

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

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Solicitor General

CR 32 of 2015

21/07/16

BETWEEN: R E X - Prosecution

AND: SIOKIVAHA TIMANI - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Ms S Kausea for the Crown
Mr Pouono for the accused

VERDICT AND REASONS

[1] The accused was charged with one count of causing grievous bodily harm contrary to sections 106 (1) and (2) (a) of the Criminal Offences Act.

[2] The particulars were;

On or about the 7th February 2015 at Navutoka he did cause grievous harm to Tesimoni Funaki when he willfully and without lawful excuse stabbed him with a knife causing injuries to the back and right lung.

[3] In order to succeed in this conviction, the Crown has to prove the following essential ingredients namely;

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- a. That the accused beyond any reasonable doubt willfully and without lawful justification stabbed the complainant in this case it is alleged with a knife.
- b. Secondly that this caused the complainant grievous bodily harm meaning, in this case, harm that endangered life.

[4] The evidence is in a very narrow compass. The complainant Tesimoni Funaki gave evidence that on or about the 7th February 2015, he was drinking with friends on the foreshore near a bench in Navutoka. He had, he admitted, a lot to drink and was drunk but could still had his wits about him. They had been drinking from bottles of spirits which had been watered down.

[5] Later that evening, the accused joined them. He took what seemed to be the remaining bottle away with him without permission. That had been retrieved but there were at least angry words exchanged between he and one of the members of the complainant's group who had taken the bottle from him before the accused walked to his home nearby. Later, he came back to the area from his home armed with a large knife. He was seen by another witness unrelated to this group Sepiuta Mu'a who was also in the beach area. She tried to get the knife from him under a pretense because she was concerned about him. He did not give it to her and moved back to the area where Tesimoni Funaki was.

[6] According to Funaki, he challenged him to a fight. The accused disputed this and said it was Funaki who challenged him. Funaki said he was angry with him and that he agreed to fight. The men fought adjacent on the road. It seems a few punches were thrown by each when the accused on his own admission pulled the knife from where he had placed it in his back pocket and, as

the complainant bent forward, he stabbed him in the upper and mid area of the back a few inches below the neck with his right hand. The complainant thought he had been punched. According to the complainant the fighting lasted about 20-30 seconds. He said did not throw any punches after what he thought had been a punch to his back. He started to have difficulty with breathing. His friends had intervened and stopped the men fighting. One of the men had the sense to arrange for the complainant to be taken quickly to hospital. There, he was able to be operated on and drips placed into his body. Blood and air that had entered through a perforated lung was able to be extracted and the operation was successful.

[7] Dr Vea from the hospital gave evidence of the steps that had been taken by a surgeon who had performed the operation. He said that without the operation the complainant could have died within one to two hours. The force used in his opinion to penetrate into the lungs deep through skin and muscle would be significant. Looking at the knife that had been produced in evidence, he considered that the length of the penetration to puncture the lung would have meant the blade would have penetrated to the area where in the photographs exhibited the blade area appears to be taped. He said the complainant had been in hospital about 12 days and made a full recovery.

[8] Sepiuta Mu'a gave evidence also of being in the area and seeing the accused with a bottle of alcohol which one of the complainant's group a man, by the name of Semi, took back from him. The accused and Semi swore at each other. Later she said the accused returned to his house nearby and came back with a knife and walked towards the area where the men were drinking. He said, according to her when asked about the knife, that it was to get some raw fish. He stood on the road and she said he was challenged by the complainant to a fight. The

complainant advanced forward. She said she saw the accused throw some punches. The complainant ducked towards the accused and their bodies connected. She intervened with others. She did not know the complainant had been stabbed until later but she saw the accused only with the handle and she found the blade nearby. She later gave these to the police having taken them first it seems with the accused to his home.

- [9] The accused gave evidence. He said he had been drinking a lot earlier in the day, spirits with friends. He admitted joining the complainant's group and taking a bottle of liquor which one of the complainants' group, Semi, came and took it back. He said he went and got a knife from his home because he was going to get some food from his uncle. He admitted joining in a fight with the complainant. Although he initially maintained he had not intended to hit the complainant with the knife that was in his back pocket, he eventually admitted this in questioning by the Crown prosecutor. He said he did this because he wanted to stop him and force him back. At that stage, the accused had his head bowed and he held him by his left arm and brought the knife out of his pocket and stabbed him with his right arm. He admitted he was left with the handle. The knife had broken during the stabbing and he had thrown the blade to the ground. He said the blade produced in evidence was not the same. It was shorter and not as wide. He denied he had the knife with him to deliberately challenge the men.

SUBMISSIONS

- [10] Mr Pouono, in written submissions, appeared to submit that the Crown had to prove not only an intention by the accused to do an act but also an intention to do an act that was intended also to cause grievous bodily harm. That is not, however, the case.

All that the Crown has to prove is that the accused willfully did an act which caused grievous harm.

[11] Further, he submitted that self-defence applied. He submitted that I should accept that the accused honestly and instinctively used force that he thought was necessary to harm the complainant because he felt he would be overwhelmed by the complainant.

[12] The Crown, Ms Kausea, submitted this could not be a case of self-defence. Ms Kausea submitted that the complainant was a much smaller man than the accused and had been engaged in what he thought was a one on one punch up. Both men at the time of the stabbing were upright. Neither had got the better of each other.

[13] She submitted that the accused could not have honestly believed that the force was necessary given the circumstances leading up to the fight. During the fight she said the accused was able to hold the complainant's head restraining and grabbing his hair before he used the knife by stabbing him on the back. He had no need to stab the accused and self-defence should not succeed.

FINDINGS.

[14] I find that the complainant and the accused and probably others associated with them had all been drinking and were probably drunk on the evening in question. However, all I find were able to act quite purposefully and I do not find that alcohol, whilst it may have played a part in fuelling the anger of the complainant and the accused, that evening, it did not affect the intent or actions of the accused that night. I have considered this in relation to the issue of whether the accused's act of stabbing was

willful and beyond any reasonable doubt I find that it was, drunk though the accused may have been. The accused admitted in evidence that he intended the stabbing and from his actions I infer beyond doubt he must have carried out the stabbing willfully. In short, when the accused admitted that he withdrew his knife from his rear pocket and used it to stab the complainant in the back whilst his head was forward, that this was an intentional or willful act. Both men up to that point had freely engaged in what was a short fight, with both men throwing punches with seemingly little harm to either prior to the stabbing. The complainant, who is a well-built man, is considerably smaller in stature than the accused who is both a well built and taller man. At the material time, when the knife was introduced both men were upright and there was no suggestion that either were getting the better of the other, as the Crown Prosecutor pointed out.

[15] I have had cited to me passages from Halsbury 4th ed, Reissue vol (1) at par 456, *Palmer v The Queen* [1971] AC 814, at 832 and considered in *Azuelo v R* (CA) 2009 TLR 149, which I have read.

[16] I have considered the evidence on this aspect of self -defence. First, I reject the accused's explanation that he took the knife from his property to take to his uncle's that evening for food. By that time, the accused had had taken away from him a bottle of alcohol which he had apparently stolen from the complainant and his group, and there had been an angry exchange of words. I do not see why he should bother to take a knife to his uncle's home and not use one from there if food was his object. I consider he picked up a knife because, fuelled with alcohol and angry at being deprived of the bottle he had taken, he was anticipating there might be more violence that evening and wanted to ensure

he was armed. The knife, which the accused said was not the blade of the knife he used was plainly well able to inflict the very serious and life threatening wound that, was inflicted by the accused. I do not find credible either his assertion that the blade produced was a different blade, smaller in size and of less width. The blade plainly, in my view, that was used in the stabbing was picked up from the scene by the witness Sepiuta Mu'a who was nearby the fighting. She said that she picked it up at the scene of the fighting and had given to the police. The knife broke during the stabbing as the accused admitted and the accused had retained the handle. I consider the accused deliberately told a lie in his evidence because he well knew that the knife he used was capable of causing serious injury and he wished to minimize his responsibility. I consider that the accused that evening was spoiling for a fight. Had he not been, I see no reason why he would have gone back to the area where he knew the men were, aware that there was already demonstrated bad blood between them.

[17] I do not accept beyond any reasonable doubt that the accused told the truth when he said in evidence he used the knife in self-defence; that is in the honest belief that it was necessary to stop and force the complainant back. At that point, there was nothing to suggest that the complainant had got the better of the accused who was a bigger man, or indeed that the accused could not have disengaged easily from the fight before resorting to what was a strike with significant and potentially lethal force. I do not consider beyond a reasonable doubt either, that this was a situation where the accused, being attacked, in a moment of unexpected anguish, had done what he honestly and instinctively thought was necessary. He could have easily resisted the complainant's forward and head down movement by, if not simply disengaging from him, by pushing him or punching him away. Accordingly, I find that the stabbing was beyond a

reasonable doubt an act that was not carried out in self-defence. It was an unreasonable response and one that I consider beyond reasonable doubt could not have honestly been considered by the accused to have been necessary and or reasonable in the circumstances for his defence.

[18] The wilful act of stabbing beyond any reasonable doubt was life threatening and unlawful and, accordingly, the accused is guilty of the crime of causing grievous bodily harm under section 106 of the Criminal Offences Act.

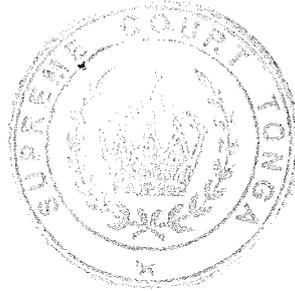
VERDICT - GUILTY

[19] The accused is convicted and remanded in custody for sentence. A probation report is ordered.

[20] Postscript

I have been asked by Mr Pouono to incorporate in my judgment, my concerns that during the hearing it became apparent that a significant part of the record of interview had been lost. The officer in charge explained that when he gave the documents to prosecutions, shortly after the offending, the record of interview was present, in its entirety. The first he knew it was not was shortly before this trial. The first the prosecution knew about this was shortly before this trial when it became apparent to the present prosecutor, Ms Kausea, that pages were missing. Inquiries of Prosecutions by the Officer in charge of this case, have failed to locate the missing pages. The trial file or file of record that I hold also has missing documents. I have asked the Attorney General to approach the Commissioner of Police to ascertain what can be done to promote the better security of important documents such as records of interview. At the very least, copies should be made of them and held in a separate file. That was not the case here and I understand is not current police practice. I record also that, at Mr Pouono's request, I excluded the record of interview, the voluntary statement and the charge sheet on the grounds of fairness. Although in this prosecution, the failure to be able to produce a

complete document did not in my view cause any irreparable injury to either party, in other cases, the damage may be far more telling



A handwritten signature in black ink, appearing to read "C. B. Cato", is written over the right side of the seal.

C. B. Cato
J U D G E

DATED: 8 JULY 2016