the end of the trial the prosecution decided not to proceed further with Count 2 against Fahiva – of abetment of murder – and I therefore find you Fahiva Tonga not guilty of that count.

The two remaining counts against the accused Fahiva Tonga are

- manslaughter by negligence
- concealment of birth

The evidence against Fahiva (especially on the count of manslaughter) rests almost entirely on the accused's record of interview and confession and her own evidence to this Court.

However this need not prevent her conviction *(May's Criminal Evidence para 8 – 86 (b) (v))* and *Sykes [1913] 8 Cr Appeals R 233.*

Before admitting the Record of Interview and Confession a trial within a trial was held and Counsel for the accused, Mr Veikoso, submitted that these should not be admitted because no woman police officer was present and therefore the accused felt scared and threatened by the police. I found no reason why the Record of Interview and Convession should not be admitted. In his closing submissions Mr Veikoso again submitted that these had not been made freely because the accused was afraid. I do not accept that and the procedure appeared to have been conducted in an exemplary manner apart from the absence of a woman police officer. I draw attention once more to the passage from *R v Rennie [1982] 1 All E.R. 385 (CA) at 388 h* which I quoted in my ruling in the trial within a trial.

Another matter came to light in the accused's evidence, that she had not signed at the end of the Record of Interview, though she had initialled "FT" after each answer and admitted this. I accept that the name Fahiva Tonga at the very end of the Record of Interview was not her signature but part of the text, but I do not

think this makes any difference. The Record of Interview is what it says, merely a record of the interview, and can be good evidence even if it is not signed by the accused at all – if the Court is satisfied that it records what took place. Here the text of the record of interview was admitted by consent after the court's ruling on admissibility. There is no doubt that the record of interview records the answers given by the accused at the time of the interview on 22nd June this year and that she gave them freely. It may well be that she has realised that some of her earlier answers are likely to place her in a difficult position in this Court, but her first answers are more likely to be reliable as her first thoughts before she had time to think up another story.

Mr Veikoso also submitted that the Record of Interview and confession were given in answer to charges of abetment of infancticide and concealment of birth, not manslaughter. As a matter of fact this is not the case. The Crown do not seem to rely on her answers to the charges. The caution before the Record of Interview states –

> "Fahiva Tonga, I wish to ask you some questions regarding your being midwife on Lasimei's delivery of her child and your assistance in it causing Lasimei to murder her infant in December 1988, and your are free to answer or not to answer any of the questions you will be asked but whatever answer you may give will be taken down in writing and will become evidence in a trial ..."

Similarly the caution on the confession uses similar words not connected to any specific charges. There was no prejudice to the accused because she knew very well exactly what she was being asked about.

If the matters listed in section 22 of the Evidence Act are no objection to the admissibility of the Record of Interview and Confession, then this cannot have been. Even if this was deception -- which I have much doubt – it would be no objection under section 22 (b)

But in any event absetment of infanticide is abetment of murder for anyone other than the baby's mother, so the two amount to the same.

By Section 42 A(2) of the Criminal Offences Act, on an indictment for murder a person found not guilty may be found guilty alternatively of manslaughter, so again there could be no prejudice to the accused. Indeed the words of the original charge on 22nd June are

> "you helped the action or allow an action to be made thus enabling Lasimei Kitekei'aho to kill her baby recently born".

So there was no unfairness to Fahiva Tonga in that.

So taking into account all the circumstances in which they were made there is no reason to stop the Court relying on the Record of Interview and Confession and giving them full weight.

In certain respects there are conflicts between the Record of Interview and Confession and Fahiva Tonga's oral evidence. Where they differ I accept the Record of Interview and Confession as being the correct version of events for the reasons given above. Quite apart from these discrepancies, there are other matters in the evidence of the accused which indicate that she was not telling the complete truth –

- she was in the next room but said she heard no sounds of labour and was surprised to hear a baby crying;
- she claimed she had never had any afterbirth in the births of 5 children and initially claimed ignorance about there being after–birth at all in any case;
- she denied knowing that Lasimei was pregnant although living in the same house, but eventually admitted she thought Lasimei was pregnant.

All these obvious lies tend to show that if she told the truth on these matters it would reveal her guilt.

For all these reasons I am satisfied that the following relevant facts have been proved beyond reasonable doubt:

1. Fahiva Tonga was Sione Kitekei'aho's mistress. Fahiva and Sione and Lasimei all lived together in 1 house at Houma from October 1987 up to this incident in December 1988 (and afterwards until this year)
2. Lasimei became pregnant to Sione. This was not disputed. Fahiva denied she knew about this before the birth but did admit she thought Lasimei was pregnant beforehand. I believe Fahiva was fully aware that Lasimei was pregnant, although she may not have known for sure who the father was.
3. Fahiva acted as midwife and about 6 pm delivered Lasimei's baby – a girl – who was born alive. The delivery took place in the bedroon of the house. Sione was in the bush and there were no other adults in the house.
4. Fahiva placed the baby beside Lasimei. The baby was still covered with blood and with the umbilical cord still attached
5. At that point Fahiva's own baby was crying and she went out of the room to attend to it. She was out for about 10 minutes.
6. When Fahiva returned she went either inside the bedroom or stood at the door where she could see Lasimei. Fahiva saw Lasimei holding the baby's nose and mouth with her hand (with the nose between thumb and forefinger). Fahiva watched Lasimei doing this for about 3 minutes. In the Record of Interview Fahiva's answer makes it clear that when she first saw Lasimei holding the baby's nose the baby was still crying.
7. Lasimei held the baby's nose until the baby stopped crying. Lasimei then said that the baby had stopped crying and kept quite and was dead. Fahiva did not intervene at any stage while the baby's nose was being held.
8. Lasimei then wrapped the dead baby in a coat and put the body in a handbag which Fahiva held. The handbag was left in the bedroom.
9. When Sione returned to the house about 8 pm Fahiva told him Lasimei had given birth. Fahiva and Sione differed as to what else Sione was told, but it is not relevant. Fahiva said she told him Lasimei had killed the baby but Sione said he was told the baby had been born dead.
10. Sione said "Let me go and bury it" and took the bag and went and buried it that night in the tax allotment he was using.
11. The whole matter remained undetected until Lasimei had another baby by Sione this year and a midwife was called.

12. On 20th April 1990 Sione led the Police to the site of burial and there in a hole 2 feet deep the same handbag was recovered.
13. In the handbag were bones which Dr Sengili Moala identified as those of a baby aged about 38 weeks from the time of conception (i.e. not a premature baby).

Sione Kitekei'aho should be taken to be an accomplice under section 126 of the Evidence Act, but the material parts of his evidence were corroborated by Fahiva herself or by Lance-Corporal Taufa and Dr. Moala.

On the count of ***manslaughter***, there is no doubt that Fahiva stood and watched Lasimei suffocate and thus kill the baby and that Fahiva did nothing to stop this. As well as the Record of Interview and Confession. Fahiva admitted this in cross-examination.

Mr Veikoso in defence submitted that the cause of death had not been proved but on Fahiva's own evidence the cause was Lasimei stifling or sufforcating the baby in her sight and Lasimei then said the baby was dead.

But Fahiva cannot be guilty of manslaughter by negligence unless she was under a legal duty of care to the baby. Fahiva was very clearly under a moral duty to stop Lasimei suffocating the baby and her failure to do so was callous in the extreme, but that is not the question before this Court.

I believe that Fahiva had taken on herself, or become under a legal duty of care to the baby in these particular circumstances for the following reasons:

(a) Lasimei was staying in the same house as Fahiva, who was one of the principal occupiers of the house. The baby was a blood relative of Sione, and Lasimei was also a blood relative of Sione. Fahiva had been Sione's mistress and living with him for over 10 years at that time. Even if Sione had not been the father of Lasimei's baby, there would still have been a duty of care arising in this situation.

(b) Fahiva acted as midwife at the delivery and it must be inferred that she chose to act. It is irrelevant that she was not qualified. It is common knowledge that the mother is not always capable of looking after the baby immediately after birth due to the after – effects of the birth – for the same reson that murder by the mother of a newly born baby is reduced to infanticide. So Fahiva's duty as de facto midwife extended to ensuring that the mother did not harm the baby. The duty also extended to completing, the things needing to be done once the baby had been born – washing it, wrapping it up and cutting the umbilical cord. These had not yet been done due to the interruption of Fahiva's baby crying and so Fahiva had not finished her duty of delivery.

(c) There was no other adult in the house to intervene. The baby was defenceless. In these circumstances any adult present had a duty to stop the baby being killed deliberately or its life being threatened.

Defence Counsel referred to section 86 (2) of the Criminal Offences Act and the illustration there regarding ommissions to perform a legal duty. Section 86 is not exhaustive and I am not sure that section 86 (2) applies in these circumstances, but I believe Fahiva had undertaken the charge of the baby and was therefore under a legal duty to supply the baby with the necessaries of health and life. As well as what is stated in section 86 (3) these obviously include as necessaries, air for

the baby to breath, and shelter from, or prevention of, deliberate suffocation. Again the illustration of section 86 (2) is not – and was never meant to be – exhaustive.

Defence Counsel submitted that only Lasimei and Lasimei's parents were under a legal duty to the baby, especially in Tongan Custom. The parents may well be under a legal duty, but that does not stop others taking on themselves other duties to a baby or having the duties imposed by law in certain circumstances.

Authority for these views about the duty of care in such circumstances *R -v- Stone and Dobinson [1977] 2 All E.R. 341 (CA) at 345 j - 346 b*, referred to in *Archbold 20 – 50*.

As Fahiva was under a duty of care it is clear she was grossly negligent in seeing the child being suffocated and not doing anything to stop it or attempt to stop it. So I shall find it proved beyond reasonable doubt that Fahiva is guilty of manslaughter by negligence of Lasimei's baby.

On the count of concealment of birth, the offence is endeavouring to conceal a birth by any secret disposition of the dead body. It does not matter whether the baby was born dead or alive. Fahiva is charged with assisting the concealment and if she assisted she is guilty of the offence.

Fahiva held the bag while Lasimei put the baby in it. Fahiva denied saying this when the Record of Interview and Confession were taken, but would not say that Sgt Tu'ipulotu made up her confession on that. Fahiva then saw or knew Sione take the bag and bury it. She knew he had done so because he told her he found the bag very heavy as he was carrying it – no doubt metaphorically weighed down by the family's guilt of these terrible deeds.

It must have been very clear to her (and anyone) that this was for the purpose of concealing the birth, From then on Fahiva kept quiet until this year.

Several defences were raised: that the bag was not produced in Court and that the doctor did not see all the bones of the baby. But there was no doubt from Sione's evidence and the Police evidence that it was the same bag and the bones were those of the same baby. There is no other sensible interpretation of the evidence before the court and there is no reasonable doubt that these were the remains of this baby.

The defence was also raised that Sione threatened Fahiva not to tell or he would cut her brains out, but such threats are not relevant to this charge because –

(a) regardless of any threats, Fahiva had her own reasons for keeping quiet – as is self evident from the Court's finding on the previous count.

(b) Fahiva admitted in her Record of Interview and evidence that Sione told her if she spoke she would be hanged by court or imprisoned for life. This was a very real possibility and Sione was correct in this, so it was not just a threat.

(c) Fahiva's act of assisting in the secret disposition of the body – holding the bag for Lasimei – was over and done before Sione was there to make any threats.

A further defence was the Fahiva did not conceal the birth because she told Sione about it, but concealment means concealment in a wider sense. It is clear that her action helped Sione and Lasimei to conceal the birth from the outside world.

So there is no reasonable doubt that Fahiva is guilty of concealment of the birth of the baby.

Fahiva Tonga, I therefore find you guilty of Counts 3 and 4 of the Indictment and I convict you on these counts.

## TRANSCRIPT OF RULING BY MR JUSTICE WEBSTER ON ADMISSIBILITY OF RECORD OF INTERVIEW, CHARGES AND ANSWERS AND CONFESSIONS OF FAHIVA TONGA.

Counsel for the Accused submitted that the Record of Interview, Answers to Charges and Confession should not be admitted because no woman police officer was present and the Accused was scared because the Police Sergeant had angry face and that this was a threat which made the Accused sign. He therefore submitted that the statements were inadmissible under section 21 of the Evidence Act.

However Counsel was unable to explain to the Court how, in the words of section 21, that made the Accused think that by making the statements she would gain and advantage or avoid an evil.

For a start I am not at all sure I accept the Accused's evidence that she was scared because no woman police officer was present or that the Sgt had an angry face (on which the Sgt was not questioned). The piece of her evidence seemed unconvincing and more like an afterthought. There was no evidence from the Accused of any threat or force or intimidation or of any inducement. The Sgt asked questions and got answers from her. I agree it would be better if a woman police officer was present whenever a woman was interviewed, in the interests of fairness, and if only to avoid unmeritorious challenges such as this one.

But the absence of a woman police officer does not of itself render a statement inadmissible. There is nothing in the Evidence Act about that. It may – and I can think of a case where it was one of a number of factors which made the court reject a statement, but it has to be taken into account in all the circumstances of what happened – and it was clear in this case that what happened was that the Accused was legitimately asked questions and gave answers without pressure. I accept that the Accused was scared – who would not be if questioned by the Police on serious charges like these. But that had nothing to do with Police pressure or threats.

*In R v Rennie [1982] 1 All E.R. 385 (CA) at 388 h* it was said –

"Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can

be few prisioners who are being firmly but fairly questioned in a police station to w hom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession."

I believe the Accused was questioned firmly and fairly in the Police Station. Finally I accept in the very special circumstances of this case that the Accused was not in custody at this time and so section 22 of the Evidence Act does not apply.

In conclusion I find no evidence of inducement, threat or promise relating to the charges and so there is no reason for these statements to be inadmissible under section 21 and I shall allow them.