

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 45 of 2020

BETWEEN : **REX**

- Prosecution

AND : **HALAVAVAE SOSAIA TAUTALANOA TAMEIFUNA**

- Accused

BEFORE HON. JUSTICE NIU

Counsel : **Ms. 'A. 'Aholelei for the Crown**

Mr S. Tu'utafaiva for defence

Trial : **30 June, 1 and 2 July 2020**

Submissions : **by Tu'utafaiva on 17 July 2020**

by 'Aholelei on 22 July 2020

Ruling : **7 August 2020**

RULING (VERDICT)

Charges

[1] The accused is charged with dangerous driving causing grievous bodily harm contrary to S.25 (4) of the Traffic Act in that on 11 July 2019, he drove motor vehicle L22303 on Vaha'akolo Road at Tofoa at a speed and in

a manner, having regard to all the circumstances, might be dangerous to the public, and caused grievous harm to Sione Angianga when he swerved the vehicle to the left of the road and hit Sione Angianga causing injury leading to permanent disablement of his upper limb.

Plea and election

[2] He pleaded not guilty and elected trial by judge alone.

The evidence

[3] The Crown called 7 witnesses and the accused also gave evidence.

(1) Sione Angianga

[4] Sione Angianga, aged 36 living at Tofoa, said that on 11 July 2019 at about 2 to 3 pm, he drove a truck with another boy, Peni, sitting at the front with him, and parked the truck on the east side of Vaha'akolo Road with the truck facing south, its left wheels touching the curb of the footpath beside the road. He said he got out while Peni stayed in the truck and went to his home and looked for a tyre there but could not find it so he came back to get into the truck to leave and that as he reached for the driver's door handle, he did not know any more until he woke up in hospital.

[5] By consent a medical report by Dr. Marina Tu'inukuafe was produced in evidence as Exhibit 1. That report is dated 26 July 2019 and it stated as follows:

"To whom it may concern,

Police report Re: Mr. Sione Angianga DOB: 18.01.1984

1026745.

The above named patient was admitted to the Surgical Ward on the 11th of July, 2019 and subsequently discharged on the 21st of July.

History pertains that Mr. Sione Angianga was the victim of a motor vehicle accident, in which the incident occurred as he was walking towards his

vehicle that was parked on the side of the road when a vehicle reportedly ran into him as he was about to enter into the driver's seat.

Upon admission to the surgical Ward, examination and review of X-Rays of his C-Spine/Chest/Right Humerus/Lumbar Spine/Pelvis and CT Head revealed the following injuries.

- 1) Multiple Facial Abrasions
- 2) Fracture Nasal Bone
- 3) Suspected C-Spine Injury: C4 Tear-drop fracture
- 4) Comminuted Fracture Right Clavicle – Closed
- 5) Comminuted Fracture mid-shaft right Humerus – Closed
- 6) Bilateral Fracture of Inferior Pubic Rami of pelvis

Due to the above injuries, he is unable to mobilize independently and has limited range of motion of his right upper limb.

He is to be followed up in our Surgical Special Outpatient Clinic and has been booked for clinics with our visiting orthopedic surgeon in August.

If you have any further enquiries, please do not hesitate to contact the undersigned.

Yours Sincerely,

Dr. Marina Tu'inukuafe "

[6] He said that the bridge of his nose had hit the side mirror of the truck. The medical report state that his nasal bone was fractured. He said that his right arm was fractured close to his shoulder. The report states that he had a closed comminuted fracture of the mid-shaft right humerus. That means that the humerus bone was fractured into small pieces in about the middle. He also said that his back was painful. The report state that he had a suspected C-spine injury because it had a C4 tear drop fracture.

[7] The report also state that Sione had multiple facial abrasions, and a closed comminuted fracture of the right clavicle, that is, the clavicle being broken into small pieces, and a bilateral fracture of "inferior pubic rami" of the

pelvis, and Sione confirmed that he suffered all those injuries as a result of what happened that day.

- [8] He said that he was in hospital for 3 weeks (although the report states that he was discharged from hospital after only 10 days) and that he had to leave hospital because he had no money to pay for his stay at the hospital. He said that he was confined to bed at his home from July until December when he was finally able to walk again.
- [9] He said that his right arm was put in cast while he was in hospital and that it was finally removed in September. He said that his arm was repeatedly x-rayed because the bone had not reconnected. He said that he was told that his arm needed to be operated on, and that he now has problem with it because it aches for about 5 minutes or so now and then. He said that as for his back, he cannot lie on his back at all because it is painful to do so and he has to lie on his side all the time. He said that the doctor has told him that there is nothing more that they could do about it.
- [10] **In cross-examination** by Mr. Tu'utafaiva, he said that he never crossed the road to the other side and crossed back again before this incident happened. He said that he was talking on his telephone as he was walking back to the truck, and that he finished talking on it when he got to the rear end of the truck to go to the driver's door, and was about half way to the door when he knew no more. It was put to him and he denied that he did cross the road and was crossing back while talking on the phone, or that a vehicle had honked its horn at him for talking on the phone while crossing the road.
- [11] It was put to him that he had walked back from across the road while talking on his phone and had gone in between the front of his truck and a van which was parked in front of the truck, and that he had come back out onto the road between the two parked vehicles and the accused vehicle which was proceeding southward properly along the road hit him. He answered that that was not true because he had hit his face on the side mirror of the truck instead, and he produced a photograph of the truck

which he had only taken the Saturday before the trial. (That photograph was later produced as Exhibit 3).

[12] He said that the side mirror shown to be on the truck was a new side mirror because the side mirror had broken off when his face hit it. He said that his face had hit the side mirror from the north side of the mirror that is the side to the rear of the truck, and not from south side which is the front of the truck. I take that to mean that he was saying that he could not have been walking in front of the truck but that he was behind the front of the truck so that when he was hit from behind he went forward and then hit the mirror which was at the front (of the right side) of the truck.

(2) Saula `Ahia

[13] Saula `Ahia, 16 years of age, form 4 at `Apifo`ou College, said that he was waiting for his bus at the bus stop at the waterfront after school to go home to Houma, when the accused and his (the witness's) sister, Malia (Uikelotu), came in a red vehicle and picked him up to take him home to Houma. He said he sat in the rear seat behind the accused who was driving.

[14] He said that at Tofoa, the accused turned the vehicle and hit a boy who was standing by the road on the left side by the truck he had come in. He said the boy was standing to watch to cross the road to the other side. He said that after the accused hit the boy they then went and he and Malia were dropped off at Tokomololo and the accused returned.

[15] He was shown a book of photos (which was later produced as Exhibit 2B) and he identified the red motor vehicle shown in photo 1 as the accused's vehicle. He said that the damage to the vehicle shown in photo 3 were not on the vehicle when he was picked up from the bus stop. He said that that damage happened when the boy was hit. He said that the accused saw the boy and he turned the vehicle and hit the boy. He said that when the boy was hit the boy was spun forward. He said that the accused slowed the vehicle down before he hit the boy and that the accused then turned the vehicle to the middle of the road after he had hit the boy.

- [16] He said that when the boy was hit their windscreen broke and the left door was damaged. He said that after the boy was hit none of them spoke, and that he felt afraid. He said that the boy was just standing by his truck facing the other side of the road and that he did not cross the road at all.
- [17] He was shown photo 9 (in Exhibit 2B) and he stated that the spot where the policeman is shown to be standing, was the point where the front of the boy's truck was. He said if the accused had not turned the vehicle to the boy, they would have travelled safely past the boy.
- [18] He said that Malia told the accused at Tokomololo to stop for them to get off and for him to go back to the boy and the accused did not say anything but he stopped and he and Malia got out and the accused left.
- [19] **When cross-examined** by Mr. Tu'utafaiva, he admitted that he had stated in his statement to the police that:

“We ran along the road at Tofoa, close to a T junction and I did not notice and I was surprised when he turned to the side of the road and hit a boy who was standing there and squeezed him (fakafeu'u) to the truck which was parked on the side of the road.”

He was asked what it was that he did not notice and he said he did not remember, but that he remembered that the accused did turn the vehicle and hit the boy. He said he was not sure what words he had told the police, but he said that the accused did turn the vehicle and hit the boy but that it only hit him with the left side of the vehicle. He said he did not know if the boy was meaning to cross the road and that it was only his own thinking that the boy was meaning to do that. He said that there was no van or vehicle parked in front of the truck. He said that the accused was rolled/spun forward of his truck and he fell down while they continued running and left.

[20] (The Court then adjourned for lunch and when it resumed in the afternoon, the witness was said to have gone home. He resumed and continued being cross-examined the following morning.)

He said that he said that the accused turned the vehicle and hit the man by the truck because the accused did turn the vehicle to him. He said that he says that the accused turned the vehicle to hit the man because the accused said for him to watch and he would teach this class (of people). He was asked why he had said that the accused had not said anything before he turned the vehicle and hit the boy and he said that he had had difficulty in answering the questions the day before.

[21] He said that Saia was lying to say that it was him who said that they get off at Tokomololo so that he would return to the boy. He said the way the boy spun forward was he somersaulted, that is, with his feet up in the air as he spun forward. He said the boy did not roll forward. He said that when he first saw him he was by the door of the truck. He said that it was not true that the boy suddenly appeared at the front of the truck. He said that the left side of the vehicle hit the boy and broke the windscreen and dented the front left door. He confirmed those damages on photo 3 of Exhibit 2A and he said that there was blood on the damaged part of the windscreen.

[22] **When re-examined** by Ms. 'Aholelei, he said that he had moved from sitting behind the accused and sat in the middle of the rear seat so that he could see the front clearly between the accused and Malia.

[23] **I asked the witness**, and he said that he had seen the boy and that the boy was doing nothing which would cause the accused to say the words he said. But he said that the boy was talking on the telephone. He said that there was no vehicle coming from the opposite direction. He pointed at a spot on the damaged part of the windscreen in photo 5 on which he said that he saw the blood and said that he saw it whilst they were driving away and that he told Malia of it and that neither Malia or the accused said anything. He said that he had told the police what the accused had said before he turned the vehicle and hit the boy, but he did not read his

statement and that he did not sign it. He however corrected that and said he did sign it after his signature on the statement was pointed out by Mr. Tu'utafaiva. He said to Mr. Tu'utafaiva that he maintained that the accused did say the words ("watch while I teach this class (of people)").

(3) Penisimani Nonu

- [24] Penisimani Nonu, aged 17 of Kolomotu'a, construction worker, said that he went with Sione (the victim) in a big truck to Tofoa to get a tyre, with Sione driving and he in the front passenger seat. He said that Sione went to get the tyre while he sat in the truck. He said that he saw him coming back and that Sione was talking on the telephone. He said that Sione came and stood by the driver's door and continued talking on the phone. He said that he saw a red vehicle coming up from behind and suddenly there was a bang of something being hit and Sione was spinning forward in front of their vehicle. He said he was surprised he had never seen anything like that. He said that a girl came and said to him, "Boy, are you alright?" and that he came out of surprise/shock and said, "I am alright." He said he then got out and other people were there holding up Sione and a vehicle came and Sione was put in it and was rushed to hospital.
- [25] He said that when they came and parked there, there was no vehicle in front of them and that he did not know if there was any vehicle behind them. He said that when Sione came back he came round the back of the truck to the front and that he was just to the rear of the driver's door, but did not know how far away he was from the driver's door. He said that it was may be half an hour before Sione came back to the truck. He said that the vehicle was right by the sidewalk. He confirmed where the truck parked in photo 9 of Exhibit 2B. He said that the front of the truck was where the policeman in the photo was. He said that Sione did not cross the road at all. He said he did not know how fast the red vehicle was travelling.
- [26] He said that Sione was spinning forward because he was hit by the red vehicle because he saw it going past as Sione was spinning. He said he did not know the distance of the red vehicle from Sione when Sione fell down,

but that the red vehicle ran off when Sione fell down. He identified the red vehicle as the one in photo 1 in Exhibit 2B. He said he saw abrasions on Sione's hand and feet.

[27] He said that after a while after Sione was taken, may be 20 or 15 minutes, the red vehicle came back and stopped in the middle of the road before it got to the truck, and that a boy went and talked to the driver. He said that he saw the boy punch the driver and that the vehicle ran while the boy was still punching the driver and that the vehicle left. He said that the red vehicle came back from the north side but that it turned off on a road to the back of the truck. He said that his parents came there and they talked and they left and he saw the red vehicle come back from the fork up the road and the boys went up to it but it turned off and went westward. He said that after that someone came and drove the truck and they left. He said that Sione had left the key of the truck in the ignition switch when he had got out of the truck.

[28] **When cross-examined**, he said that no vehicle was parked in front of the truck and that may be Sione was only away for 20 minutes. He said that Sione was coming out of a "fair" area in front of which they had stopped. He said that he did not see Sione all the time that he was out of the truck. He said he himself did not have a phone with him. He said he saw him come out of the fair and that may be someone rang him because he saw him take out his phone and spoke to that person. He said he saw him come and went to open the door when he looked at a vehicle coming down fast. He said that he also looked at the vehicle through the rear window of the cab of the truck.

[29] He was shown the photo of the truck, Exhibit 3, and he pointed to the place on the truck where the rear window was. He said that although the truck had a high tail gate, he saw the vehicle driving up from behind by looking at it on the side of the gate (to the road) and not over the top of the gate. He said the car was travelling up fast. He said that Sione did come round the back of the truck and not round the front of the truck.

[30] He was shown his statement to the police on 25 July 2019 where he stated:

“When we got there [Sione] got off and went to the home and walked back to get on for us to wait for a woman to come with the tyre.”

and he said that the woman came and told him that after Sione was already taken to hospital.

[31] He was also shown a part of his statement where he stated:

“At this time I was still sitting in the vehicle, front passenger seat while [Sione] went around the side to the road to get in to the drivers seat.”

and he said that he was still saying that Sione was walking around the rear of the truck (and not the front of the truck).

[32] He was further shown another part where he stated:

“And I clearly saw a red vehicle running straight up and hit [Sione].”

and he was asked whether that was the correct version or whether his earlier version where he had said that he was surprised when there was a bang and Sione was spinning forward, was the correct version. He answered that what he says is that he saw the speeding and then the bang.

[33] Mr. Tu'utafaiva put to him that Sione had crossed in front of the truck and had appeared suddenly in front of the truck. He replied that Sione had not, and that Sione had gone around the back of the truck.

[34] He also shown another part of his statement where he had stated: “... on the door of the driver and hit his head on the vehicle mirror and rolled on the road”, and was asked whether he meant the car's side mirror and he said it was the truck's side mirror. He was shown the photograph of the truck and he made a circle around a spot on the truck where he said that was where that mirror was. He said that that mirror hit Sione's head. He said that there were 2 side mirrors there – a small round one below and a

big one above. He said that Sione was hit by the red car and he hit the small mirror. He said that the small mirror has since been replaced with another one.

[35] He said that Sione was not spinning but was rolling on the road. He said that he did not know which part of the car hit Sione. He said that Sione was still talking on the phone when he was hit by the car. He said that Sione did not cross from one side of the road to the other. He said that Sione could have gone to the fair on the other side of the road and then came back because he would not have known if he did. He said that he did not see the red car stop after it hit Sione because it kept running. He said that the red car did not hit the truck, and that it was Sione who did.

[36] **On re-examination**, he said that when he saw Sione on the road, there was blood on his head and face and his nose. He said that when Sione went around the back of the truck up to the time he was hit, there was no time at all for him to cross over to the other side and then cross back again before he was hit.

[37] **I asked** him and he said from the time that he saw Sione go round the back of the truck to the time he was hit, it was about 1 minute. He said that the driver's window on the truck was down and that he could hear Sione's voice talking on the phone for about 20 seconds before he was hit by the red car.

[38] Mr. Tu'utafaiva further put to him a part of his statement to the police: "He stood at the driver's door he was holding on to the door as if to get in." He said that he did see him very close to the truck. He said that he heard him (talking) as he was coming to the door.

(4) Malia Uikelotu

[39] Malia Uikelotu, aged 24, of Pea, said that last year the accused hit a boy (with a vehicle). She said that he turned the vehicle to hit the boy and he hit him, and that they continued running up to the fork on the road and

nearly had an accident and then nearly had another accident at Tufumahina and he dropped them off at Tokomololo and went home.

- [40] She said there was the accused, herself and her younger brother, Saula and the vehicle was a red Ford belonging to the accused. She said she was in the front passenger seat, the accused was driving, and Saula was sitting in the middle of the rear seat. She said that their speed was not very fast, maybe 40 – 60 kmph when the accused hit the boy and squeezed him (fakau'u) to the truck by which he was standing. She said that it was her side of the car that hit the boy.
- [41] She was shown photo 4 of Exhibit 2B which showed the left side of the red car. She pointed to the mount remaining on the front left door where she said there was affixed a side rear view mirror which was there and which broke off when the accused turned the car and the side mirror hit the rear of the truck and then the car then hit the boy in a squeezing (fakau'u) manner against the truck and rolled him against the truck until the boy fell off at the front of the truck and they continued running.
- [42] She said that they had been in town and were leaving and that they went to where she was staying at Kapeta and that they left there and the accused played on the road. She said that at Vaololoa, the accused turned the vehicle to hit a boy and that she stopped him. She said that what happened was they were driving along, the accused turned the car to hit a boy who was standing by a Chinese shop opposite Tupou High School. She said the boy was one of rubbish collection boys and there was a rubbish truck there in front of the boy. She said that the accused turned the car to hit the boy and that she pushed the steering wheel to turn the car and the car turned and missed the boy. She said that she told the accused to stop doing it or they'd have an accident, but that the accused just laughed.
- [43] She said that they continued along Vaha'akolo Road to go to Pea and that when they got to the intersection with Paini Tu'uua Road, a Voxy vehicle was coming towards them from the opposite direction and the accused

turned their vehicle to hit the Voxy when they were about 3 or 4 meters away from it. She said that she grabbed the wheel and turned it and thereby turned their vehicle away and saved them from hitting the Voxy. She said that she told the accused to stop his playing or they would have an accident. She said that he just laughed again.

- [44] She said that they continued and at Tofoa a boy was standing by his truck on their left side and he was talking on his phone. She said that 3 vehicles travelling in front of them went past the boy and the accused saw the boy and he said "you two watch while I teach this class (of people)". She said that she said no but the accused turned, to her surprise, and hit the boy. She said that the glass from their side mirror fell on to her and that the car then hit the boy by the door of the truck and squeezed the boy to the truck. She said that the boy's head hit the windscreen of the car and smashed area of it where she was. She said that they continued while the boy was rolled along the side of the truck and he then fell in front of the truck while they carried on towards the fork of the road.
- [45] She said that she told the accused when they hit the boy to stop but the accused just continued driving away. She said no one else said anything. She said that at the fork the accused just drove right through narrowly missing another vehicle. She said that he was travelling fast and that at Tufumahina he overtook 5 vehicles all at the same time and they nearly had an accident with another vehicle which was coming the other way as he turned at the fork in the road there and went to Tokomololo.
- [46] She said that at Tokomololo she told the accused to leave them there and for him to go back to Tofoa and he did while they walked. She said that when she got home to Pea she saw that the vehicle was parked at the back under a coconut tree but she did not see the accused. She said that she then talked with a friend of the accused named Taani Latu and told him what had happened, and that after that, she then went to the Central Police Station at Nuku'alofa and told them what had happened and they took her statement.

- [47] She said that she estimated their speed when they came to the boy at 40 to 60 kmph. She was shown the photo of the truck, Exhibit 3, and she said that the boy was standing just to the left of the driver's door. She said that the accused turned the vehicle to the boy as soon as he finished saying what he said, at the same speed that they were travelling. She said that there was no vehicle behind or in front of the truck. She said that there were 3 or 4 vehicles in front of them and the last of them had gone past the truck when they came up to the truck.
- [48] After the lunch break, the witness continued her evidence. She said that it was about 2 seconds after the accused said the words that he hit the back of the truck. She said that after the accused hit the boy, the accused speeded up the car and the rolling or spinning of the boy was faster. She said that she only noticed the boy when the accused said the words he said. She said that they were close to the truck then because he just spoke and then turned the car to the truck. She said that their speed at the fork of the road was may be 80 to 100 kmph.
- [49] She said that when they were getting out of the car, Saula got out alright but she could not open her door. It was jammed and Saia got out and came round and pulled it from outside and then it opened. She said it was not like that before they left because the vehicle was new and its side mirror was there and the windscreen was not broken.
- [50] **When she was cross-examined**, she said that it was after school at 3 pm that she went to the accused's place at Pea. It was put to her that she had told the accused to take her to town and she said that she told Losana a girl at his place that she was going to Kapeta and that the accused offered to take her because he wanted to go for a drive anyway. Mr. Tu'utafaiva read part of her statement to the police to her that stated: "On 11 July 2019 at 1400 hours or so I told Saia of Pea to come and bring me to town", and she said that she did say it but that was after the accused said that he was coming to town. She agreed that she did not tell the police that the accused had suggested that he would take her, and that the reason was

because she was still flustered from what had happened, although it had happened at 3 or 4 and her statement was being taken at 8 to 9 pm. She said that she was not lying or making up lies in her evidence in court.

- [51] She said that when they came to town they went past Kapeta because the accused said that they go to town because he had something to do there and then they would come back to Kapeta. She said that when they drove past the bus stop she saw Saula there and she told the accused and they went around and picked him up, and the accused said that they would take him to Houma to give her a ride there sight-seeing. She said that as they were travelling, the accused said that he was hungry and that she said that they go to Kapeta and see if there was any food there.
- [52] She said when they got to Kapeta, there was no one there but there was food there and that she gave the accused some. It was put to her that she had told the police that they went to Kapeta to pick up an effeminate boy to go with them to Houma but that he was not there, and she agreed that that was true but that that person was not there and that the accused asked for some food and that there was some yam and chicken soup there and the accused had some.
- [53] She said that when she had gone to the accused place, the accused was drinking homebrew from a bottle and that she saw him drink it. She said that when she got there the accused was already drinking and was drunk. She said he and another boy were drinking from a bottle which they were passing between them, only one bottle. She said that while they travelling to town the accused took out another bottle and drank from it, when they come to get on to Taufa'ahau Road at Pea. She said that she did not tell the police that the accused had drunk homebrew. She said she only told the police that the accused was drunk.
- [54] It was put to her that she had not told the police that the accused swerved to hit a rubbish collection boy but she said that she remember well that she did tell the police that and that she read her statement after the police wrote it. It was put to her she was lying and she said she was telling the

truth, and that the accused did turn the car to hit a van at Havelu. She said that she did push the steering wheel to save the boy.

[55] She said that when the accident happened, Saula was sitting in the middle of the back seat but that before then, he was sitting behind her, and that she only noticed him sitting in the middle when the accident happened. It was put to her that she was lying to say that the accused had turned the car to hit the oncoming van when it was 3 to 4 meters away because that distance was so close that they would have hit the van if he did turn the car to hit it. She replied that the van did turn away from them as well at the same time that she turned their car away from it. It was also put to her that she had not said anything to the accused about the accused turning to hit the boy (at Vaololoa) and the van (at Havelu) because Saula did not hear her say any such thing. She said that she did say it loudly that Saula would have heard it, and that if he said that he did not hear her say it, she was still saying that she did say it to the accused.

[56] She said that she only saw the boy when the accused said he would teach this class (of people). She said that there were 3 or 4 vehicles in front of them and that she did not see anyone crossing the road from their right to their left and did not hear any horn honking and that no vehicle stopped to avoid anyone crossing the road.

[57] She said that it was true that she had said that she saw the boy just getting off the truck and was doing his telephoning beside the truck because she saw him just closing the door of the truck and then did his telephoning.

[58] She said that the car's side mirror did hit the rear of the truck.

[59] It was put to her that she had said in her statement to the police that: "As we got to ... a man was standing beside the vehicle that is the side to the road ... the accused then said to me, "Watch while I teach this class which he meant the man by the vehicle". She agreed that she did see the man

before the accused said those words and that she had not told the police that the man had just got off the truck.

- [60] She said that the boy did not do anything wrong and that it was only the accused who said that he did. She said that the accused was drunk then and that he was not drunk before then. She said that she told the police all that but that she did not read what they had written and that she just signed it.
- [61] It was put to her that she had said nothing in her statement about the car hitting the rear of the truck, and that all she stated was: "He then turned to where the man was standing – and did not hit the truck but just hit the edge of the man (tele'i atu pe 'a e motu'a) and I told him to stop but he kept running". She said that she told the police all that she has told the Court but he only wrote what he did. She said that she was not making it up. She said that the side mirror broke because it hit the truck, and the shattered mirror pieces fell on to her. She said that she had told the police all that but he did not write them down. She said that what she said to the accused when he said to watch while he would teach this class was "Don't," but that she did not state it in her statement to the police.
- [62] She said their vehicle went up and hit the boy with the side of the vehicle, that is, with the left side of the vehicle as is shown by the damage to the left side as shown in photos 3 and 4 of Exhibit 2B. She said that the accused turned the car to the truck after it had gone past the rear of the truck and squeezed the boy to the truck so that the boy's body rolled on the side of the truck and of the car. She said that the boy's body was being rolled along while he was still standing and his head hit the windscreen of the car and broke it and then his body fell to the front of the truck. She said that the accused "ran" the body of the boy along the side of the truck, and that the side of their vehicle was badly squashed so that the door dented inwards and was jammed. She said that their speed was may be 40 to 60 kmph but that the accused also speeded up when he hit the boy.

- [63] She said that she told the accused to stop but he did not. She said that Saula said that there was blood on the windscreen. She said that the accused did not stop, and that no one came and punched him. She said that she did not call out to the accused to run or they would get hurt.
- [64] She said that at the fork in the road, they should have stopped because there was a vehicle coming and was almost up to them but the accused just drove through and that she told the police that they nearly had an accident at the fork, and that they nearly had another one at the fork at Tufumahina, but it was true that nothing in her statement said anything about those. She said that the accused was overtaking 5 vehicles doing 80 to 100 kmph and was going very fast and that they were afraid.
- [65] She said that it was her who told the accused to go back and help the boy that they hit and that she thought that he did but she was surprised to find that he had gone and slept instead.
- [66] **On re-examination**, she said that the accused and his friend Sione were drinking a 1.25 litre bottle of homebrew when she first went to his home, and that the bottle was nearly empty when they left to go to town. She said that the bottle that the accused had in the car was also a 1.25 litre and that it was still full. She said that when the accident happened that bottle had not gone half way down yet. It was placed between the front seats. She said the last drink that the accused had from it was before they got to Kapeta where the accused had the food. She said that Saula pointed out the blood on the windscreen when they got to Tufumahina.
- [67] **I asked** and she said that the accused's grandmother was her aunt, the accused was her "nephew". I asked her and she said that the dents on the side of the car could have only been caused by the body of the boy being rolled by the car against the side of the truck.
- [68] I asked her what she meant when she said that the accused speeded up when he hit the boy, and she said that the accused revved up the car to go faster when the boy was being squeezed on the side. She said that the

accused did not stop the car at all after the boy fell off, and that no one ran up to hit the accused and that she did not call out to the accused to run or they would be hurt.

(5) Leniti Pale

[69] Leniti Pale, 38 years old of Ma'ufanga, police officer of 18 years with 15 years in the forensic division, said that on 11 July 2019, he took 15 photographs of Sione Angianga at Vaiola hospital and he produced them in a booklet as Exhibit 2A.

[70] **There was no cross-examination.**

[71] **I asked him** and he said that he took the photographs at about 8:45 pm of the 11 July 2019.

Photographs 14 & 15 showed abrasion of the left knee.

Photographs 12 & 13 showed 2 abrasions of the right knee.

Photographs 9 & 10 showed 2 abrasions on the left shoulder.

Photograph 8 showed 2 small abrasions of the left knuckles.

Photographs 5 & 6 showed injury on left side of bridge of the nose and above left brow.

(6) Havea Fusikata

[72] Havea Fusikata, aged 37 of Puke, police officer of 12 years with 7 years in the forensic division said that he went and took photographs on Vaha'akolo Road at Tofoa and that he also took photographs of the red motor vehicle no. L22303, of the accused, at the Longolongo police station on 15 July 2019.

He produced 9 photographs in a booklet which he produced in evidence as Exhibit 2B.

Photograph 1 - showed the red vehicle.

Photograph 2 - showed the accused pointing to the red vehicle he drove.

Photograph 3 - showed the damage to the windscreen and left side of the vehicle.

Photograph 4 - showed a closer view of the damages in photo 3.

Photograph 5 - showed the accused pointing to the dent on the front of the left door frame where he said that that was the part of the vehicle that he hit Sione Angianga with.

Photograph 6 - showed the rear of the red vehicle.

Photograph 7 - showed the accused pointing to a spot which was then marked with a yellow marker which he said was where Sione Angianga was when he hit him with the red vehicle.

Photograph 8 - showed a closer view of the accused pointing to the same spot.

Photograph 9 - showed the same spot but from the other direction but without the accused, and also showed a policeman and another man standing on the footpath to the left.

[73] **When cross-examined**, he said that he took the photographs on the road and then they went and took the photographs of the car. He said that he did not write down what he asked and what the accused said but that he could still remember it. He said that other police officers were there too and that their leader there was Fifita and that he was present. He said that he did not take any photo of the inside of the car or any bits of glass in the car because he was not told to. In respect of photographs 3 and 4 he said that what appeared to a different colour shown on the dents on the left door of the car was the reflection of the grass as lit by the sun. As to photograph 9 he said that they did not see any bits of broken glass or blood on the road. He said that he did not take any photograph of the truck.

[74] There was no re-examination and **I asked** and he said that he did not see any evidence or sign on the damaged area of the car that indicated that another vehicle had caused that damage. As to the marker shown in photograph 7, he said that the accused had pointed to the spot on the road where he had hit the victim with the car, and the marker was then placed on that spot and then the photographs were taken. As to photograph 8, he said that the policeman shown standing on the road was standing in the middle of the road.

[75] Mr. Tu'utafaiva asked him and he said that it appeared from the photographs 8 and 9 that there appeared to be a faint broken white line painted along the middle of the road.

(7) Soane 'Ulukaufonua

[76] Soane 'Ulukaufonua, 25 years old of 'Utulau police traffic officer, said that the work he did was to interview the accused and he drew a sketch plan on the 15 July 2010 of the area where the accused said that he hit the victim with the car. He produced the plan in evidence as Exhibit 5. He said that he took measurements and the width of the road was 10.2 meters and that the spot indicated by the accused as point of impact was 2.58 meters from the curb.

[77] **In cross-examination**, he said that the accused was questioned by Fifita at the scene. He said that he was present when the accused was questioned at the police station on the day of the incident and that the accused said that he would only speak in the Court, but that at the scene, Fifita asked him where he had hit the victim and he pointed to a spot on the road which he then measured from the curb. He agreed that the accused was only estimating the position of that spot. He said that there was a broken white line painted in the middle of the road but that it was faint. He said that photo 9 showed the spot which the accused said he hit the victim.

[78] He said that they ought to have looked at the truck as well but they did not get to it, especially to verify its width. He said that he was present when

photos 1 to 6 were taken but no photograph was taken of the inside of the red car shown in those photographs. He said that he had read Malia's statement but she did not say anything about any broken glass falling on her inside the car when they hit the boy.

[79] He said that Saula himself had said that he was surprised when the accused suddenly turned the car and hit the boy, that he Saula had used the word "surprised". He said that Saula did not say that the accused had said, "Watch me teach this class" or anything like that.

[80] He agreed that it was important, and he would have written it down in Malia's statement, if Malia had said that the accused had played using the vehicle on the road, namely, turning the vehicle at a boy by the Chinese shop at Vaololoa, or turning the vehicle at an oncoming vehicle at the junction with Paini Tu'uua Road, or hitting the rear of the truck with the side mirror of the vehicle at the scene, or of nearly having an accident at the fork in the road, or of overtaking 5 vehicles at one time doing 100 kmph at the time. He said that such things were not relevant to the boy being hit but they were important.

[81] After he was shown photographs 4 and 5, he was asked and he said that they did not investigate to see if there was any red mark found on the truck to indicate where the red car might have hit it.

[82] **I asked** and he said that the plan was not drawn to scale.

[83] Ms. 'Aholelei asked and he said that it was possible for a witness to have a second statement but in this case, Malia did not make a second statement.

Defence case

Evidence of the accused, Halavavae Sosaia Tautalanoa Tameifuna

[84] The accused, 24 years of age, of Pea, domestic work, said that he went to Losana's home that day to take her to draw out her money and after they did that they returned to her home at about midday. He said that they then ate some take away chicken and that there were Losana and her husband,

Aloha, himself and his friend, Sione Latu. He said that he and Sione Latu then drank homebrew, a 1.5 litre bottle until it was finished at about 1 pm. He said he was slightly drunk (mamafana).

- [85] He said at about 1:30 pm. Malia came there. He said that Malia was lying when she said that he was still drinking with Sione when she came. He said that Malia insisted that he take her for a ride in his new van, which he had just bought in July and he eventually agreed and went with her in the van.
- [86] He said that they came along Taufa'ahau Road, then Fatafehi Road and then Vuna Road, and as they drove by the bus stop there, Malia shouted that there was Saula. He said they went and got him from the bus stop to take him to Pea. He said that as they went to return to Pea, Malia said to go to Kapeta and he told her to tell him where to go. He said that Malia was sitting beside him at the front and Saula was sitting behind him, not behind Malia, and that Malia was lying to say Saula was sitting behind her.
- [87] He said that at Kapeta, Malia went in the house and came with some food which she and Saula ate. He said that Malia was lying to say that he was the one eating or he was the one being hungry.
- [88] He said that when they left there, they all sat in the same seats in the vehicle. He said that at Vaololoa, nothing there happened and Malia was lying to have said that he had turned the vehicle to hit a boy by the road.
- [89] He said that at that time, he did not feel drunk anymore. He said that Malia was lying to have said that he had a bottle in the car and drank from it.
- [90] He said that at the junction with Painsi Tu'uua Road nothing happened at all and that Malia was lying to have said that he turned the car to hit a silver Voxy coming towards them.
- [91] He said that at Tofoa, the road was quiet and there was only one car travelling in front of them and he noticed a boy crossing from the right side of the road about 100 meters away from him, in front of the vehicle in front of them. He said that he noticed the boy because the car in front tooted its

horn at him. He marked a point on the sketch plan (Exhibit 5) where the boy was when the car in front tooted its horn. That point was just past the middle line of the road. He said that the boy was talking on the telephone because he was holding the phone to his ear.

[92] He said that the car in front stopped and the boy continued walking and disappeared between a truck and a black Voxy which were parked on the left side of the road. He said that the car in front then speeded off and that he was coming along at about 40 to 45 kmph. He said that when he was in line with the truck he was surprised when the boy suddenly hit his windscreen from the side.

[93] He said that it was lie for Malia to say that he had said "Watch me teach this class".

[94] He said that it was also a lie for Malia to say that the side mirror of the car hit the truck and that it was lie that pieces of the mirror fell on to her. He said that it was a lie that the boy was standing by the truck talking on his phone.

[95] He said that before the boy hit his vehicle, he did not see him at all. He said after thinking about it he must be the same boy who had crossed the road. It was put to him that Sione (the victim) had said that he never crossed the road to the other side and crossed back again, and he said that he thought he was the same one.

[96] It was also put to him that Sione said that he came round the rear of the truck to the right side of the truck and he said that if Sione had come round the rear of the truck he would have noticed him.

[97] He said that when the boy hit the vehicle, the left front window was down and the front windscreen was smashed and that Malia screamed as he went past the black Voxy. He said that the windscreen was smashed as shown in photo 5 of Exhibit 2B.

- [98] He was asked what happened to the side mirror on the left front door and he said that it broke off when Sione hit it and that it fell in front of the truck. He said he knew that when he went back to the scene and saw it lying there and he told a boy to go and get it but the boy said that they talk first.
- [99] He said that what Malia said was wrong. He said that when he went past the Voxy he braked and stopped but that a boy crossed over from the other side of the road and punched him on the chest, and Malia shouted for them to run or they would get hurt. He said he then ran and they went to Tokomololo.
- [100] He said that as they ran their speed was about 30 kmph up to the fork (with Taufa'ahau Road) where they stopped and gave way to 2 vehicles before they continued. He said that it was not true that they were doing 80 kmph at that fork or that they did not give way there. He said when they went to the next fork at Pea, it was not true that they were going at 80 to 100 kmph but that they were only doing 45 to 50 kmph.
- [101] He said that at the Tokomololo cemetery he stopped and told Malia that he had to go back and help the boy and Malia said for them to go to Houma and take Saula, but he said he would go back and help the boy. He said it was not true that it was Malia who had suggested that he go back to help the boy. He said that he felt in his conscience that he should go and help despite being punched.
- [102] He said that he returned to Tofoa and was queuing because the road was busy and when he was close to the place, a boy crossed over from the east side (right side of the road) and he told the boy to go and get his mirror for him, but the boy just came over and punched him on the chest and he saw about 7 boys coming with pipes and knives and so he turned to a side road on the left and went around and came back on Vaha'akolo Road to the scene but he saw the boys run up to him, so he turned a side road to his left and went to Taufa'ahau Road and decided to go home or he would be hurt.

- [103] He said that he did not tell the police what had happened because he had no telephone.
- [104] He said that in photo 8 (Exhibit 2B) he was pointing at the spot where the boy hit his vehicle, and that in photo 5, he was pointing at the point where the boy hit his car, which was the front frame of the left front door.
- [105] He said that the dent at the front of the frame near the front left wheel was caused by a rubbish tin which he hit at his home as he turned into the drive way because his uncle had called out to him as he was turning and he looked at him and he went and hit the rubbish tin. He said that it was a big hit because the rubbish tin went flying as a result. He said that he then went and parked the car at the back by a coconut tree.
- [106] **In cross-examination** by Ms. 'Aholelei, he said that he was surprised when the boy hit his van and said that he was pointing in photo 5 at the place where the boy hit his van and caused the damage to the windscreen and dent on the left door of the van.
- [107] It was put to him that Sione (the victim) was small in size and how could he have caused such damage, and he said that Sione could have. It was also put to him that Sione could not have had all the injuries he suffered – the broken nose, the abrasions, the fractured arm and fractured pelvis – by just stepping forward into his vehicle, and he replied that he believed that Sione did suffer those injuries as a result when he fell on the road.
- [108] It was put to him that he was lying in his evidence and he said that what happened was what he had told in his evidence, and that Sione was lying because he did not see anyone walking round the rear of the truck.
- [109] He also said that a boy crossed over from the right side of the road and punched him when he stopped after the boy hit his vehicle. He marked a spot on the sketch plan (Exhibit 5) as the place where he stopped and the place from where the boy crossed from.

- [110] **When he was re-examined** by Mr. Tu'utafaiva, he said it was the boy who had hit his vehicle and that he had said yes when Ms. 'Aholelei had asked him that it was not possible for such damage and injury to have happened as a result of such a hit.
- [111] **I asked him** and he agreed that the point that he had marked where he stopped after the collision was about 18.3m from the point of the collision. He said that he did not stop sooner because he was startled by Malia's screaming and he was also surprised himself. He said the reason he stopped was to help the boy but he had to run when the boy came and punched him.
- [112] He said he did not see the boy cross up to his van. He said that he believed that the boy was running. He said that he believed on impact with the car he would have bounced backwards.
- [113] He said that he had bought the car on 1 July 2019, new, for \$22,000 on order from China. He said that the left front door was as new as the right front door. He agreed that the middle of the left front door as shown in photo 5 was dented inwards but that bottom of the door was not dented so that something had hit the middle part and dented it.
- [114] I asked him if Sione was running and he hit the door frame Sione's body would bounce back and not cause the dent to the middle of the left front door. He said he agreed. I asked him how the dent to the middle of the left door would have happened and he said that he did not know.
- [115] I asked him what sort of rubbish tin it was he hit at his home and he said that it was drum a black drum which they used as a rubbish bin, I asked him and he agreed that there would have been a black mark made on the car when it had hit the drum. He said that all the dent to the front of the door frame was caused by the hitting of the drum, but that the dent on the door was caused by Sione's body.

[116] I asked him and he said that he did not go and report the matter to the police was because he was afraid that he would be caught for drunk driving.

[117] **Mr. Tu'utafaiva** asked and he said that in photo 9 (in Exhibit 2B), the nose of the police vehicle was shown on the left by the sidewalk and that was where he stopped his vehicle after the collision. He also said that it made no difference whether Sione was running or was walking. He said that if Sione was running he would bounce, but if he was walking he would not bounce and that he would stick to the vehicle instead.

[118] He said that what he had meant about being caught by the police was not that he was drunk but because of the smell of homebrew on his breath. He said that the drum was empty. He said that the reason he went home was to ring his mother about the accident.

Submissions and consideration

[119] Mr. Tu'utafaiva made his submissions first. He says that there are 3 elements of the offence which the Crown must prove:

- (a) that the accused drove the motor vehicle L22303 on Vaha'akolo Road at Tofoa on or about 11 July 2019;
- (b) that the accused's speed and manner of driving, having regard to all the circumstances, might be dangerous to the public; and
- (c) that the accused caused grievous harm, namely, permanent disabling to the right upper limb of Sione Angianga.

He says that the first element is not disputed but that the second and third elements have not been proved beyond reasonable doubt.

Grievous harm admitted

[120] However, in respect of the third element, he does not dispute that grievous harm was caused to Sione Angianga. What he disputes is that the accused caused it. He says in paragraph 16 of his submissions:

“16. The third element is why or how was Sione grievously harmed. Was it caused by the defendant swerving his car and hit him as alleged by the Crown (?). Or, was it caused by Sione walking on to the road and crashed onto the side of the defendant’s car”

The circumstances

[121] He said that in respect of the second element, the relevant circumstances were

- (a) the accused had consumed homebrew;
- (b) the accused was the driver and the 2 passengers were related by blood to him;
- (c) the motor vehicle was in good condition;
- (d) the weather was good.
- (e) the traffic on the road was not busy.

Ms. ‘Aholelei has no problem and agrees with that.

The speed and manner

[122] As to the speed, there is no dispute that the accused was driving at about 40 to 45 kmph. However, it is with regard to the “manner” of driving of the accused that counsel disagree. Mr. Tu’utafaiva says that the evidence of the accused should be preferred – that the victim walked into and crashed against the accused’s moving vehicle and sustained his injuries. Ms. ‘Aholelei says that the evidence of the victim, his passenger, Penisimani, and of the accused’s 2 passengers, be preferred, that the accused deliberately turned the vehicle to and did hit and injure the victim.

[123] The reason that Mr. Tu’utafaiva says that the victim walked into and crashed on to the accused’s vehicle is based on the claim of the accused that the victim did, as the accused stated in his evidence, namely, that the victim walked across the road and disappeared between the truck on the

left and a Voxy van parked in front of the truck, and then came out of the same gap and crashed into the left side of his vehicle.

The area where Sione was

[124] Mr. Tu'utafaiva however stated in paragraph 11:

"11. Before looking at the evidence of the alleged swerving it is important for the court to decide where Sione was shortly before the impact."

He then referred to the relevant parts of the evidence of the victim (Sione) and of Penisimani and of Saula and of Malia, and then he continued:

"It is submitted that the evidence shows Sione to be at the area of the truck's driver's door before the impact."

[125] I accept that submission of Mr. Tu'utafaiva because that is the evidence of all those witnesses and I believe their evidence. I therefore cannot see how it can be said by the accused that the victim (Sione) had crossed the road and disappeared and then came out suddenly and crashed onto his vehicle. He claims that that was why he did not see him before he crashed onto his vehicle – because, in other words, Sione was not standing in the area by the driver's door of his truck, such as Mr. Tu'utafaiva has agreed that Sione was standing.

[126] I therefore have to accept that Sione did not come out suddenly from in front of the truck such as the accused has said in his evidence that he did, but that he was standing in the area by the driver's door of his truck.

Sione had not crossed the road

[127] I also have to accept that that means that Sione was not the boy whom the accused say was crossing the road while talking on his telephone and to whom a vehicle had honked its horn, because that boy had disappeared between the truck on the left and a Voxy van parked in front of the truck.

[128] Because not one of the witnesses saw any such boy crossing the road while taking on the telephone or that a vehicle honked its horn at him, despite the cross-examination that there was such a person, I do not believe that there was such a person. I believe that the accused has only made that up to make out that Sione was that person and that after he had disappeared between the truck and the Voxy, he suddenly re-appeared through the same gap and crashed onto his (the accused) vehicle. I believe that he has made up that story to try and prove that he had not swerved the vehicle deliberately and hit Sione and injure him so severely.

[129] If both Saula and Malia saw Sione standing by the door of his truck talking on his telephone, how could the accused not have seen him? I accept that he did see him standing there talking on his telephone because Penisimani was sure he could hear Sione talking on his telephone when the red car hit him, just beside the driver's door of the truck. That supports what Saula and Malia are saying.

Inevitable conclusion

[130] There cannot therefore be any doubt that Sione did not run or walk onto and crashed onto the vehicle of the accused. Not one piece of evidence, other than the claim of the accused, suggest that he did. On the other hand, there are the evidence of the accused's own "aunt" and "uncle" who were riding in the vehicle with the accused, and who both saw Sione standing by his truck, that the accused swerved or turned the vehicle onto and deliberately hit Sione with the left side of the vehicle. that is the inevitable conclusion.

[131] It is the inevitable conclusion that the accused did see Sione standing there and that Sione was standing only 2.58m from the curb of the left side of the road whilst the accused vehicle had the remainder of the width of the eastern half of Vaha'akolo Road of 10.1m, namely, he had 7.52m of the left half to his vehicle, and that up to that point the accused was travelling properly in a normal way proceeding southwards at about 40 – 45 kmph. If the accused had kept that normal course, he and his 2 passengers would

have travelled safely past Sione and his truck. But, no, something happened.

[132] That something was that the accused vehicle turned off from its normal course and headed to the rear of the truck where the left side mirror of the car hit the right rear corner of the truck and it broke off its mount on the side of the car altogether. Malia gave evidence of that. She said the glass pieces from the mirror fell on to her through the open left window where she was sitting at the front passenger seat.

[133] The only way that the course of the car could have changed, such as Malia and Saula have said happened, was if the steering wheel was turned that way. Both Malia and Saula say that it was turned that way, deliberately, by the accused.

Deliberate swerving

[134] Mr. Tu'utafaiva submits that the evidence of Malia and Saula that the accused had said to them:

“Mo sio kau ako'i e kalasi ko `eni.”

(You two watch while I teach this class of people)

could not be relied upon as true because both Malia and Saula had failed to tell the police that piece of evidence and so the police did not write it down in their statements, and in Saula's case, he had not said it at all when he gave evidence in chief on the first day and that he only said it in cross – examination on the second day. He pointed to the silence of Saula in answer to his questions:

1. How did you know the vehicle was turned? (no answer)
2. After he said he would teach this class of people, what did Saia do? (no answer)
3. Can you answer? He then said, No.

Mr. Tu'utafaiva submitted in effect that Saula could not answer these questions because Saula had lied that the accused had said these words.

[135] Mr. Tu'utafaiva makes the same submission about the evidence of Malia that the accused had said the same words, not that she was silent and not answer like Saula, but that she did not say that the accused turned the vehicle to the victim. He pointed out that Malia only said that she was then surprised that the car hit the rear of the truck with the side mirror of the car, meaning that she did not say that accused had turned the car to hit the victim.

[136] He says that Malia's evidence about the accused drinking from a bottle of homebrew in the car, and swerving the car at Vaololoa to hit a rubbish collection boy by the road there, and swerving to hit an oncoming vehicle at Havelu were all made up to paint a bad picture of the accused's driving that day, and that she had not told the police, not only those 3 things but also what she says the accused said about teaching this class of people.

[137] I am afraid I do not agree with Mr. Tu'utafaiva. I believe the evidence of Saula and of Malia that the accused did say the words they say he said: "Mo sio kau ako'i e kalasi ko `eni". When he said those words, there was the victim, Sione, standing by his truck – on the side of the truck to the road – that is he was on the road close to where the vehicles were passing by him going south on the east half of Vaha'akolo Road, talking on telephone. It is clear that as far as the accused was concerned that man (Sione) should not have stood there talking on his telephone. He should either have got off the road and talk on the sidewalk or got into his truck and talk there. He therefore decided to teach him not to stand like that there on the road and do his talking on the telephone and he told Malia and Saula that. He said to them: "Mo sio kau ako'i e kalasi ko `eni".

[138] Within 2 seconds, he turned the steering wheel to the left, but he had turned it too far to the left that the car hit the rear right corner of the truck with the side mirror of the car and the mirror was shattered and the whole frame broke off its mount which was affixed to the front left door. Bits of the shattered mirror flew backwards and some fell in through the open left window where Malia was sitting and fell onto her.

- [139] The accused then turned the car so that the left of the front part of the car, where the front left wheel was, hit the man who was talking on the telephone on the road by his truck, the man whom the accused had told Malia and Saula he would teach.
- [140] The man (Sione) never saw the car coming because he did not know what had hit him or how it had hit him. But both Malia and Saula say that the left side of the car squeezed (fakafeu'u/fakau'u) the boy against the truck and rolled him between the truck and the car, and the boy's head hit and smashed the car's windscreen. And Penisimani says that Sione's face hit the small round side mirror of the truck and broke it off, and that Sione then rolled onto the road at the front of the truck.
- [141] Now looking at the photographs of the red car and the indentations to the left side thereof, and confirming from the police photographer, Havea Fusikata, who had looked at those indentations and had confirmed that no vehicle, had caused those indentations, I have to conclude that they were caused by the body of the boy (Sione) when it was squeezed by the car against the truck, and then rolled between the two vehicles as the car was moving forward - thereby causing the boy to hit his head on the windscreen and smash it and his right arm and right clavicle and his pelvis to be squeezed and crushed by front frame of the left door of the car because that part could not bend or dent like the other parts of the car, and then the body was further rolled against the middle of the front left door of the car and squashed it in and jammed that door against its frame, and at the same time brought the head of the boy around to hit the small side mirror of the truck which broke his nose bridge, before the body of the boy fell off at the edge of the front of the truck.
- [142] At one time, as Malia said, the accused revved up the car and rolled the body faster. I believe that. The squeezing of the body of the boy against the truck must have necessarily reduced the speed of the car down as the body was rolled between the two vehicles such the car would have come to a stop but the accused revved up the car and the rolling of body continued

and faster as Malia said and only finished when the body fell off at the front of the truck. There was then no further resistance and the car continued running, but the body of the boy kept rolling and sliding along the road resulting in the abrasions to his knuckle and both his knees and shoulder.

[143] I believe that neither Malia or Saula believed what they were seeing happen before their eyes – that their nephew, the accused could do such a thing to that boy for just standing on the road and talking on the telephone. It was not an accident at all; it was premeditated causing of serious injury. Malia could not think to live with it – she told the accused to go back and help save the boy from the sure death it appeared that they had left him in. And when she got home and talked with the accused's friend, it confirmed her resolve to do something about what she saw happened. She went to the police and reported it.

[144] I accept both their evidence as true because they had no motive to make it up, and no evidence was pointed to which may indicate that either of them had any ill feeling towards their nephew. If was against their interests, namely the wellbeing of their nephew, to have said what they have said that the accused did. I therefore believe that they have not made their evidence up. As to Saula not answering the 3 questions of Mr. Tu'utafaiva, I believe he was in a quandrary like he said he was, to tell the truth and see his nephew get convicted, or to say nothing at all. He properly chose not to answer, and he correctly answered that he could not answer the question.

[145] Accordingly I believe the evidence of Malia and Saula that the accused deliberately turned the steering wheel of the car so that it would hit and that it did hit the victim Sione Angianga and caused grievous harm to him. I give credit to Malia and Saula for maintaining their stand as to what they saw and heard happened.

[146] On the other hand, I find the accused evidence unbelievable and I do not believe it, for the following reasons:

- (a) If Sione (the victim) had crossed the road like he said Sione did and he suddenly emerged from between the truck and a Voxy van onto the road and crashed onto the red car, then Sione would not have hit his face on the small side mirror of the truck. But Penisimani was sure that Sione's head did hit the small side mirror of the truck and broke it off. He said he saw Sione hit the mirror then fell at the front of the truck. I believe Penisimani because Sione confirmed that the side mirror shown on the photograph of the truck was put on to replace the broken one.
- (b) If Sione had crashed onto the red car like the accused said he did, no one would have claimed or seen any reason to think that the accused was to blame for hitting Sione. No one would have come forward and blame the accused for it. And the accused would have immediately stopped and jumped out to help Sione or see if he suffered any injury. I find that he lied that he stopped, and that a boy ran up and punched him and that Malia shouted that they run or they would get hurt. I find that, as Malia and Saula said, he did not stop at all. That is consistent with him being in the wrong. This was a clear case of hit and run.
- (c) He said he could not tell the police what happened because he had no telephone to use to ring the police. Yet he said he went home to telephone his mother about the accident. What telephone did he use to do that? Why could he not have used it to tell the police what happened?
- (d) He lied that he hit a drum at his home and caused the big dent between the left front wheel and the front left door, because there was no black mark from the drum or sign of any such hard object hitting any part of the red car. Besides he said the drum was empty. It could not have made such a large dent on the car.
- (e) He was asked by Ms. 'Aholelei whether it was true that he had turned the car to hit an oncoming Voxy van at the Paini Tu'uua junction, and

he replied that he had not done any such thing at the "silver" Voxy. That struck me. Malia had not said that the Voxy was silver in colour. She just said it was a Voxy. But it was clear that the accused remembered that the Voxy was "silver" in colour. Why would the accused remember that? Because he had tried to run into it and Malia stopped him. If he had not done so, he would not have recalled any Voxy of any colour on the road. But he recalled it was silver in colour because he had tried to hit it.

- (f) If the damage to his red car had been caused by Sione when he walked or ran and crashed into his red car – thereby sustaining such extensive damage to his windscreen, side mirror and extensive indentations to the side of his car, and causing the left front door to be jammed, he would have stopped and got his name and address or phone number, and see about how Sione would pay for all the damage he had caused. But he did not. And it is now one year later and he says nothing about any claim which he has made against Sione to pay for those damages. That to me is consistent with Sione not having caused any of the damage that the car sustained.

Conclusion

[147] I therefore come to the conclusion that the accused did turn or swerve his red vehicle no. L22303 to the left of the road where Sione Angianga was standing and talking on his telephone and hit him and thereby caused injury which he has lead to permanent disablement of his upper limb, and I am satisfied beyond reasonable doubt that he is guilty of the offence with which he has been charged in this trial. I convict him as charged.

NUKU'ALOFA: 7 August 2020.



A handwritten signature in black ink, appearing to be "Niu J", is written over the seal.

**Niu J
J U D G E**