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IN THE SUPREME COURT OF TONGA **CR 08 of 2016**

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **SALESI MAKAFILIA** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Counsel: Mr 'Aho for the Crown

Mr Tu'utafaiva for the Defendant

VERDICT AND REASONS

[1] The accused, Salesi Makafilia, was indicted on one count of causing serious bodily harm contrary to section 107(1), (2) (c) and (3). The trial commenced on the 8th August 2016. At the conclusion of the evidence and after submissions which lasted for only about half a day, I adjourned for my verdict to be given on the 10th August, 2016.

[2] The evidence was in a very narrow, confined ambit. The case involved one issue and that was whether the accused should be acquitted of the offence of causing serious bodily harm by virtue of self-defence and/or defence of another.

[3] The complainant gave evidence that on the 21st August, 2015, he was at Sopu outside the residence of the accused when the

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accused appeared with a machete. The complainant admitted he had been fighting with the brother of the accused, Lautaimi, and followed him to the Makafilia home. He admitted that he saw the accused appear with a machete and that he threw a large rock at him. He said also that a friend of his also threw a rock and that both missed. He said he also proceeded to punch the accused about three times. He said other young men were present about 6-7 of them. He said that the accused had struck him twice with a machete to the upper breast area and in the area of his wrist. He admitted to Mr Tu'utafaiva that he had been drinking since about 8pm in the evening. The incident occurred about 2am. Medical evidence was given by the tendering of a report that the complainant had sustained a wound to the left distal forearm, deep through muscle exposing the radius bone which was not broken. There was also a 15 cm transverse laceration on the right anterior chest at the level of the clavicle.

[4] The only other evidence, aside from the machete which was produced in evidence, was a record of interview of the accused taken on the 28th August, 2015. The accused was unrepresented. He said that he was married, a vegetable grower, and that he had been at home drinking on the night in question. He had finished drinking with others at about 1am. He said his younger brother had alerted him to the fact that Lautaimi was being chased by a group of boys. He said he got up and took the machete and ran towards the boys chasing Lautaimi.

[5] He said he ran over. There were a lot of them. They came with rocks. He tried to disperse them using the machete. The boy that he hit with the machete was the second boy. He ran over not knowing that he had a machete. He then beckoned him with the machete and the complainant beckoned to throw rocks at him. The accused said that he struck the complainant with the machete in order for them to disperse because they were

throwing rocks and that is what he thought he'd do, to injure someone and they will disperse.

[6] He admitted hitting him twice. He was not acquainted with him. He said his first blow landed below the right side of his neck and as for the second strike he could not confirm where it landed. He believed he had injured him. They then retreated and went home. He said this occurred on the main road opposite his residence at about 2am. He repeated that he hit the complainant because he tried to disperse them when they chased Lautaimi and he did not wish for Mosese Piutau to be injured when he tried to disperse them. He felt remorseful not happy. He did not wish for anything like this to happen and he said he wished to apologise to Mosese Piutau.

[7] The accused did not give evidence.

[8] Mr Tu'utafaiva advanced self-defence and defence of another. He submitted that a person was able to use reasonable force in self-defence or in the defence of another as he honestly believed was necessary in the circumstances. *Beckford v The Queen* [1988] 1 AC 130 at 144 per Lord Griffiths. In this case, the events he submitted had taken place in the early morning, and there were a number of people in the road. He had learned Lautaimi was being chased. He submitted that he accused had acted in the agony of the moment prima facie raising self-defence and that he was entitled to an acquittal based on self-defence and defence of another unless I was sure that the force used was unreasonable.

[9] Mr Aho submitted there was no need for the accused to do what he did. Lautaimi, he said on the complainant's evidence had returned to the house. He could have simply avoided doing anything. He submitted there was no real threat and that his

actions were disproportionate to the force used by the complainant to use the words of Ford J in R v Makafilia [2005] Tonga LR 448, at 454. He submitted that self-defence should fail and the accused should be convicted.

Findings and Verdict

[10] The accused did not give evidence. In these circumstances, the veracity of the assertions he made in his record of interview could not be tested. However, there does not seem to be very much at all at variance with what the complainant said in his evidence occurred. He had admitted fighting with Lautaimi and chasing him to the area of the Makafilia residence. He suggests Lautaimi went inside but the accused makes no mention of this, in his record of interview. Rather he says he ran towards the area where the boys were chasing Lautaimi. The complainant does confirm that a number of young men were present and the complainant admitted that he and a person by the name of Etuate threw large rocks at the accused when he appeared with a knife. He admitted wanting to proceed fighting with the accused. I have no reason not to believe the accused when he said he used the machete to disperse the group. In other words, I accept that what he did was with an honest belief that it was necessary to disperse this group of aggressive youths in self-defence and in defence of his brother when he confronted them. Where Lautaimi was on the point or stage of confrontation between the accused and the group of youths is unclear.

[11] The real issue is whether what he did namely striking twice with a machete was reasonable in the circumstances as he believed them to be. On this issue, there is some force in Mr Aho's argument that the use of a weapon such as a machete was an unreasonable or disproportionate reaction. A machete is a weapon capable of being used with lethal consequences. Further,

there was not merely one blow inflicted by the accused but two. I am, however, guided in my verdict by the direction in the Privy Council in *Palmer v R* [1971] AC 814 approved by the English Court of Appeal in *R McInes* 55 CR App R 551, cited in Archbold (2016 edition) at para 19-46, as follows

> "If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weight to a nicety the exact measure of his defensive action. If the jury thought in a moment of unexpected anguish a person had done only what he honestly and instinctively thought necessary that would be most potent evidence that only reasonable defensive action had been taken".

[12] As the judgment also emphasises self-defence is rooted in common sense. Whilst initially, the accused took the machete with a view to going outside and protecting his brother from others who were chasing him, the focus of his attention quickly moved to the complainant and his group, who assaulted him. Two of that group, the complainant and a friend reacted by throwing what were described as large rocks. In these circumstances, I cannot assert beyond reasonable doubt that the decision of the accused which I accept was honestly and instinctively formed to use the machete to disperse the group by hitting the complainant was an unreasonable or excessive use of force. It achieved, as Mr Tu'utafaiva, said the result he sought in that the group dispersed. Further, although two blows and lacerations were inflicted, they were not lethal injuries or life threatening. A more determined use of a machete (which I closely examined) in the hands of a person bent on revenge would have had the potential and would have been likely in my view to have inflicted far more serious harm.

[13] In these circumstances, faced with the group, two of whom had been involved in an attack on him, moments earlier and with knowledge that they had been involved with chasing his brother, as Mr Tu'utafaiva submitted in the "agony of the moment" and in

the circumstances he found himself, that is confronted alone by a number of what must have seemed to be angry young rock throwing men, I am unable to say beyond reasonable doubt that his use of the machete to inflict the injuries he did for the purpose of dispersing the group was unreasonable or an excessive, or disproportionate use of force.

[14] Accordingly, I acquit the accused. He is discharged.

C. B. Cato

DATED: 10 AUGUST 2016 **J U D G E**