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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 147 of 2019

BETWEEN:

REX

- **Prosecutor**

AND:

TAVALEA TUPOU

- **Accused**

BEFORE:

HON. JUSTICE NIU

Counsel:

Mr. 'I. Finau for Prosecution

Mr. S. Tu'utafaiva for defence

Trial:

16 and 17 March 2020

Submissions:

by Mr. Finau on 18 March 2020

by Mr. Tu'utafaiva on 24 March 2020

Ruling:

24 April 2020

RULING (VERDICT)

[1] This case concerns a fight between some boys from Tonga College and some boys from Liahona High School, which happened on Wellington Road between the Narottam store on the north side and

a Chinese restaurant on the south side, on 16 February 2019, a Saturday at around noon.

- [2] A Tonga College boy involved in the fight, and during the fight, the complainant, received a stab wound which penetrated his skull which required surgery that same day during in which he was put to sleep and subsequently hospitalised for some 2 to 3 weeks during which a drain tube was attached to his injury to drain blood and fluid from it to a bottle which had to be emptied every so often. At the end of two weeks the drain was removed and after another 2 weeks, stitches which had been sutured to close the cut to his scalp were removed. He was advised to be careful and to keep well for 2 years, in order that the hole in his cranium would close up.
- [3] When this trial was held, a year later, the complainant said that he could still feel the hole in his skull since it happened last year. He said that he could still feel his head throbbing when he runs or exercises, and that if he rubbed the spot on his head where the hole was, he could hear it in his ears like the rubbing of a microphone with one's finger.
- [4] The complainant said that he was sure that it was the accused who had caused that injury to him. He said that the accused was from Liahona High School because he had been with other Liahona boys who had teased them Tonga College boys at the bus stop by the water front bus stop the Saturday before.
- [5] The accused is charged with causing that wound. He is charged with causing grievous bodily harm under S.106 of the Criminal Offences Act, namely, that on 16 February 2019 at Kolofo'ou, he wilfully and without lawful justification caused grievous bodily harm to the complainant when he stabbed him in the head with a sharp object.
- [6] Initially the charge stated in the particulars in the indictment that the accused stabbed the complainant in the head with a knife, but at the end of the evidence of the prosecution, Mr. Finau asked that

the charge be amended by replacing the word "knife" with the word "object". Mr. Tu'utafaiva, counsel for the accused, responded that it was alright, and I accordingly allowed the amendment to be made.

[7] In the alternative, the prosecution charges the accused with serious bodily harm under S.106 of the Criminal Offences Act, namely, that on 16 February 2019 at Kolofo'ou, he wilfully and without lawful justification caused serious bodily harm to the complainant when he stabbed him in the head with a sharp object (as was similarly amended).

[8] Mr. Tu'utafiava stated at the end of the prosecution case that the accused would not give evidence and would not call any evidence. He subsequently made written submissions that the prosecution had not proven beyond reasonable doubt that

(a) the accused wilfully and without lawful justification stabbed the complainant with a sharp object, or that

(b) the accused caused grievous harm to the complainant.

[9] He submitted that the evidence of the only eye witness (Sione Savou Ve'a) called by the prosecution, evidence in chief, he said that the complainant was fighting with another person (not the accused), but in cross-examination, he said that he only saw the complainant (for the first time) after the fighting was stopped. He also pointed out that this witness stated in his evidence in chief that he saw something in the hand of the person fighting with the complainant but did not know what it was.

[10] This is what (I wrote down) that that witness said about it in his evidence in chief. "I saw Wesley fight with someone. No one else fought with Wesley, and that person injured Wesley. I did not know what he used. I saw he had something in his hand but not sure which hand ... We walked together with him (the complainant) and Misi to the market... Wes was injured because he was holding his head, it was bleeding ..."

- [11] This is what (I wrote down) he said in cross examination: "I only saw Wesley (for the first time) at the fight ... When we came around the corner, the fight was just finishing, it was being stopped. I only knew of his injury when we were walking to the market. Yes, I did say that I saw Wesley fight with someone, yes I saw him then before the fighting was stopped."
- [12] To me, his evidence was that the injury of the complainant was not caused by the accused. But that evidence confirmed to me that the person who fought with the complainant caused the injury to the complainant's head with something which he held in his hand.
- [13] Mr. Tu'utafaiva submitted that the evidence only established that Wesley chose to be involved in the fighting, and thereby got injured when he collided with the accused. He submitted that that did not prove beyond reasonable doubt that the accused wilfully and without lawful justification stabbed the complainant's head with a sharp object.
- [14] In his evidence in chief, the complainant said that he was standing with the witness, Sione Savou Vea and another friend, Kofe Liku, under the south mango tree on Digicel Square at the north-eastern corner of Wellington Road and Taufa'ahau Road when the fight broke out on the road between Narottam store and the Chinese restaurant on Wellington Road. He said that he saw Tonga College boys in the fight and he ran to where the vehicle he had come on was parked, which was on the roadside in front of the Chinese restaurant opposite Narottam. He said that he was wearing a pair of grey shorts, which grey shorts were normally worn by Tonga College boys, and that he also wore a red Tshirt, and that he also wore a cap on his head.
- [15] He said that there were vehicles queuing on the road and that as he ran between those vehicles, the accused was coming from the east side and they crashed into each other and when they parted from each other, he felt blood spurting from his head and flowing

down his face. He said he fell down and other fighters attacked the accused and another boy led him (the complainant) away to the market from where the police took him to hospital.

- [16] He said that at the hospital he was laid on a bed and that whilst he was lying there, the accused also arrived at the hospital to treat a cut which he had sustained to his hand. He said that he told the police who was there that the accused was the one who had caused him his injury. He said that the police then arrested the accused and asked him what he had done to him, the complainant, and that the accused did not speak but that he just held up his hand above his head and moved it from the back to the front and then downwards in a stabbing manner. He said that the accused was also mumbling something but it was unintelligible. He said that the police then took the accused out to the vehicle.
- [17] He said that he was still wearing the cap and that it had a hole in it where the injury to his head was, meaning as I understand it, that the hole in the cap was caused by the sharp object which caused the injury to his head. He said that the police took the cap with them as evidence.
- [18] When cross-examined by Mr. Tu'utafaiva, the complainant said that the red Tshirt he was wearing was the same as those used by the Tonga College boys for their sports, and that he was proud to wear those colours (grey and red). He said that he saw the fight when it broke out and at first said that it was with Tonga College boys on one side but did not know who were on the other side, but when Mr. Tu'utafaiva pointed out that he had told the police that the fight was with Liahona boys, he agreed.
- [19] He also admitted to Mr. Tu'utafaiva that he had not run to get to the vehicle he had come on but to join the fight. He said that he went in a sort of drooping manner at the accused and that they collided. He said that he then felt liquid bubbling and then blood flowed down his face and the boys then punched the accused and

that he the complainant fell down. He said that Misi, a big boy, told him that he, the complainant, was injured and he led him away to the market.

[20] He also admitted that he was a member of a group of Tonga College boys who called themselves the "Red Zone" and that they would fight with the Liahona boys. He said that he had seen the accused with other Liahona boys at the bus stop and that he and the Red Zone boys would chase them off.

[21] Now, considering all those evidence, I am reasonably satisfied beyond reasonable doubt that the complainant received the injury which he sustained, namely, a stabbing injury which penetrated the cap he wore, his scalp and his cranium, when he came into collision with the accused between 2 vehicles which were queuing on the road, like the complainant himself said in his evidence. According to the complainant, the accused was the only one he had contact with, or who had contact with him at the fight. And according to the witness, Sione Savou Ve'a, the person who was fighting with the complainant, had caused the injury to the complainant with something he held in his hand.

[22] Furthermore, that evidence was confirmed by the accused himself when the police asked him at the hospital to tell them what he did to the complainant, because he then demonstrated how he had held his hand up and then back and then forward and then downwards in a stabbing manner. Mr. Tu'utafaiva did not question or challenge the complainant about that evidence. I must accept it as an admission by the accused that he had caused the injury which the complainant sustained and which injury had kept the complainant for some two or three weeks in hospital and which left a hole in his cranium which will not close up for another year to come.

[23] Mr. Tu'utafaiva also submitted that the charge with which the accused is charged in the indictment does not specify which type of

grievous harm the charge is relied upon because there are five different grievous harms specified under S.106 of the Criminal Offences Act”, and S.106 (2) lists the following:

“(2) ‘Grievous harm’ means -

- (a) any harm endangering life;
- (b) the destruction or permanent disabling of any external or internal organ, member or sense;
- (c) any severe wound;
- (d) any grave permanent disfigurement; or
- (e) the transmitting to another person, by any means, of the Human Immunodeficiency Virus (HIV).”

[24] The prosecution ought to have specified in the charge the particular harm under subsection (2) the accused is being charged with in order that the indictment is clear so that the accused is not misled as to which harm he is being tried upon. Clause 11 of the Constitution requires that. It provides (as relevant):

“11. No one shall be tried ... unless he have first received a written indictment ... Such written indictment shall clearly state the offence charged against him and the grounds of the charge.”

And I urge Mr. Finau that in future he shall specify in the charges in an indictment the particular harm under subsection (2) with which the accused is being charged.

[25] However, Mr. Tu’utafaiva makes no submission that the indictment is bad or is invalid for that reason. In fact he makes no submission about it, and I consider that he makes no such submission because there has not in fact been any misconception on the part of the accused as to which particular harm he is being charged with. That is because although there are 5 different harms stated in the

subsection, only one relates to the charge brought against the accused in this trial, namely, (c): "any severe wound".

[26] Mr. Tu'utafaiva further submits that the prosecution has not proven that the complainant has suffered grievous harm because there is no medical or expert evidence on the extent of the injury to the complainant's head. I am afraid I do not agree. I do not consider that medical evidence is required to prove that a wound is a severe wound before the Court can find that the wound is a severe wound. I consider that what is or what is not a severe wound is question of fact for the jury, or judge sitting alone, to decide. In the English language a severe wound is a serious wound and not just a simple cut to the skin, and it also depends where on the body it is inflicted and it also depends on how deep it is. It must be such that it is serious, that is, that it requires treatment and attention to prevent death either from the wound itself, or from infection of the wound if untreated or badly treated. And in the Tongan version, a severe wound is "ha lavea lahi". That in the Tongan language means a "big wound", and a big wound means a serious wound, just as it is in the English language as I have said.

[27] In the present case, the wound of the complainant penetrated the scalp and the skull, meaning that there was a hole in the skull which would allow blood from the scalp to enter the skull where the brain is. Immediate surgery was required to be done and it was performed that same day or evening whilst the complainant was put to sleep. The result of that surgery was the leaving of the skull with a hole in it and a drain tube to drain blood and fluid from it into a bottle for 2 weeks, after which the tube was removed and the stitches of the scalp left on for another 2 weeks. Even after the stitches were removed, the hole in the skull remained and it would remain for another year from now. I do not consider that I would need a doctor or an expert to tell me that that wound which the accused caused to the complainant was a serious wound that is, severe wound.

[28] I am therefore satisfied beyond reasonable doubt that the wound sustained by the complainant was a severe wound and was a grievous bodily harm, and that it was caused by the accused wilfully and without lawful justification by stabbing him his head with a sharp object.

[29] Accordingly, I find the accused guilty and I convict him on the first count of the indictment and discharge him on the alternative second count.

NUKU'ALOFA: 24 April 2020.



Niu J

J U D G E

