

18/05/17

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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

PANGAI REGISTRY

CR 46 of 2017

BETWEEN: REX

Prosecutor

AND : FAKATOUOLA LAFO'OU

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Hearing : 9, 10 May 2017.

Date of Ruling: 12 May 2017.

**Counsel : Mr. J Lutui and Mrs L Fakatou for the Crown
Mr. S Tu'utafaiva for the accused.**

RULING

- [1] Mr. Lafo'ou (the accused) is on trial on one count of serious causing bodily harm contrary to section 107(1), (2)(b) and 4(a) of the Criminal Offences Act (Cap 18) in that it is alleged that on 24 December 2016 at Pangai, Ha'apai he wilfully and without lawful justification caused harm to Taufu'i Tohi when he punched him causing injuries to his face and collarbone.
- [2] The trial proceeded on a single and narrow issue. The accused admits the elements of the offence save that he does not accept that he caused Mr. Tohi bodily harm as alleged in the indictment. Specifically the accused says he did not cause the fracture to Mr. Tohi's collarbone.

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The evidence

- [3] By consent an agreed summary of facts was read into evidence and five exhibits were admitted also by consent. The exhibits were the accused's record of interview with the Police on 30 December 2016 (exhibit 1), the statement of the complainant on 24 December 2016 (exhibit 2), a video recording of the incident (exhibit 3), a medical report of the complainant's injuries prepared on 24 December 2016 by Dr. 'Amanaki Puniani (exhibit 4) and a radiology report in respect of an injury to the complainant's collarbone dated 16 January 2017.
- [4] From the summary of facts it is admitted that on 24 December 2016 Mr. Tohi was refereeing a sevens rugby match between Ha'ato'u and Faleloa at Lea-'ae-tohi field as part of the Fekitoa Sevens Tournament. During the match a fight broke out between the players of the two teams. Supporters of the teams ran onto the field. The accused (who was a supporter) was observed to punch Mr. Tohi causing him to fall to the ground (see paragraph 8 of the agreed summary). The accused was also seen to slap Mr. Tohi while he was on the ground before he limped away. The accused was at or near the Faleloa tent after the incident demonstrating how he had punched Mr. Tohi. These events were witnessed in whole or part by a number of the spectators namely Peioneti Ve'a (who also gave evidence in person), Saia Fonua, 'Afa Wellington Funaki, Vikita Makaafi, Loni Taukolo (who also gave evidence in person), Suva Havili and Liku'one Tongotea who from approximately 10 metres took a video on zoom mode which was shown to the Court. Mr. Tohi was unconscious for a short time and removed from the field. He took himself to the Niu'ui Hospital where he was examined by Dr. Puniani. Mr. Tohi suffered lacerations to his face and a broken collarbone (paragraph 16).
- [5] Mr. Tohi lodged a complaint with the Police the same day. His statement to the Police records that there was a fight between the teams. He blew his

whistle on two occasions (presumably to stop the fight) and that Malakai Fekitoa came on the field and was talking to him. That was all he could remember. He did not know who had punched him.

[6] In his statement to the Police the accused acknowledged that there had been a fight during the game and that 'We ran inside to stop the fight..' but he denied any knowledge of punching or slapping Mr. Tohi.

[7] The medical report on Mr. Tohi's injuries records that his right temporal and right temporal mandibular region were swollen, tender and bruised, that he had a small laceration on the lateral edge of his right eyebrow and that he had fractured his left clavicle. The later radiology report also records that Mr. Tohi's left clavicle was fractured.

[8] After Mr. Lutui had read the summary of facts to the Court and produced the agreed exhibits the Court was shown the video of the incident. The video is instructive. It shows the sevens match between the Ha'ato'u and Faleloa teams. The players are in green and red uniforms. Mr. Tohi is the referee. He is easily distinguishable from the players as he is wearing a mainly blue top and white shorts and a cap. Mr. Tohi appears to be moving freely and is seen to raise his left arm to signal a penalty to one team with apparent ease. Shortly after this a fight breaks out between the players and Mr. Tohi blows his whistle to stop the fight but that is ineffectual. He does not otherwise involve himself in the fight or try to restrain the players. He moves away to keep out of the players' way as they fight. It is only a matter of a few seconds before spectators come on to the field. The accused is seen to run onto the field from some distance away. He is running with a limp. He runs directly towards Mr. Tohi. It is 7 or 8 second from when the accused appears on the video and Mr. Tohi is assaulted. At that crucial moment the accused and Mr. Tohi are concealed behind players but Mr. Tohi can be seen to fall to the ground on to his left side. As the players, who are still fighting, move

away and clear the view the accused can be seen standing over Mr. Tohi. He forcefully punches or slaps Mr. Tohi three times. It then appears that he is restrained and a man in a hat comes forward and remonstrates with him. The accused walks off and then comes back to Mr. Tohi but a crowd has gathered around and you cannot see what he is doing.

[9] The prosecution called Mr. Peioneti Vea to give evidence. He is 27 years old and works at the Prison. He was a spectator at the rugby match and saw the fight break out. He described how the accused had limped onto the field and went to Mr. Tohi and punched him on his right side causing him to fall to the ground on his left side. He said that the accused then stepped over the referee and slapped him backhand. He said that the crowd then moved in but that was after the accused had slapped the referee. He said he observed the incident from a distance of about 30 metres and that it was the accused who had punched the referee and that he knew him. He was asked if anyone else was in the immediate vicinity of the referee when he was punched and he said that the linesman was there but he did not know his name. Mr. Vea said that accused went and stood under a tent and demonstrated what he had done to one of the Faleloa players. The video was then shown to Mr. Vea and he pointed out where he had been standing near to a large tree at one end of the field. He said that after Mr. Tohi was taken off the field he lay for about 10 minutes. He could not remember all the people who helped the referee but one of them was a doctor named Tevita. Mr. Vea was not cross-examined.

[10] The next witness was Loni Taukolo. He is 36 years old and is a driver. He too was a spectator at the match and had seen the accused playing the previous day. He said he was sitting under a tree and he did not see the referee punched the first time but did see the accused return and slap the referee while he was on the ground. He said he shouted at the accused that he would tell the Police and he saw the accused later around the area of the

organising committee. He pointed out on the video where he was when he was watching the match, which was in the same general area as Peioneti Ve'a said he had been. Mr. Taukolo was not cross-examined.

[11] The final witness was Dr. Puniani. He is a medical officer at the Niu'ui Hospital with a Bachelor of Medicine and Bachelor of Surgery Degree from the Fiji School of Medicine. He has worked as a doctor for more than three years. He examined Mr. Tohi on 24 December 2016 and he described his injuries and his diagnosis as appeared in the medical report. He said that the injuries to Mr. Tohi's face were consistent with an assault to the right side of his face and that the fracture of his left clavicle could have been caused by a high impact force from a fall or a kick. Under cross examination Dr. Puniani said that the impact to Mr. Tohi's face likely came from the side. The laceration to Mr. Tohi's face was superficial and could have been caused by some sharp object on the ground when Mr. Tohi fell. The swelling and bruising to the right temporal and right mandibular region was likely the result of two separate forces. He said that a high impact force sufficient to break a collar bone could result from someone being pushed. In re-examination Dr. Puniani confirmed that to cause the injury to his left clavicle Mr Tohi would have fallen on his left side and that it was possible that if punched someone could fall with sufficient force to break their collar bone. In answer to questions from me Dr. Puniani said that there were range of factors that might cause a falling person to break their collar bone including their age, weight and the manner in which they fell. He also said that a person with a broken collar bone would suffer pain in their shoulder if they were to lift their arm into the air.

[12] That was the end of the prosecution's evidence. Mr. Lafo'ou did not give evidence and he did not call any witnesses to give evidence on his behalf.

Counsel's submissions

[13] Mr. Tu'utafaiva argued that the Court could not be satisfied beyond a reasonable doubt that the accused and not some other person had caused Mr. Tohi's injuries. He relied on three principal matters. First, he argued that the evidence was that the accused punched Mr. Tohi only once and then slapped him but Dr. Puniani said that there were two forceful blows to Mr. Tohi's face. Mr. Tu'utafaiva submitted that the accused slapping Mr. Tohi would not cause the swelling and bruising to Mr. Tohi's face and so the evidence did not exclude the reasonable possibility that someone else had punched Mr. Tohi. Secondly, Mr. Tu'utafaiva submitted that the video showed that at the time of the assault there were a lot of other people around and one of them might have assaulted Mr. Tohi. Thirdly, relying on Dr. Puniani's evidence again Mr. Tu'utafaiva submitted that if Mr. Tohi had fallen to the ground as a result of a punch that would not generate sufficient force to break his collar bone and he may have been pushed to the ground by some person other than the accused.

[14] Mr. Lutui said that whilst the evidence was that there was one punch Mr. Vea had also said that the accused had slapped Mr. Tohi with the back of his hand which is a hard surface and this was consistent with Mr. Tohi's injuries. He noted that it was not put to the prosecution's witnesses, Mr. Vea or Mr. Taukolo, that there had been another attacker. In response to the argument that Mr. Tohi may have been pushed to the ground Mr. Lutui noted that Dr. Puniani had said that it was possible that if someone was punched and fell to the ground they would fracture their collarbone and the accused had acknowledged in the agreed statement of facts that he had punched Mr. Tohi and caused him to fall to the ground. Mr. Lutui also noted that Mr. Vea had said in his evidence that the only other person in the vicinity of Mr. Tohi when he was punched was a linesman. Mr. Lutui also relied upon the video evidence which he said confirmed Mr. Vea's evidence that Mr. Tohi had fallen

to the ground on his left side. Mr. Lutui argued that the only reasonable conclusion from the evidence was that that the accused was the only attacker and that he had punched Mr. Tohi causing him to fall and to break his collarbone.

[15] In reply Mr. Tu'utafaiva submitted that he did not have to put to the prosecution witnesses that there was another attacker. He also submitted that whilst Dr. Puniani had said a fall might break a collarbone he had also said that relevant factors were the age and weight of the person who fell and in this case Mr. Tohi was just 46 and of healthy build.

Discussion

[16] The prosecution must prove beyond a reasonable doubt that the accused caused the fracture to Mr. Tohi's collarbone. In my view the prosecution easily satisfied its burden.

[17] The accused accepts in the summary of facts that he punched Mr Tohi and caused him to fall to the ground and that he then slapped Mr. Tohi. All of the witnesses (referred to in the summary of facts and Mr. Vea and Mr. Taukolo who gave evidence in person) identified the accused as the person who attacked Mr. Tohi. No one referred to any other person attacking Mr. Tohi. Importantly, neither Mr. Vea nor Mr. Taukolo was cross-examined and so their evidence that the accused was the attacker is entirely unchallenged.

[18] The video is important because it shows that the accused run directly towards Mr. Tohi and although the actual assault (which the accused admits) cannot be seen it is at that point in time that Mr. Tohi falls to the ground. When the players move away the only person standing over Mr. Tohi is the accused who then proceeds to punch or slap him around the head. None of this suggests the possibility of another attacker.

- [19] Mr. Tu'utafaiva argues that Dr. Puniani's evidence that there were two blunt force blows to Mr. Tohi's face raises the possibility of another attacker. I do not agree. The video shows clearly that the accused threw at least three forceful blows at Mr. Tohi's head whilst he was on the ground and as Mr Lutui argues, correctly in my view, Mr. Tohi's injuries could have been caused when the accused slapped Mr. Tohi with force with the hard back of his hand.
- [20] There is nothing in the argument that Mr. Tohi may have been pushed to the ground. There is no evidence of a push and Dr. Puniani said that it is possible that a person falling from a punch could break his collarbone. He also said that a range of factors could cause a falling person to break their collarbone from a fall (and not just the two of age and weight that Mr. Tu'utafaiva focused on in his reply submissions). In any event it is a complete answer to this submission that the accused accepted in the agreed summary of facts that it was his punch that caused Mr. Tohi to fall.
- [21] There is nothing to suggest that there was any other possible cause of Mr. Tohi's broken collarbone other than his fall. Before the assault Mr. Tohi is shown on the video apparently untroubled by any injury. He is then assaulted and falls to the ground. A short time later he goes to the hospital and is examined and found to have a broken collarbone. In the absence of any evidence to suggest otherwise (of which there is none) the only reasonable inference to be drawn is that Mr. Tohi's collarbone was broken in the fall.
- [22] I am satisfied that all elements of the offence have been proven beyond a reasonable doubt. On the one matter not conceded by the defence I accept Mr. Lutui's submission that the only reasonable conclusion is that the accused punched Mr. Tohi to the ground causing Mr. Tohi to fracture his collarbone.

The result

[23] I find the charge against the accused is proved to the required standard. I will hear Counsel on sentence.

Pangai, Ha'apai: 12 May 2017



O.G. Paulsen
LORD CHIEF JUSTICE