

Mr Latham
DPP
Scam and J.L.

IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

CR 119, 120, 121 of 2019

BETWEEN:

R E X

-Prosecution

AND:

PAEA HE LOTU SIKA
'APOLOSI VEA
'ALUNGAMONU MAKA

-Defendants

VERDICT

BEFORE: JUSTICE CATO

Counsel: Ms. L. Fakatou for the Prosecution
Mr. S. Tu'utafaiva for the Defendants

Date of Verdict: 18 June 2020

1. On the 15th and 16th June, 2020 I heard evidence and submissions relating to a charge against the accused, Paea Sika, 'Apolosi Vea and 'Alungamonu Maka that they jointly on or about 4th November 2018 at Vaini did wilfully and without lawful justification cause harm to Hopoate Teisina when they repeatedly punched and kicked him which fractured his jaw. I reserved my verdict until today.

2. On or about 4th November 2018 around 8am, members of His Majesty's Armed Forces (HMAF) were returning from Nukualofa to Taliai Military Camp after attending a flag raising ceremony to commemorate Tupou 1 day. They travelled in two buses. Both bus drivers, Pita Tapa and Halahuka Kohinoa, army officers, gave evidence.

3. When the two buses reached Vaini, in front of Beulah College the complainant, Hopoate Teisina, and another male were stopping vehicles in the middle of the road. Katalina Metui said that she was gardening in front of her house on the Taufu'ahau road when she saw two males swearing and shouting in the middle of the road. They were trying to stop the Army bus. She said that she was about 150 metres away. She saw some males (about 5 got off) and chase the two males; one disappeared and the other got caught at the gate. She said they were about to go back to the bus when the complainant, Hopoate Teisina, got up and swore at them. He was walking and kept turning back to the soldiers and swearing at them. He approached her side of the road and she ran and left her rake. He took the rake and started sweeping with it. She said the bus came back and stopped about 120 metres away from her. She said soldiers got off and ran towards this person She said about ten got off. When the complainant saw them, he ran away and used the rake with a sideways movement with his arm. The accused was running away from her. She said that she saw the soldiers running after him and what happened next she was not sure. She said the chase was about 50 metres. She did not see what happened to Hopoate.

4. Pita Tapa gave evidence that he was the driver of the first bus. He said that he asked Hopoate to get out of the way. He swore and hit the bus. They were on the way to the army camp at Fua'amotu. He said that he had told his men Sika, Maka and Ve'a to move him to the side. When they got off Hopoate punched Sika. He said he did not see if any of the accused punched back. Hopoate then started hitting the second bus. The first bus started back in the direction of Nuku'alofa and travelled only a short distance to where the other bus was. He said soldiers from the other bus had already got hold of Hopoate. He said there were a number of soldiers (about ten) around the complainant who was on the ground. He said he called the accused to come back. The accused he said were only out of the bus about three minutes. He said that he did not see anybody kick or punch Hopoate.

5. The witness appeared to me to be hostile on the issue of the second time the accused left the bus and engaged with Hopoate, that is the second incident. He had said that there were too many soldiers and he did not see what had happened, but in a statement to police he had said that the three of them beat the man. He seemed to admit that he had had seen this in his evidence but then he said the second time they got off the bus, he couldn't really see if there was punching. He then admitted that what was in his statement was true. He said that they attacked him. He said he saw Sika punch he said that they all punched back and he fell to the ground. There were about 7 men around. He said he could not recall, apart from Sika, who was doing the punching. He did not see any kicking. He then said only Sika was doing the punching; the other two were just grabbing him. He was about 7metres away. He saw Sika punch him on the left chest. He fell to the ground in the middle of the road and they took him to the side of the road.
6. Under cross-examination from Mr Tu'utafaiva the witness said that there were two incidents, the first involved the complainant throwing a bottle and hitting the front mirror of the bus. He agreed that he told his officers to move the two men away from the road. He saw Hopoate going to the bus behind and having a rake in his hand. He said that after they had turned around about ten people had got off the second bus. They were chasing after Hopoate who was still holding onto the rake. He said that he saw Sika hit him. He said he saw two punches and the other two grabbed him. Hopoate fell to the ground.
7. The complainant, Mr Hopoate Teisina, gave evidence that he and his friend had about 2 bottles of vodka to drink in the early morning. He admitted to being drunk. He was a strongly built individual of athletic stature. He said that the soldiers had got off the bus and beat up his friend. He ran away and they started punching him and he fell to the ground. He said he lost consciousness and woke up in hospital and his jaw was broken.
8. Halahuka Kohinoa was the driver of the second vehicle. He said he saw the complainant throw a bottle at the first bus. He said he saw three or four people get off the first bus and removed Hopoate to the side. He said that he got loose and hit our bus. He got out and he was attacked

by the man with a rake and he used it to attack them. He tried to grab him and he ran away. He said he did not get to him. He said he did not know how the complainant got to the ground. He said there were many people around him on the ground, civilians and soldiers. He did not see how they beat up Hopoate. Hopoate was unconscious. He was, on the application of the Crown, declared hostile. He later said he had only said Hopoate was beaten because he was on the ground. I indicated to counsel that I was dissatisfied with the evidence that this witness was giving on the second incident. He seemed to me to be partisan in so far as the second incident was concerned and the part played by the accused.

9. Mr Tu'utafaiva indicated an objection to admissibility of the records of interview of the accused, and a voir dire was commenced in relation to those made by Maka and Ve'a. He later withdrew this objection and the records of interview, charge sheets and voluntary statements were admitted by consent in relation to all three accused. I summarise these in the case of each accused.
10. Mr Sika was interviewed on the 20th December 2018. He said that he was in the military band of the armed forces. He said that he recalled the 5th November 2018. He said they had been at a flag bearing ceremony and he had returned in the bus intending to go to the Taliai Camp. He was in the leading bus. When they got to the pedestrian crossing at Beulah he said two boys, one from the left and the other from the right, crossed and the bus slowed down and stopped. They were swearing at the bus and us and telling us to get off so they could fight. The driver called for him to leave but he did not leave. He said that he got down from the bus and he told him to go because he was not making any sense and this person(Hopoate) swore at him and shortly he punched and attacked him with 'Apolosi Ve'a and 'Alunga Monu Maka. He said that they attacked him and he ran off. He said that the complainant had hit his right hand. Then he turned away and ran and we did not chase him but we got into the bus to leave.
11. He then continued by saying that shortly after we heard something hit the bus and we turned back and the same guy was standing with a rake. He was asked when he punched you, you all chased the boy and caught him. He said yes. He was then asked when you caught him what

did you do? He replied we caught him and punched him that was me, 'Alunga Monu Maka and 'Apolosi Vea that hit him.

12. He was asked what were the beatings he did? He replied just punching and it hit the boy's back and forehead and they walked and got in the bus. He said that this was the beating they gave him after he had punched his hand.
13. He said, as we walked and got into the bus and returned, they heard the bang on the bus and saw it was the same boy standing with a rake. He said that they then went back and saw him and he ran on the road towards Vaini. He got off with 'Alungamonu Maka and 'Apolosi Vea and they chased him and caught the boy. Then he said that's when they hit him twice. When asked what those beatings were, he said that I punched and kicked him. He said when asked whether his punching and kicking hit him, that it all hit him. When asked what part of the body did it hit, he said head, face, and mouth. He was asked did he know that these kicks and punches would cause bodily harm, and he replied yes.
14. He further identified himself standing with one foot on top of the complainant as he lay on the grass. This photograph was taken with a number of other soldiers present.
15. He admitted that he had beaten him for the first time when Hopoate had punched him and when he had beaten him twice (the second incident) he admitted that he had not done anything to him. He was then charged with the offence of causing serious harm. Later, he was formally charged under caution the particulars being put to him that he did repeatedly punch with his hand and hit Hopoate Teisina's face, and kicked his face with his feet causing bodily harm and fractured his right jaw without his consent, to which he replied, "it is true." He later made a voluntary statement, to this effect;

"What I am charged with by the Police is true, but the reason why it happened is because he stopped our bus and said inappropriate things to us and he was already told to go and he threw something at the bus and this caused what I am charged with and I am satisfied with it."

16. Mr Maka was interviewed on the 20th December 2018. He said that Hopoate had stopped their bus. He threw a bottle at the bus and punched the side window of the bus. The driver opened the bus and he got off with Sika and Vea to take Hopoate to the side of the road. He said we got off and he punched at Sika. He said we then attacked him but Sgt Mafile'o got off and held us and took us to the bus and then we left. He said that they then got back into their bus and saw him crossing to the other bus at the back and hitting that bus. The bus he was travelling in turned back and Hopoate was running heading to Vaini. They had caught him at the entrance to Beulah.
17. He then, importantly, was asked what then did you do to Hopoate when you caught him? He replied that Hopoate was running with a rake and he knew that he was running towards us with the rake and they hit him. He admitted that it was he, Sika and Vea that beat up Hopoate. He said that the beatings that he did was that he punched and Hopoate fell down. He kicked his face and the side of his abdomen. He said that it was only the three of us that caught Hopoate when he was running and they had hit him. He said the other boy had run inside the school. He also said that it was true in relation to the charge of bodily harm being put to him with particulars that he did repeatedly punch Hopoate Teisina with his hand and it hit his face and he repeatedly kicked his face and other parts of his body, causing injuries to his face and fractured his right jaw without his consent. He said in his voluntary statement that he apologised to the victim for the punishment that he did and what he did was wrong.
18. Mr Vea was interviewed also on the 20th December 2018. He said when asked what he did to cause bodily harm that he punched the boy twice. When asked which part of this boy's body his punches landed on, he said that he would not answer any more questions, and that he would only speak in Court. He later said "true" to the charge of causing bodily harm with the particulars of punching Hopoate's face twice with his hand causing it to swell and bruise and fracturing his right jaw without consent. His voluntary statement states that he apologized to the victim for the problem and what happened.

19. A medical report was tendered by consent. The principal injury was a fracture to the jaw with limited mouth opening. The complainant was hospitalized between the 5th November 2018 and the 12th November when he was discharged.
20. The accused all elected not to give evidence.

Verdicts

21. I deal first with Mr Vea's case. I am not prepared to act on the evidence of either of the more senior officers Pita Tapa and Halahuka Kohinoa in so far as the second incident is concerned that ended with the complainant on the ground. Both officers were not very forthcoming on what occurred in relation to the second incident and I accepted the Crown's application to have them declared hostile. I formed the view they were partisan to the accused and were not desirous of telling the truth on the second incident (see section 147 of the Evidence Act) I could not rely on their evidence they gave about the second incident because it was conflicted, also. For the correct approach to hostile witnesses, credibility, and previous inconsistent statements, at common law see *R v White* (1922) 17 CrApp R 60) However, I accept the evidence of Pita Tapa, the driver of the first bus, that there were two incidents; the first when the three accused had been directed to get Hopoate Teisina out of the way during which Hopoate had punched Sika. He did not say what the other accused did.
22. There is no independent evidence that implicates Mr Vea in any concerted attack on the complainant. In his record of interview, he mentions punching Hopoate twice but he does not say when that was, that is during the first or second incident. Nor does he say where he punched him expressly refusing to answer any more questions. In the written statement of charges he says true to particulars that include punching him twice, and fracturing his right jaw, which could suggest the punching related to the second incident. However, I am reluctant to act on the simple word "true" to particulars put when the charge is being put to the accused and he is unrepresented, especially when he only a short time earlier has declined to answer more questions in the interview. Nor am I able to take anything from his expression of remorse in the voluntary statement. The evidence, in my view, is not sufficient in relation to Mr Vea for

me to infer beyond reasonable doubt that he acted in concert with either of the other accused to beat Hopoate Teisina resulting in his broken jaw in the second incident. He may have been involved in punching in the first incident where there was violence. Even if his admission of truth when the charge is put to him suggests it is likely or probable the punching took place in the second episode that is not sufficient. I must be satisfied beyond a reasonable doubt that is so. I have indicated that the two army officers did not assist the Crown in the evidence they gave and I would not rely on their evidence in so far as the second incident is concerned. I note that there were other soldiers that got out of the car, and some are likely to have had a view of what happened before Hopoate fell to the ground in the second incident, but no evidence was given by any of those officers concerning the second incident. Accordingly, I acquit Mr Vea of the charge of causing bodily harm and he is discharged from the indictment.

23. Considering Mr Maka's position and the evidence that is admissible in his case, separately, the only evidence that is relevant in his case is his record of interview in which, significantly, he raises in my view the issue of self-defence as a legal justification for his assaulting Hopoate. Applying the principles relating to self-defence in *Palmer v The Queen* [1971] AC 814 (and see *Rex v Vaka* CR 90 of 216, Supreme Court, 13th June 2017 where I applied *Palmer*) I cannot exclude the possibility that, at the material time, when the soldiers caught up with Hopoate, Hopoate turned to confront them with the rake and Maka punched and kicked Hopoate in the honest belief that he and the others were in imminent danger of being assaulted by Hopoate with the rake he was carrying. Hopoate was seen by other witnesses to be carrying a rake, during his flight from the area of the buses. Mr Kohinoa mentions in his evidence that, when he commenced to chase Hopoate, he went to attack him with the rake. Hopoate was inflamed by alcohol, in an angry and dangerous mood, and he was seen to have acted irrationally already in wilfully breaking a bottle, striking the bus, and had punched Sika in the first incident. He was, in my view, well capable of using or threatening the accused with the rake as a weapon. He appeared at trial as an athletic, strongly built man, and a man not to be taken lightly with a rake in his hand, drunk and angry and caught up with by the group of pursuing soldiers. I must judge Mr Maka on the evidence that is separately relevant in his case, and the circumstances as he believed them to be. Nor do I think that Maka's reaction, assuming his belief to be honest that he and or the others were in imminent danger was excessive, in the circumstances as he

found them to be. The Crown bears the onus of negating self-defence or defence of another, and I am left in a state of doubt on this issue because there is no reliable evidence that negates the possibility that, when he was caught up with, Hopoate did not act, as Maka said, in what must have been a fast moving, dynamic event before he was assaulted and fell to the ground. As with Vea, I do not consider that I should act adversely to him because of his assertion unrepresented and in the face of his earlier assertion amounting to self defence that the charge was true. Accordingly, I give him the benefit of the doubt and acquit Mr Maka of causing serious bodily harm. He is discharged.

24. I now turn to the case of Mr Sika. He was assaulted it seems in the first incident by Hopoate. He admits in his record of interview as to the second incident catching Hopoate and also that Maka and Vea, as well as he, hit or punched him. The fact that he mentions Vea and Maka in his record of interview is not evidence that is admissible against Vea or Maka in their cases, and I have put Sika's evidence to one side when considering their cases. He said that he punched and kicked Hopoate and hit his head, face, and mouth in the second incident. There is no suggestion of self-defence in his record of interview. On the issue of causation, I consider that I must view Sika's actions without resort to any concerted or common purpose because the other accused have been acquitted in circumstances which negative their involvement in a culpable concerted attack. Causation means that the Crown, however, has only to prove beyond reasonable doubt that Sika's assaults, whether punching, kicking or both to head, face or mouth of Hopoate, was a material cause of the bodily harm (it need not be the only or substantial cause but it must be more than trifling) which is particularised as a broken jaw. I have taken into account that, although Maka acted in self-defence when kicking Hopoate in the face, his actions may have also contributed to the broken jaw. Sika, however, was specific about punching and kicking him in an area that included the mouth in his record of interview. The medical report, as well as noting a fractured mandible, makes a note that Hopoate had limited mouth opening. The medical opinion was that the injuries sustained are consistent with blunt object applied with force to the face. In these circumstances, I consider that the inference is irresistible beyond reasonable doubt that the actions of Mr Sika by punching and kicking to the face and mouth were wilful and materially contributed to the fractured jaw. Accordingly,

he caused serious bodily harm to Hopoate without legal justification. I find him guilty of the offence and convict him accordingly.

Verdict Ve'a not guilty

Verdict Maka not guilty

Verdict Sika guilty



A handwritten signature in blue ink, appearing to read "Cato", is written over the printed name.

C. B. Cato

JUDGE

NUKU'ALOFA: 18 June 2020