

HOMICIDE IN TOKELAU: CRIMINAL PROCEDURE

*Danica McGovern**

The High Court of New Zealand is the High Court for the New Zealand external territory of Tokelau. That Court sat first on an interlocutory matter for a civil case that may be heard in 2013. Recent events have raised the possibility that the Court might also sit in 2013 for its first criminal case. This practice note describes Tokelau's criminal procedure for serious offending.

La High Court of New Zealand a compétence pour connaître des litiges qui sont du ressort de Tokelau, archipel de trois atolls polynésiens du Pacifique, placés sous souveraineté néo-zélandaise.

La High Court of New Zealand a siégé en cette capacité pour la première fois en 2012 dans le cadre d'une demande de mesures provisoires prises en référé. Des événements récents laissent aussi entrevoir la forte probabilité que la High Court of New Zealand ait également à siéger dans le courant de 2013 pour statuer dans une première affaire pénale.

Cet article rappelle les principes qui gouvernent la procédure pénale à Tokelau pour les délits et les crimes.

I INTRODUCTION

2013 is a year of firsts for Tokelau. The High Court of New Zealand has been the superior court of Tokelau since 1986,¹ but no case has yet been heard by it in the exercise of that jurisdiction. This year, the Tokelau High Court's first civil and first criminal cases are both in prospect.² Tokelau and New Zealand officials alike are having to familiarise themselves with the law and procedure to be followed.

* BA, LL.M, Doctoral candidate (VUW), Law researcher.

¹ Tokelau Amendment Act 1986, s 3.

² For a discussion of procedure relevant to the civil case, see Tony Angelo and Ashleigh Allan "High Court of New Zealand and Tokelau – a recent case" (2012) 43 VUWLR.

The event giving rise to the possible criminal case was a drinking session involving four men which ended in the death of one of them, apparently the result of a fall from a balcony at the home of one of the men. While the level of intoxication of those involved makes the facts unclear, there is evidence of an altercation between the host of the drinking party and the deceased. Fairfax News reported that the deceased suffered serious physical injury, including a black eye and a hole near his temple.³

This note outlines the criminal law and the procedure that is to be followed in cases where a death has occurred in Tokelau in circumstances such as those described in the news report, and which could give rise to a criminal prosecution for homicide or a lesser related offence.

II TOKELAU'S CRIMINAL LAW

Tokelau has had over a century of contact with foreign legal ideas. Legislation to deal with matters of a criminal nature was first enacted for Tokelau in 1912. It was based on British ideas about criminal law and punishment, but reflected some traditional offences and realities of Tokelau life, such as a provision allowing fines to be paid in coconuts.⁴ Subsequent enactments were not adapted to suit Tokelau's circumstances, and socially unacceptable behaviour tended instead to be dealt with in accordance with tradition.⁵

After an extensive review of its criminal law between 1984 and 1996,⁶ the General Fono promulgated the Crimes, Procedure, and Evidence Rules 2003. These Rules contain all the criminal offences that the elders believed to be important for Tokelau, and the rules of procedure and evidence they considered necessary for the operation of Tokelau courts.⁷ The High Court was given

3 Michael Field "Death may be first Tokelau murder" (13 January 2013) <<http://www.stuff.co.nz/world/south-pacific/8171854/Death-may-be-first-Tokelau-murder>>.

4 Native Laws of the Union Group 1912. These were promulgated by the High Commissioner for the Western Pacific.

5 Native Laws Ordinance 1917, which was promulgated in English, Samoan and Gilbertese for the Gilbert and Ellice Islands Colony; Tokelau Crimes Regulations 1975, which were a direct transplantation to Tokelau of the Niue Act 1966, Parts 5, 6 and 7.

6 For a comment on the reform process, see A H Angelo "Making the Criminal Law Your Own: The Tokelau Endeavour" in Kayleen Hazlehurst (ed) *Popular Justice and Community Regeneration* (Praeger Publishers, Westport, Connecticut, 1995) 22 at 31.

Some current information on the operation of the courts of Tokelau is provided in the *Tokelau Judicial Annual Report July 2011–June 2012* (Government of Tokelau, Apia, 2012).

7 Lomia Gaulofa, Vaioleti Lui and Elisabeth Field (eds) *Tokelau Crimes, Procedure and Evidence: A Proposal* (Victoria University of Wellington, Wellington, 1998) at 10.

exclusive jurisdiction for three offences (murder, manslaughter, and treason) because these were unknown in Tokelau and the elders decided they were best left to an outsider to address. Other offences are usually dealt with by a lay Commissioner, with input from the Taupulega (village elders),⁸ although for some of the more serious offences the Commissioner has the option to decline jurisdiction and refer the matter to the High Court.⁹

III CRIMINAL PROCEDURE

The rest of this note steps through the process that should be followed, from beginning to end, depending on the charges laid.

A Investigation and Decision to Prosecute

The Tokelau Police are responsible for investigating and prosecuting criminal offences.¹⁰ Prosecutions are conducted in the name of the Government of Tokelau or of a village of Tokelau.¹¹ Unlike in New Zealand, there are no guidelines for the exercise of prosecutorial discretion to assist the Tokelau police with their decision.

The offences with which a person may be charged when a death has occurred are murder, manslaughter, bodily harm, assault, and failure to assist. Tokelau's failure to assist provision is broader than the provision that exists in New Zealand law; this reflects the communal nature of Tokelau life.¹²

B Commencing Proceedings

Tokelau has a two year limitation period for any offence other than murder. However, if the alleged offence was against a person under a disability, the limitation period commences on the date when the person is no longer under a disability.¹³

A criminal prosecution begins with the issue of a notice to appear, but there is a provision which allows the prosecution to proceed without further formality if the accused is sufficiently informed of the charge and of the consequence of failing to

8 Crimes, Procedure and Evidence Rules 2003, rule 83.

9 Ibid, rule 136, Schedule 2.

10 Police Rules 1989, rule 5. There is capacity under these rules for the Administrator of Tokelau to appoint officers of the New Zealand police force as Tokelau police officers.

11 Crimes, Procedure and Evidence Rules 2003, rule 117. A village is a corporate entity under the Tokelau Village Incorporation Rules, rule 3.

12 Crimes, Procedure and Evidence Rules 2003, rules 4, 6, 14, 15 and 17 respectively.

13 Ibid, rule 104.

appear, and agrees to appear before the court.¹⁴ A warrant may be issued if the accused fails to appear.¹⁵ There are provisions for arrest, bail and remand in custody, but Tokelau's small size and geographical isolation typically makes their use unnecessary.¹⁶

C The Commissioner's Court

The jurisdiction of Commissioners is set out in the Tokelau Amendment Act 1986. Section 7(1) provides that in criminal cases, Commissioners have jurisdiction over any offence punishable by fine only or by imprisonment for not more than one year. However, s 7(2) limits the penalties a Commissioner may impose to the following:

- (a) a term of imprisonment not exceeding 3 months;
- (b) a fine not exceeding \$150;
- (c) the performance of community work;
- (d) police supervision;
- (e) a public reprimand;
- (f) the payment of compensation of up to \$1000 for loss of or damage to property; and
- (g) the restitution of any property to the victim of the offence.

A charge of assault or failure to assist would be heard by the Commissioner. A charge of bodily harm would be heard by the Commissioner unless the Commissioner declines jurisdiction (in which case the High Court would have jurisdiction).¹⁷

Proceedings in the Commissioner's Court are inquisitorial, and only the Commissioner may put questions to the accused. The Commissioner may consult with the Taupulega, but the decision must be made by the Commissioner alone.¹⁸ Basic rules of evidence are set out in rules 163–174 of the Crimes, Procedure and Evidence Rules. The accused is entitled to representation by a lawyer.¹⁹

14 *Ibid*, rule 100; Form 2.

15 *Ibid*, rule 101; Form 4.

16 *Ibid*, rules 121, 122 and 123.

17 *Ibid*, rule 112.

18 *Ibid*, rule 132. For the lesser offences, appeal is to a Committee of the elders.

19 Constitution of Tokelau, Rule 16; ICCPR Art 14. The right to appear in Tokelau courts is governed by rule 95 of the Crimes, Procedure and Evidence Rules. As at February 2013, three lawyers have right of audience.

D The High Court

The Tokelau Amendment Act 1986 gives the High Court of New Zealand "all jurisdiction which may be necessary to administer the law of Tokelau in the same manner in all respects as if that jurisdiction had been conferred upon that Court as a separate Court of justice in and for Tokelau."²⁰

If the accused was charged with murder or manslaughter, or with bodily harm and the Commissioner declined jurisdiction, the case would come within the High Court's jurisdiction. A preliminary hearing (in the Commissioner's Court) must take place first, and depending on the outcome of that hearing, the case may proceed to the High Court for a defended hearing or the entry of a guilty plea.

1 Preliminary hearing

The first stage is a preliminary hearing in the Commissioner's Court.²¹ The process is inquisitorial, and the accused must be given the opportunity to be heard, and what is said must be recorded in full. The accused must have the opportunity to read and sign the record, which becomes part of the record if the case is committed for trial.²² The Commissioner may, at the end of the preliminary hearing, discharge the accused, commit the accused for trial, or accept a settlement of the case.²³

2 High Court Trial

Tokelau High Court trials are by judge alone.²⁴ If the case was defended, a New Zealand High Court judge would need to travel to Tokelau for the trial. The Tokelau Amendment Act states that the High Court may sit in Tokelau, New Zealand, or any other appropriate place as the Chief Justice directs,²⁵ and the Crimes, Procedure and Evidence Rules include provision for a person to be transferred to New Zealand for trial and imprisonment.²⁶ However, there is no authority in New Zealand law for a person to be held in these circumstances, leaving the government vulnerable to an action for habeas corpus if this provision was used.

²⁰ Section 3(1).

²¹ Crimes, Procedure and Evidence Rules, rule 129.

²² *Ibid*, rule 132.

²³ *Ibid*, 129 and 130.

²⁴ *Ibid*, rule 135.

²⁵ Section 3(3).

²⁶ Crimes, Procedure and Evidence Rules, rule 141.

If a trial was held, Tokelau's rules of evidence would apply. The principles governing the rules are the same as those governing the New Zealand law of evidence, but the rules themselves are a greatly pared down version.²⁷

If a guilty plea was entered and the defendant agreed, there is nothing in the law to preclude the case being dealt with on the papers, as long as the plea and the sentencing decision are made public.

E Reconciliation and Settlement

If the court which hears the case is satisfied that the accused committed the offence, and the court is willing to accept a settlement between the accused and the victim, it may promote reconciliation as an alternative to conviction and sentence. Rule 130 of the Crimes, Procedure and Evidence Rules encourages reconciliation in appropriate cases, and provides specifically:

- (1) In criminal matters the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings taken for an offence of a private or personal character, on terms for the payment of compensation or other terms approved by the court.
- (2) Where settlement of a criminal matter is approved by the court under paragraph (1), the court shall order the proceedings to be stayed.

In many cases, the parties are reconciled and settlement is reached. Whether an offence related to a death could be considered private or personal in nature is uncertain. Social attitudes to various types of offending, and whether or not they can be considered to be private or public, will affect the judge's application of this rule.

F Sentencing

An accused who pleads guilty or is convicted would be sentenced by the court which dealt with the case.

Tokelau law contains no guidance on sentences to be imposed, beyond the limits on the Commissioner's jurisdiction in the Tokelau Amendment Act 1986 and the maximum penalties set out in the Crimes, Procedure and Evidence Rules.

The maximum penalty for murder is a term of imprisonment of not less than 10 years nor more than 20 years, and for manslaughter imprisonment for a term not exceeding 6 years. For bodily harm dealt with by the High Court, the maximum

²⁷ See *Ibid*, rules 163–174.

penalty is a fine of not more than 20 penalty units²⁸ or not more than 1 year imprisonment. A period of not more than 12 months community service could be substituted. If a sentence of imprisonment was imposed, Tokelau would need to build a facility or designate an existing building as a prison to house the offender for the duration of the sentence.²⁹

For bodily harm dealt with by the Commissioner, assault, or failure to assist, the maximum penalty that can be imposed is a fine of not more than 3 penalty units or not more than 3 months imprisonment. A period of not more than 3 months community service can be substituted. This is usually done as there are no prisons in Tokelau. A Commissioner may also reprimand the offender, order community work, or police supervision.³⁰

Either court may impose a suspended sentence. Under this option, the court would order the offender to come up for sentence if called upon, within any period specified by the court but not exceeding two years from the date of conviction. The court may impose whatever conditions upon the offender it thinks fit, including supervision.³¹

Tokelau law does not specify factors which the sentencing judge must take into account when determining the sentence, or require that the judge be provided with information about the offender's circumstances or the impact of the offending on the victim. It is likely, following New Zealand practice, that a High Court judge would find it useful to be provided with a pre-sentence report and a victim impact statement (both of which could be provided orally if there is a sentencing hearing). The sentencing judge might also find it helpful to hear from the Taupulega about any steps that have been taken to resolve the matter in accordance with custom. Nothing in the law precludes this information from being provided or the judge from taking it into account when determining the sentence.

IV CONCLUSION

The circumstances giving rise to the potential criminal case are unfortunate, and at a practical level Tokelau faces many challenges in responding to any offences that may have been committed. However, the law does set out a clear process to be

28 A penalty unit is NZD\$50 (Interpretation Rules 2003, rule 13).

29 Imprisonment in New Zealand would only be an option if the New Zealand parliament legislated for it (see above discussion of the High Court's jurisdiction).

30 Tokelau Amendment Act 1986, s 7(2).

31 Crimes, Procedure and Evidence Rules, rule 138.

followed, which in the High Court jurisdiction may be supplemented, as appropriate, with New Zealand practice.