



treatment. The account of earlier assaults was given by the accused in his police record of interview and corroborated by his mother who had seen injuries to his head and face. I accept that he had been the victim of earlier assaults, and that one had been quite serious.

- [3] I accept also that the accused, as he admitted in his record of interview, was plainly so angry, after being assaulted that he went home and obtained from the kitchen a sharp knife. The knife was produced in evidence. The blade was narrow and sharp and looked to be about 6-7 inches in length. The accused admitted in his record of interview that he was furious about being beaten, went home and took the family's cooking knife, then walked through a cemetery. He got a rock in one hand and had the knife in the other and then returned to the area where he had been attacked. He said that if he were to find anyone there who had beaten him that he would injure and beat the person with the knife and a rock.
- [4] He went back to the area known as the "fale kapa" around where the incident had happened and met up with other young men. One was Aleki Ve'a who was a witness in the case aged about 15, and another Sione Fakatene who was the younger brother of the deceased, aged about 17. I accept, contrary to the accused's account that he did show the group the knife and said that if he would see anyone he would stab that person with the knife. He also punched Aleki and he asked where the boys were who had attacked him. After this, he left.
- [5] Probably within half an hour, he met up with his mother, Talafaiva. She had learned that he had been injured and found him in the street. The two then proceeded to try to locate someone with a car who could drive the accused to hospital. They were walking in the township around an area known as the

cross roads when the deceased Lipine Fakatene, aged 33, and his young brother Sione came up to them. The evidence revealed that Lipene had been informed that the boys had been threatened by the accused at the "fale kapa". I find that this resulted in Lipine and Sione approaching the accused and his mother and then Lipine punched the accused with sufficient force to cause him to stagger back. I accept that Lipine was a strongly built man and bigger than Sione who also appeared to be robust. The accused by comparison was slightly built, and rather thin. I also accept that the mother Talafaiva intervened, attempted to stand between Lipini and her son and tried to hold Lipini back but was unable to do so.

[6] I accept the evidence of Sione who was present nearby that he fronted up to the accused and was prepared to fight but that he did not become further involved because the accused pulled the knife on him in a stabbing movement or movements which he avoided. I accept that, shortly after this, Lipine punched the accused several times so he quite possibly saw the deceased produce the knife in his confrontation with Sione. During this assault, the accused may have attempted to cover his head and then retaliated by stabbing the deceased with a knife twice with sufficient force to enter deep into the body and sever an artery close to the heart. This caused bleeding and lung and heart complications. The deceased collapsed shortly after and died before reaching hospital.

[7] As one would accept, witnesses to the incident vary in their accounts. The area where the fatal incident took place seems to have been dark, and the incident was over in a short period of time. From about 15 metres, a witness Alecki Vea, who had been assaulted by the accused earlier, saw Lipine punch only once and the accused retaliate with the knife. He did not see Sione punch the accused, but he was nearby and he saw him run after the

accused after the stabbing. He said he saw the accused fall down after the punch and appear to guard his head and face; although he seemed to be rather uncertain about this, suggesting that the accused held up only his right hand and the deceased was stabbed shortly after this. He confirmed that Lipine had been informed by a member of their group the accused had threatened their group with a knife and he had been expecting a fight to occur.

- [8] The accused, in his evidence, did not mention Sione being involved in any punching until after he had stabbed the deceased, and Sione then attacked him. He denied pulling a knife on Sione. Talafaiva said that Sione was also involved fighting her son before the stabbing and that she had not seen the stabbing because she had turned away to see other people approaching. She saw the accused run off as his brother approached.
- [9] As I have said, I prefer the evidence of Sione who, I thought, was a witness who did not appear to embellish his evidence. He was adamant that the accused had first pulled a knife on him as he had fronted him, also after Lipine had first punched him. I accept his evidence that he was prepared to punch the accused but did not because the accused had pulled the knife on him. I accept that, about that time, his brother Lipine became further involved with the accused retaliating by stabbing Lipine twice with the knife causing the fatal wound from which he died. The accused then ran away towards his brother and ran home.
- [10] No question was asked by the interviewing officer as to why the accused had used the knife which he admitted he knew could cause injury or death. The accused, in examination in chief, had responded, in answer to a question put by Mr Tu'utafaiva as to why did you get your knife, that he was trying to find a way he could move away from him. He said the accused kept punching

him whilst he was guarding himself and that he had stabbed him because firstly he was afraid and secondly he was trying to push him away. He said that the next thing he could see the deceased was falling backwards with blood on his shirt and he ran away. He said Sione attacked him and then he fell back when he saw the knife. He ran towards his brother and then home with the knife. I have said I prefer the account given by Sione on that point that he had confronted the accused prior to the stabbing.

[11] Under cross-examination from Mr Aho who had received negative answers to a series of questions suggesting that he had been angry when he used the knife, the accused, whilst asserting that he had been afraid, admitted, in his voluntary statement, that what he did had been wrong and he was a sinner. In re-examination, Mr Tu'utafaiva asked the accused if he knew what he was doing was wrong, why had he done it. The accused answer was "Just because I was afraid and I feel I was going to die to what they have done to me."

[12] Whilst I do not accept the accuracy of the accused's evidence in all respects, I paid close attention to his evidence on this issue which was of central importance to his state of mind at the time of the stabbing. I consider that when giving this answer, he was quite possibly telling the truth. He was a slightly built man and had been the victim of a serious assault earlier in the day. As I have said, the deceased and his brother Sione, both strongly built men, were very close to him when Lipine had hit with a punch that had made him stagger. I accept that Lipine then punched him several times after Sione had commenced to become involved and the accused had produced the knife. Although his mother was present she had been unable to stop the assault. I am satisfied that the stabbing took place during the period when Lipine was further assaulting the accused with several punches and the two brothers were close together. I am

further satisfied that the stabbing took place when the accused was in an obvious state of fear that he could be seriously injured if not killed. I accept that, at that stage, the stabbing was defensive and was not the subject of reprisal or revenge. This would have been otherwise, if contrary to my finding, any threat of serious harm had passed when the accused had stabbed Lipine.

[13] The remaining question is has the Crown discharged the onus of proof it bears of negating self-defence because the use of a knife, in these circumstances, involved excessive force? Mr Tu'utafaiva submitted that it was not and that, in all the circumstances, it was a reasonable and indeed he submitted the only response he could have made. Mr Aho contended it was an over-reaction to the threat the men presented and was consistent with the angry attitude of revenge or retribution he had displayed earlier when he had taken out the knife determined to use it on his attackers. Whilst I acknowledge that the accused was in an angry mood when he went out with the knife and shortly after assaulted Aleki Ve'a at the "fale kapa" area, it is at the time the accused stabbed Lipine that I must judge whether his response to the assault was reasonable defence, or, as the Crown submitted, excessive.

[14] I am greatly assisted by the leading Privy Council case of *Palmer v The Queen* [1971] AC 814, at 831-832 which has been followed in England in *R v McInnes* (1971) 55 Cr App R 551 where Lord Morris when delivering the judgement of the Board observed;

" It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the

necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter....If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of self-defence. But their Lordships consider....that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this they will acquit."

[15] Applying this approach, I am satisfied that the actions of the accused in stabbing the deceased were in self-defence he believing that he was in peril of death or, it follows, at least serious harm. In these circumstances, I accept that in his moment of anguish he did what he honestly and instinctively believed was necessary to avoid the serious peril that confronted him. In those circumstances, applying the approach in Palmer, the use of the knife to stab is potent evidence that only reasonable defensive action had been taken. As I have said, I am unable to reject his evidence that at the time of the stabbing he believed that he was in peril of serious harm. In his state of

mind, I cannot say that the actions of the accused were, beyond any reasonable doubt excessive, being the standard of proof the Crown is required to attain in order that the self-defence is rejected. Accordingly, I accept that the accused at the material time of the stabbing had acted in self-defence and not out of revenge. The accused is accordingly acquitted of manslaughter and discharged from the indictment.

[16] I wish to make it clear that this judgement does not condone the accused's foolish action in taking a knife from his home to use in retribution or to avenge the actions of others who had assaulted him, earlier in the day. Had he used the knife to avenge the actions of others who had assaulted him he, likely, would have been prosecuted had others been harmed. As events developed, he was assaulted by the deceased Lipine who was likely motivated by the accused's actions earlier at the "fale kapa" after he had assaulted Aleki Ve'a in the presence of Sione and had produced the knife stating his intention to use it on those who had attacked him, earlier. There was no evidence, however, that Lipine or Sione had been involved in any earlier assault. What followed as a consequence of the accused's wrongheaded decision to return home, take a knife from the kitchen and return to the scene so as to avenge the earlier assaults, ended ultimately in the tragic death of Lipine Fakatane. Knives and other weapons should not be carried by young men for the purpose of fighting and this case is a demonstration of the very tragic consequences that can occur when they are.

**DATED: 13 JUNE 2017**



*[Handwritten signature]*

**JUDGE**