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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 51, 53 & 54 of 2019

REX -V- WALTER DISNEY FANGATUA (CR51/2019)

REX -V- LISIATE FONUA (CR53/2019)

REX -V- SIOPE MA'U NIUSINI (CR54/2019)

RULING

BEFORE HON. JUSTICE NIU

Counsel: Ms. T. Kafa for the Prosecution
Mr. S. Fili for Walter Fangatua
Mr. Lisiate Fonua representing himself
Mr. A. Puovalu for Siope Niusini

Trial: 28, 29 and 30 October 2019

Submissions: By Sunia Fili filed 14 November 2019
By Atalasa Pouvalu filed 25 November 2019
By Lisiate Fonua filed 29 November 2019
By Tupou Kafa on 9 December 2019

Date of Ruling: 16 December 2019.

rec'd 06/01/20
Sick

The charges

- [1] The three accused have been tried together in a joint trial because the charges against them are in respect of one incident and in respect of the same person. A fourth accused (Semisi Tu'ineau) has already pleaded guilty to one charge of assault in respect of the same person in the same incident.
- [2] Walter Fangatua (Fangatua) is charged with:
- (a) serious causing bodily harm to Lehopoame Tu'utafaiva (complainant), by striking him repeatedly with a hoe blade, and alternatively,
 - (b) assaulting him by striking him with a hoe blade.
- [3] Lisiate Fonua (Fonua) is charged with:
- (a) serious causing bodily harm to Lehopoame Tu'utafaiva (complainant), by striking him with a hoe blade and injuring his head, and alternatively,
 - (b) assaulting him by punching and kicking him repeatedly.
- [4] Siopo Niusini (Niusini) is charged with assaulting Lehopoame Tu'utafaiva by punching and kicking him repeatedly.

The evidence for the prosecution

- [5] The complainant and 4 witnesses gave evidence for the prosecution.

The complainant evidence

- [6] He said he is in the Tongan army and he and some of his army friends were having a few drinks at the home of an army couple friend in Havelu. Late at night, two boys came into their drinking, namely Fonua and Niusini. He said that as the two accused were leaving, they threw a piece of brick which hit the bonnet of the vehicle which was parked at the front of the house.
- [7] He said that he and another soldier chased after them followed by some other 5 soldiers and 3 women from their party. The 2 boys escaped into the home of one Teivi. He said that as they were walking back, a motor vehicle came up and stopped and boys got out of it and fought with them. He said he was hit on the head by someone from behind with a pipe and he fell down and he was then kicked and punched whilst he was down.

- [8] He said he did not know who hit him or who kicked and punched him on the ground (the road) but that he received 2 cuts to the back of his head, one of which measured 2cm long and 1cm deep and it was stitched at the hospital that same night. He said he also had a split lip. The cut to the head bled profusely.
- [9] In cross-examination (by Sunia Fili) he admitted that he had shouted out to the people at the home of Teivi, "We are soldiers, come and fight", and (by Atalasa Pouvalu) he admitted that both groups of boys had consented to fight each other.

Medical evidence

- [10] Medical evidence was given by Dr. Meleane Toafa that she could not recall the attendance she made except the notes she made on the chart of the complainant. She said that the notes confirmed the cut on the scalp of the head was 1cm deep and 2cm long and it was on the left occipital area of the head, that is left lower back of the head, and that the injury was not likely to have involved any damage to the skull. She said that she had the cut washed with Betadine and sutured with non-absorbable string, that is, the string would have had to be removed when the cut healed. She said she gave him penicillin and ibuprofen tablet to take and an injection against tetanus and discharged him that same night. She had told him to come back to outpatient on Monday to change the dressing.
- [11] Dr. Toafa was asked by Ms. Kafa what she thought of the severity of the injury and she said it was not life-threatening, that it was not likely to cause death. She was asked what in her opinion had caused the injury and she said that it could have been caused by a blunt object like a timber as well as a sharp object like a knife. She said that she just could not say what may have caused it. She said that she could not remember any other injury or even any blood but she said there would be a lot of blood from the head injury.
- [12] She was asked by Mr. Fili whether or not the injury was a serious injury and she replied that she could not say. She was asked by Mr. Pouvalu whether a punch could have caused the cut and Dr. Toafa said that it could, but that a punch would have left a bruise and swelling but she had not found any such bruise or swelling.

Witness Fatafehi Mafua evidence

- [13] She said that it was in her and her husband's house where the soldiers were drinking that night, as her husband was also a soldier. She said that 2 men came and joined the drinking and one of them spewed and was taken outside and told to go home and he wanted the other man to go home with him but that other man wanted to stay. She said that she told the one inside to go and he finally got up and went out. She said that there was a bang and she went out and there was a dent on the bonnet of a vehicle parked at the front of the house, and she was told it had been caused by some object thrown by the two men who had just left.
- [14] She said that straight away the soldiers got up and chased after the two men and that she also ran behind them. She said that the soldiers were running from their house onto Vaha'akolo Road (on which their house was situated) and diagonally across Vaha'akolo Road to a road which I will call Ocean of Light Road because it runs past the Ocean of Light School, and no one knew the name of that road, which branches westward from Vaha'akolo Road, and they ran westward along that road (Ocean of Light Road) and turned right onto a road which branches northward, at the end of which she said was where Teivi Tu'ineau lived, a man who worked in the Police department. She said that when she got to the corner of that road and Ocean of Light Road, she saw that Teivi Tu'ineau's house was in darkness and then she heard a loud bang coming from there and then the lights came on in Teivi Tu'ineau's house and she saw the soldiers walking back from there.
- [15] She said that as she was standing there, a car drove up to go to Teivi's place and it stopped. It had two men in it. One asked her what was happening. She said she saw that they were both brothers of Teivi Tu'ineau. She said she told them that 2 men had come and drank at their place and threw at a vehicle at home and were chased and they had run to their home (the home of the two men in the car).
- [16] She said that as the soldiers were walking back to Ocean of Light Road there was a shout from Teivi Tu'ineau's place "where have you come from" And she saw men running down from there and one of them was a brother of Teivi and

he was carrying a pipe. She said that she and the soldiers then ran down to Ocean of Light Road and turned eastward and ran along Ocean of Light Road. She said that the men caught up with her husband and they hit him and he fell down and she stopped and stood on the south side but he got up and ran again.

- [17] She said she saw the man who had the pipe hit a soldier downwards with the pipe and the soldier fell face down on the road. She said that something came off the pipe when it hit the soldier. She said that another man picked something up and hit the head of the soldier who had fallen down on the head with it and she then saw it was a hoe blade. She said that she recognised that man because he had long hair that was tied up at the top of his head. She described the way he had hit with the blade as a stabbing rather than a striking because he was holding the blade with both hands and stabbing downwards with it.
- [18] She said she recognised the soldier who was hit and was lying on the road as the complainant and that he was grunting, and she saw 4 men come back to him and beat him while he was still on the ground, and that she recognised 2 of them as the 2 men who had come into her house and joined the drinking. She said that they were kicking the complainant but was not sure which part of his body they kicked. She said that the man with the pipe also hit the complainant again but again was not sure where on the complainant's body. She said that she was only about 3 meters from where those beatings took place.
- [19] She said that the men then ran eastwards towards Vaha'akolo Road to where the soldiers were.
- [20] She said that the 2 brothers of Teivi who had been in the car then came and asked her what happened and she asked them to help to take the complainant to the hospital but they did not want to. She said she also asked another man but he did not want to either. She said that she cried but they just stood and looked.
- [21] She said she saw the brother of Teivi who had the pipe pick up a rock by her side to throw and she was afraid that it might hit her and she then left by a side road to the south and came up to Vaha'akolo Road and came to the intersection with Ocean of Light Road and police vehicles were already there and was surprised to see the complainant walking up to the police vehicle. She said he was bleeding and had swollen eyes.

- [22] She said that of the 2 men who had come and joined the drinking, the man who had spewed and was taken out of her house earlier had had army trousers on, and that she recognised both men as two of the 4 men who had come back and beat up the complainant while he was lying on the road. She said that only those two men did the kicking to the complainant, and that she could identify those 2 men again. She then indentified the two accused in Court as Fonua and Niusini respectively, as those two men. She also recognised and identified the man with the long hair tied at the top of the head, who had used the hoe blade to stab the complainant's head, as the accused in Court, Fangatua.
- [23] On cross-examination by Mr. Fili, she said that it was the stabbing of the complainant's head with the hoe blade which had caused the cut to the back of his head. She said that she had not drunk any liquor herself and that she was not drunk.
- [24] On cross-examination by Mr. Pouvalu, she said that she was not wrong when she recognised the two men who had come to her house as the two of the four men who were kicking the complainant whilst he was lying on the road, and that they delivered more than 1 kick each.

Witness Sofia Olie To'a evidence

- [25] She said that she and her husband were in the drinking and that one of the soldiers, Lavemai knew one of the 2 men who came and joined the drinking as Siope, and that it was Siope who spewed during the drinking.
- [26] She said that she had also run behind her husband and the other soldiers when they chased after the two men and that she saw the complainant slip and fall as the soldiers were running back when chased by the men. She said that the men hit and kicked and punched him while he was on the ground and that she ran up and shouted to them to stop or he would die.
- [27] She said that the soldiers were throwing stones at the men and the men then ran towards the soldiers, one of the men carrying a pipe. She said that she then ran to Vaha'akolo Road.

- [28] She said she saw may be 4 or 5 men punching and kicking the complainant on the ground more than once each and that the pipe was also used to hit him on the ground.
- [29] She said she was about 10 meters away from where the complainant was lying and she could not recognise or identify any of the men who hit, punched and kicked him.
- [30] She was cross-examined by both Mr. Fili and Mr. Pouvalu but nothing of substance was revealed.

Witness Ofa Palefau Havea evidence

- [31] She was the police officer who interviewed the accused persons. No objection was raised by either Mr. Fili for Fangatua or by Mr. Fonua to the admission of the records of interview as evidence against Fangatua and Fonua.
- [32] Ms. Kafa, counsel for prosecution, confirmed that no record of interview of the accused Niusini was sought to be admitted.
- [33] Fangatua stated in answer to questions put to him in the record of his interview that he and Sonatane and Niusini and Fonua had been at Noah Bar and they came and stood at the frontage of TASA office at the corner of Vaha'akolo Road and Ocean of Light Road and finished off their drinks. Niusini and Fonua then went to the house of Paula and Fatafehi Mafua which was on the other side of Vaha'akolo Road but one allotment towards the south because there was drinking there, whilst he and Sonatane stayed. Then a vehicle came and picked up Sonatane and he left. Not long after he left, Niusini and Fonua came running up with 3 soldiers running after them and they ran past him and they ran to the home of the Tuineaus. Then one boy and 2 women ran past him as well and he then followed behind the 2 women.
- [34] A vehicle with Maika Tu'ineau driving came and Fangatua stopped it and he gave Maika his jacket and told him that the soldiers were running to their home. He then ran up and shouted to the soldiers and asked what had happened but one soldier punched him and he ran behind Semisi Tu'ineau who then exchanged punches with the soldier. The soldier then ran and called out to come and fight. He and Semisi ran to them and they fought and Niusini

appeared with a hoe with a metal handle and hit a boy with it, and Fangatua took it off him and hit the soldier again with it. Semisi then took the hoe off him and the blade came off. Fangatua picked up the blade and hit the soldier with it on the area of his left ear some 6 times while the soldier was holding his head. He said that the injury to the soldier, who is the complainant, was caused by him. He said he had no lawful justification to hit him.

- [35] Fonua stated in answer to questions put to him in his record of interview that he and Niusini went into the drinking of the soldiers and that Niusini spewed on the floor of the house and he was chased out. He said he continued to drink but he was abused by being forced to drink and was punched and so he and Niusini ran while being pursued by the soldiers. He admitted that he was one of the men who beat up the complainant by punching him with his right hand.

Evidence of Fangatua

- [36] In his evidence in chief he said that the soldiers caught Fonua at Tu'ineau's place and beat him up and that the complainant smashed the windscreen of the van at Tu'ineau's place and that he (Fangatua) ran up and asked them what had happened and that they turned around and punched him and so he ran back to Semisi Tu'ineau and hid behind him and Semisi fought with them and they ran off. They then came to Ocean of Light Road and five soldiers attacked him alone and he used the hoe blade in self defence against them and they backed off. He then saw the complainant lying on the ground and he went and hit him with the blade on his upper part one blow only and he went after the other soldiers but they came at him with timbers and he then backed off and went to the Tu'ineau's place and the brawl ended.
- [37] In cross-examination by Ms. Kafa, he admitted that he was not using the hoe blade in self defence against the complainant because the complainant had not used or had any weapon. He also agreed that he had hit the complainant 6 times. He also agreed that what he did was he stabbed him with the blade, not strike him with the blade.

Fangatua witness Valingi Finau evidence

- [38] This witness is the mother of Fangatua and she said that she heard swearing and loud noises from the road (Ocean of Light Road) and she looked out and saw

many people there. Her house is about half way between Vaha'akolo Road on the east and the side road to Teivi Tu'ineau's home on the west, on the north side of Ocean of Light Road. She said she came out and saw boys running with pipe and timber and some with rocks. She said she did not know anyone of them, except her son, Fangatua, whom she saw there and she went and grabbed him but he shook her off and he and others then fought each other. She said she saw someone lying on the ground and heard a female voice say "No soldier falls down. Stand up". She said she saw them stand the boy up and walked him to the police vehicle. She was cross-examined by Ms. Kafa but nothing of substance was revealed.

Fonua evidence

- [39] The accused Fonua gave evidence and he stated that he went with Nuisini to the drinking and Nuisini spewed and was told to go outside. He said that two men then questioned him and one slapped the back of his head and he was angry and he went outside and stood there with Nuisini. Whilst standing, he said that something hit something with a bang and the soldiers came out and he and Nuisini ran. They ran all the way to Teivi Tu'ineau's place.
- [40] He said Nuisini got through the fence to the place but he was caught by the soldiers outside the fence and they beat him up. He said that Fangatua showed up and stopped them and he was then able to get over the fence and escaped into the Tu'ineau place.
- [41] He said that there was noise of fighting coming from the road and he ran there and saw throwing of rocks and heard a pipe being dragged on the road. He said he was afraid and so he just stood there.
- [42] When questioned by Mr. Fili, he said that he saw someone tall and plumb hit the vehicle at Teivi Tu'ineau's place. He said he did not see anyone fall down on the road at any time.
- [43] When questioned by Mr. Pouvalu, he said he did not see Nuisini again after they got to Teivi Tu'ineau's place until the next morning.
- [44] When questioned by Ms. Kafa, he said that the reason they ran away from the house where the drinking was was because they might be blamed for the

throwing at the vehicle and be beaten up. He denied that he took part in beating the complainant. When it was put to him that he had stated in answer to question 23 in his record of interview that he had joined in beating up the complainant, he said that he had only said that and had signed that answer because the officer had told him that Fangatua had said that he had been one of those who had beaten the complainant.

- [45] When it was pointed out to him that there was no mention of Fangatua in question 23, the accused Fonua then said it was true that he had joined in beating the complainant. But he maintained that he only punched, and not kick, several times, and he maintained that when he was punching him, the complainant was not lying down and that he did not know of anytime the complainant was down on the ground.

Niusini evidence

- [46] The accused Niusini gave evidence that at the drinking one soldier was forcing him to drink despite his protest. He said that the soldier held his T-shirt and told him to drink a full glass of liquor until it was empty. He said he had to drink it and when he finished, he threw up on the floor and he was taken outside and when he came back inside he saw Fonua being slapped by the soldier on the ear. He said he called him to come out and he himself went to Vaha'akolo Road and waited there for him. Fonua came out and they stood there talking and they heard something hit something. They saw the soldiers come out and they called to them that they would beat them up. He said that he then took off and ran all the way to Teivi Tu'ineau's place before two stones thrown by the soldiers hit him – one on his back and one on his calf. He went and hid in the garage. He said he heard the soldier beating up Fonua and he looked and found a pipe and ran out with it but he stepped in a hollow outside and he fell down and winded himself and lost the pipe. He said that Maika Tu'ineau then picked him up and that was all he knew. He said that the trousers he had on that night were long jeans.
- [47] When questioned by Ms. Kafa, he maintained that he had not punched or hit or kick the complainant or join others in doing that to the complainant.

Submissions of Fangatua

- [48] Mr. Fili for Fangatua has submitted that the accused Fangatua was acting in self-defence when he hit the complainant with the hoe blade. He says that he was doing that in protection of his friend and of his friend's property, namely, the vehicle which he says the complainant had damaged, and that the use of the hoe blade was not unreasonable because the soldiers were using stones and timbers against them as well.
- [49] Alternatively, he says that there cannot be an offence of assault or of causing serious harm to the complainant because the complainant had consented to it when he had challenged them to come and fight them soldiers.

Submission of Fonua

- [50] Fonua says in his submissions that whilst they were drinking with the soldiers, Niusini spewed and they told him to go and spew outside and he went out. And as he continued to drink one soldier slapped him on his ear. He said that Niusini called him to come out and he came out and stood there with him and that while they were standing there they heard a bang and the soldiers came out and called to them that they would beat them up. They then ran to Teivi Tu'ineau's place and that Niusini got in there but he was caught and beaten by the soldiers until Fangatua came and stopped them and he got away into Tu'ineau's place. He says he saw someone come there and damaged the motor vehicle there and when he left he ran behind him but as he came out onto the road, the soldiers were throwing stones at them, and so he backed off.

Submissions of Niusini

- [51] Mr. Pouvalu for Nuisini says that the prosecution has failed to prove that the accused Niusini did assault the complainant by punching or kicking him because:
- (a) the complainant could not identify anyone who assaulted him, and
 - (b) the witness, Fatafehi Mafua, although she said that she saw the two men who had come and join the drinking in her house both punched and kicked the complainant while he was lying on the road, she was wrong about the trousers that Niusini was wearing. He says that

Niusini has given evidence that the trousers he was wearing that night were long jeans, and not army trousers such as Fatafehi Mafua said.

[52] He also says that there was no assault because the complainant had consented, and accordingly there was lawful justification and that the complainant cannot complain that he has been assaulted. He says that it was a fight between the two lots of men who had consented to so fight.

[53] He further says that that the witnesses did not know where on the complainants' body the punches and kicks landed or whether or not the punches and kicks landed on the complainant.

Submissions of the prosecution

[54] Ms Kafa for the prosecution has submitted that:

Fangatua

In respect of Fangatua, he had used the hoe blade to hit the head of the complainant (where the cut which was 2cm long and 1cm deep was) and that the use of the blade was **not**:

(a) *lawful justification* such as Mr Fili has submitted because it was disproportionate to the force which the complainant and other soldiers had used, which was simply their fists, and that Fangatua admitted that the force he had used was excessive, and was not

(b) *self-defence* because Fangatua said in evidence that he had hit the complainant on his head with the hoe blade out of anger and not out of fear, and so it was not used for the purpose of defending himself.

[55] She says that the accused had the opportunity to run away but he did not do so, and that he instead came back with the other men to fight the complainant and the soldiers. She says that the soldiers, and the complainant, were already turning and walking away. The threat to life and property had ceased and the accused and the men chose to come and fight out of anger instead.

[56] She says that that is proved by the fact the complainant was unarmed whereas he himself was armed with the hoe blade.

[57] As to the severity of the injury caused by Fangatua to the complainant's head, she says that although it was not life-threatening, it was still an injury because there was a breakage of the skin of 2cm length and 1cm deep and that it bled

profusely. She says that the cut was “bodily harm” for the purpose of S.107(2) (c) of the Act.

- [58] She says that Fangatua admitted in his answer to question 31 on his record of interview by the police that he had caused the larger of the two cuts to the complainant’s head, the one 2cm long and 1cm deep.

Fonua

- [59] In respect of Fonua, she says that the evidence of Fatafehi Mafua identified both the two men who had come into their house and join the drinking there as the two men out of the four men who were kicking and punching the complainant while he was laying on the road. Those two men were Fonua and Niusini.

- [60] She says that that was admitted by Fonua in his answer to question 23 in his record of interview that he did hit and punch the complainant, and he also admitted when charged with that assault that the charge was true.

- [61] She also says that in cross-examination, the accused admitted that he did punch the complainant but denied that he kicked him.

Niusini

- [62] As to the claim by Niusini that he was wearing a pair of jeans that night, and not a pair of army coloured trousers, she says that that did not mean he was not one of the four men whom Fatafehi saw were punching and kicking the complainant while he was lying on the road because he could have been one of the other three who did not wear the army coloured trousers.

- [63] She also says that Fangatua had said in his answer to question 18 in his record of interview that he saw Niusini and Tu’ineau punch the complainant while he was on the ground.

- [64] As to the claim by Niusini that this was a consensual fight between the two groups, the beating of the complainant whilst he was lying on the ground was unjustified because he was on the ground and there were four or so of the men beating him.

- [65] She says that the claim by Niusini that there was no evidence that the punches and kicks by the four men on the complainant on the ground were not proved to have hit the complainant, is disproved by the evidence of Fatafehi and Sofia who said that they saw the complainant being kicked and punched by the 4 men and Sofia herself said the kicks and punches hit the complainant.

[66] Ms Kafa submits that Fangatua himself admitted he had caused the cut to the complainant's head and that he had repeatedly hit the complainant's head with the blade at the spot where the larger cut was, the 2cm long 1cm deep cut. She also says that that is supported by the doctor's evidence that the cut was more likely to have been caused by a sharp object like a knife because there was no swelling where the cut was. Alternatively, Fangatua is guilty of assault because he has admitted he did hit the complainant with the blade.

[67] As to Fonua and Niusini, she submitted that they were both guilty of assaulting the complainant.

Consideration

[68] I am satisfied that Fonua was angry with the two soldiers who had questioned him and with the soldier who slapped him on the back of his head and that he was still angry when he left and went outside. I am also satisfied that Niusini was angry with the soldier who had collared him and told him to drink the full glass of liquor empty, and which he did and as a result of which he spewed on the floor of the house which caused the others to require him to go outside. He also said that he saw Fonua being slapped by a soldier and I am satisfied that that added to his anger.

Throwing of the rock

[69] I am satisfied that the soldiers were aware that the two accused were unhappy with the treatment that they had given them and which had caused them to leave, and that the soldiers knew straight away, when the thrown rock hit the bonnet of the vehicle parked in front of the house, that it had been thrown by one of the two accused, and that they were within the rock's throw away from the vehicle, and so they gave chase straight away.

Running away

[70] That assumption by the soldiers that it was one of the two accused who had thrown the rock was confirmed by the two accused themselves, when they ran, after the rock hit the vehicle, to be correct. Otherwise, the soldiers would not have chased after them.

Apprehension of an offender

[71] It is reasonable, and lawful, for a private citizen to give chase and apprehend an offender, whom he has seen commit an offence, and the soldiers were justified in giving chase to the two accused for the purpose of apprehending them.

Where they went wrong however was when the complainant called out to the people in Teivi Tu'ineau's placed to come out and fight them soldiers. That was an incitement to cause a disturbance, and the soldiers agreed with that incitement and stayed and fought with the men instead. The disturbance occurred because of that.

Fighting is unlawful

- [72] Fighting is unlawful. If two or more people agree, either expressly or impliedly, to fight each other, that is an offence under S.4(c) of the Order in Public Places Act. It is not a defence to such offence that both parties consented to fight each other. And it is not a defence to a charge of assault which had occurred in the course of such fight that the complainant had consented to fight. That is because such defence, if upheld, would render the offence of fighting pointless. It would render the punch delivered during the unlawful fight lawful. If the punch was lawful, then how can the right be unlawful? That would be absurd.

The fight

- [73] The challenge by the complainant to the men to come and fight was accepted by the men. That was unlawful already, to come out and fight because such fighting was unlawful. It was wrong of the men to come out to fight.
- [74] Mr Fili submits for Fangatua that Fangatua was acting in self-defence when he hit the complainant on his head with the hoe blade, that Fangatua was doing that to protect his friends and their property, and that the use of the blade was not unreasonable because the soldiers were using stones and timbers against them.
- [75] I do not agree that self-defence can be claimed by Fangatua. Self-defence is an act carried out by a person to protect himself, or someone else, who is in the immediate danger of being killed or injured, and the act is, in the circumstances, reasonable. In the present case the complainant was laying on the road helpless and was being beaten by several of Fangatua's friends, and the complainant did not pose any immediate danger of death or injury to Fangatua or his friends. Fangatua and all his friends could have run away from the complainant and be completely safe. There was no necessity to hit his head with the hoe blade to prevent him getting up and killing or injuring them. The act that Fangatua did was therefore not done in self-defence.

Consent to be assaulted

[76] Mr Pouvalu for Niusini submits that the complainant had consented to be assaulted when he challenged the men, including the accused, to come and fight. As I have stated, such fight was unlawful and any punch or kick thrown by any of the fighters was unlawful, and it cannot be justified by the fact that the person complaining had consented to fight in a fight in which the punch or kick was delivered.

Identity of Niusini

[77] Mr Pouvalu submits that the prosecution has not proved that Niusini had punched or kicked the complainant such as the charge has alleged against him. He bases that on the evidence of Fatafehi that one of the two men who had been drinking with the soldiers in their house had army coloured trousers on that night, and that one of the four men she saw punching and kicking the complainant on the ground was the one with the army coloured trousers, but that Niusini has given evidence that he had jeans on that night instead.

[78] Fatafehi said in her evidence that she saw and recognised the complainant as the man lying on the road grunting and that she saw four men come back to him and beat him while he was still on the ground, and that she recognised two of them as the two men who had come into her house and joined the drinking there. She said that the four men were kicking the complainant. That is sufficient identification that the two accused who had been in her house, namely, Fonua and Niusini, joined two other men in kicking the complainant on the ground. It has nothing to do with whether or not one of them (Fonua or Niusini) had army coloured trousers on that night. Besides, Fatafehi herself said, as I have stated in paragraph 22 above, that one of the 2 men who came and joined the drinking had army trousers on, and that it was that man who had spewed on the floor of her house. Niusini admits in his evidence that he was the one who spewed inside the house.

[79] Mr Pouvalu also submits that the complainant could not and does not identify any one who had beaten him. That is true but that does not affect the evidence of Fatafehi that she saw both the 2 men who had been in her house join the 4 men in kicking the complainant on the ground.

[80] He also says that no witness could say where on the complainant's body any punch or kick land. Again, that does not prove that no punch or kick landed on

the complainant or disprove that any punch or kick landed on him. The complainant has already given evidence that after he fell down, after being hit on the head from behind, he was then kicked and punched whilst he was on the ground.

The cause of the injury

[81] The doctor stated that the injury to the complainant's head, measuring 2cm long and 1cm deep, could have been caused by a sharp object or by a blunt object such as a punch, but that she considered that it was not caused by a punch because if it been caused by a punch there would have been a swelling of the scalp in the area of the cut, but there was no such swelling. If that is so, and I do see any reason to doubt that evidence, I consider that the cut had been caused by the object which could have caused it, namely the sharp edge of the hoe blade.

[82] I also accept the evidence of Fatafeli that she saw Fangatua, the one with the hair tied up on top of the head, hold the hoe blade like holding the handle of a spade and stabbing it downwards at the complainant's head whilst he was lying face down on the road, and that the 4 men came back and punched and kicked him on the ground as described above already.

[83] The accused himself, Fangatua, when interviewed by the witness, 'Ofa, admitted that he had picked up the hoe blade and hit the complainant with it on the head 6 times and that he did cause the cut to the complainant's head as a result, and that he had no lawful justification for doing that.

Serious causing bodily harm

[84] The two offences:

(a) serious causing bodily harm, and

(b) simple causing bodily harm,

were enacted by the Legislature in 2012 (Act no.19/2012), by adding three further subsections to S.107 of the Criminal Offences Act as subsections (3), (4) and (5), so that the whole section 107 now reads as follows:

“107 (1) Every person who wilfully and without lawful justification causes harm to any person in any manner or by any means whatsoever shall be guilty of an offence under this section.

(2) “Harm” for the purposes of this section means —

(a) any injury which seriously or permanently injures health or is likely so to injure health; or

- (b) any injury involving serious damage to any external or internal organ, member or sense short of permanent disablement; or
 - (c) any wound which is not severe; or
 - (d) any permanent disfigurement which is not a serious nature.
- (3) An offence under this section may be the offence of serious causing bodily harm or the offence of simple causing bodily harm.
- (4) The offence of serious causing bodily harm –
- (a) is punishable by a term of imprisonment for any period not exceeding 5 years;
 - (b) shall, subject to sections 35 and 36 of the Magistrate’s Court Act, be heard and determined by the Supreme Court.
- (5) The offence of simple causing bodily harm –
- (a) is punishable by a term of imprisonment for any period not exceeding 3 years;
 - (b) shall be heard and determined by the Magistrate’s Court.”

[85] Whereas the Act provides in section 106(2) for what may be grievous bodily harm and section 107(2) provides for what may be bodily harm, nowhere in the Act is any provision as to what may be serious causing bodily harm and what may be simple causing bodily harm. It leaves it to the Court, that is, the Supreme Court to decide what is serious causing bodily harm and be punished by that Court up to 5 years imprisonment, or the Magistrate Court to decide whether it is simple causing bodily harm and be punished by it up to 3 years imprisonment.

[86] The difference between the two offences is one is “serious causing bodily harm” and the other is “simple causing bodily harm”, the prohibited act in either offence being either:

- (a) a serious causing or
- (b) a simple causing.

I would think that a slap on the mouth of a person which causes a split lip which bleeds, may be a simple causing bodily harm, but that a punch with a clenched fist to the mouth of the person which causes a split lip which bleeds, may be a serious causing bodily harm. The difference lies in the way the injury is caused – hence its name “serious causing” or simple causing”. The use of a weapon to cause the injury may be sure to be serious causing bodily harm.

[87] I do not think that that means that a person convicted of serious causing bodily harm has to be sentenced to at least 3 years imprisonment so as to be sure it is a serious causing bodily harm. One only has to look at sentences imposed for indictable (Supreme Court jurisdiction) offences and find that they are often sentenced for periods less than 3 years imprisonment, which sentence is well within the jurisdiction of the Magistrate's Court.

Conclusion

[88] Having therefore considered the law and the evidence as I have stated above, I am satisfied beyond reasonable doubt that:

(a) Walter Fangatua is guilty of the charge of serious causing bodily harm brought against him and I convict him of that offence.

The alternative charge of assault against him is dismissed.

(b) Lisiate Fonua is guilty of the charge of assault against him and I convict him of that offence.

The alternative charge of serious causing bodily harm brought against him is dismissed.

(c) Siope Niusini is guilty of the charge of assault brought against him and I convict him of that offence.



Niu J

J U D G E

NUKU'ALOFA: 16 December 2019.