

Sean and A.C.

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 183 of 2019

BETWEEN : REX

- **Prosecution**

AND : TOIO LAUTEAU

- **Accused**

BEFORE HON. JUSTICE NIU

Counsel : Ms. H. Halaevalu Aleamotu'a for the Crown

Mr S. Taione for the accused

Trial : 10 and 11 August 2020

Submission : in Court on 28 August 2020

Ruling : 15 September 2020

RULING (VERDICT)

Charge

[1] The accused is charged with one count:

That on or about 7 May 2018 at 'Ohonua he seriously caused bodily harm to Mele Valeti Lauteau by hitting her head with a hammer twice causing lacerations to her head contrary to S.107 (1), (2) (c) and (4) of the Criminal Offences Act.

Evidence

- [2] The Crown called 4 witnesses and their evidence is the only evidence in this trial because the accused did not give evidence or call any witness.

Mele Valeti Lauteau

- [3] The first witness was Mele Valeti Lauteau, the complainant. She is 43 years of age. She is the wife of the accused. She said that she did not want to give evidence against her husband because she still loved him. She said she had come from 'Eua and visited her sister and her husband at Havelu and that the accused rang her from 'Eua but that she did not answer the phone because it was her sister's and her husband was using it.
- [4] In the following week she returned to 'Ohonua and her husband met her at the wharf and they went home. While they were talking at home, her husband asked her why she had not answered his call, and she told him that the husband was using the telephone, and that it was not hers. She said that her husband then told her not to lie and she told him that she was not lying. She said that her husband again told her that she was lying and that she then attacked her husband and scratched his face and neck and he pushed her and she fell on the bed.
- [5] She said she got up and attacked him again and he pushed her against the wall and he then went out of the bedroom into the hall and to the lounge. She said she then picked up a rock hammer which they used as a door stop and threw it at her husband but it missed him and it hit the dining table instead. She said that her husband then came and pushed her and her face hit the corner of the hall way wall and the lounge wall.
- [6] She said she swore at him and picked up a mop and hit him on his head with it. She said that he then grabbed her and threw her on the floor. She said she swore at him again and that she got up and ran at him but he side stepped and that she hit the corner of the dining table. She said she saw the hammer and she picked it up and attacked him and they struggled with

each other. She said that he managed to pull the hammer off her and that as he pulled it off her she fell down on the floor. She said she then saw blood on her hand which was the blood from her face.

[7] She said that she told her husband that she was injured. She said her husband told her that they go to the hospital and that she told him no, and that she would go to his mother's sister. She said that he said that his aunt would be angry with him, but that she told him that she would still go to her, and she then walked to her husband's mother's sister's place.

[8] At this stage, Ms. Aleamotu'a asked that the complainant be declared a hostile witness so that she could be cross-examined on a statement she had made to the police which was contrary to the evidence she had given. Mr. Taione opposed that request. I referred to S.147 of the Evidence Act and stated I had no way of telling whether the complainant was not desirous of telling the truth to the Court as at that stage.

[9] The complainant then continued with her evidence and said that when she got to the aunt's place, she went with her to the hospital. She said that a female doctor attended to her and she said that she lied to the doctor that she and her husband had quarreled and that her husband had hit her head with a hammer. She said she showed the doctor her injuries – one on the right side of her forehead and the other one was to the back of her head but close to her left ear. She said that the doctor then stitched up the injuries and that she was to be taken to Tongatapu for further treatment.

[10] She said that two policemen came to her in the hospital in 'Eua and that they questioned her and wrote down her statement. She however said that she could not recall if she had signed it.

[11] She was shown her statement and she stated that it did not contain her signature. In respect of what was stated in the statement, she said she had not told the police any of it. She said that what was stated in the statement was only stated by her to the doctor (and not to the police).

[12] Again, Ms. Aleamotu'a asked that she be allowed to cross-examine the witness on her statement, and I stated that I was still not sure if she was not desirous of telling the truth, but I stated that the witness could be recalled after other witnesses have been heard.

[13] Mr. Taione did not cross-examine the complainant.

Viliani 'Amone

[14] Viliani 'Amone, police officer of 'Eua of some 6 years said that he took photographs in the house of the complainant and the accused in the same evening of 7 May 2018 and on the following day, 8 May 2020, and also at the place where they had found the accused. He produced a booklet of those photographs in which they are numbered from 1 to 26. That booklet was produced as **Exhibit 1**.

[15] He also produced a hand drawn sketch plan of the layout of the house as **Exhibit 2**.

[16] He said that he had written a statement of the complainant at the hospital on the day she was injured and that the complainant did sign it and that he also signed it. He produced that statement as **Exhibit 3**. He identified and pointed to the signature both on page 1 and on page 2 of the statement.

[17] He said he had known and was acquainted with the complainant ever since they grew up in 'Eua and he identified her in the Court at the time of giving his evidence.

[18] He said that he and another officer (Giovani Finau) asked the complainant if they could go into their house and take photographs and she agreed and told them how to open the lock of the door. They then went into the house and took the photographs that evening. He said that they then went to the accused's father's home and found the accused there. He had already changed his clothes. He said he took photographs of him and of the clothes he had worn. Those photos are in the booklet Exhibit 1.

- [19] He produced the hammer as **Exhibit 4**, the jeans shorts which the accused had worn as **Exhibit 5** and his underwear as **Exhibit 6**. He identified the blood shown on those 3 items as are shown in the photographs taken of them.
- [20] He also produced a hand drawn sketch plan showing the layout of the complainant and accused's house and the house of the accused's aunt which he said he had measured and found to be some 230 meters away from each other.
- [21] He also confirmed that there were blood smears and blood drops at various places inside the house which they marked with numbered markers which are shown in the photographs.
- [22] Mr. Taione **cross-examined** the witness but nothing of substance was revealed.
- [23] I asked the witness and he said there was no other injury on the accused except the finger nail scratch mark appearing on his chest as shown in photo no. 25. He said that there was no bleeding from it.
- [24] He said that the officer Giovanni Finau was the one in charge of this investigation and that he was the one who had spoken with the doctor, Selu Taunaholo.
- [25] He said that photographs 11, 12 and 13 also show the blood spots and smears.

Dr. Seluvaia Taunaholo

- [26] Dr. Seluvaia Taunaholo is 39 years of age and was the doctor in 'Eua hospital at the time of this incident. She qualified from the Fiji School of Medicine in 2015 and she began working as doctor in the Ministry of Health in Tonga from 2015 up to now. She was transferred to and she worked at 'Eua from 17 October 2017 until December 2019.

[27] She said that whilst at `Eua she attended to all patients and cases of all description including injuries of all kinds including injuries from assaults. She said that she attended to the complainant on the injuries she received on 7 May 2018.

[28] She produced her records of her attendances and of the hospital attendances to the complainant at `Eua up to her transfer in the following day to Vaiola Hospital at Tongatapu, and they were exhibited as **Exhibit 8** and **Exhibit 9**. She also produced the report from the Vaiola Hospital as **Exhibit 10**.

[29] In Exhibit 8, she wrote that she first saw the patient at 2115 hrs on 7 May 2018 and that "dried blood all over patient x 2 lacerations 2 cm above R brow near temporal area and one on L parietal area L forearm swelling and facial swelling". Her opinion was written as follows:

- "1) Above injuries caused by blunt trauma force.
- 2) Yet to rule out depressed skull fracture and forearm fracture. Above findings to assault, could be life threatening. Case will be transferred to Vaiola for further investigation and management".

[30] She said that she got the information on page 5 on Exhibit 9 from the complainant patient herself:

"According to patient she just returned to `Eua today on the boat. This evening was sitting with husband talking properly. Was surprised for husband to suddenly grab her & started assaulting her with a Rock Hammer.

Results of assault was L forearm & head. Head maintained 2 lacerations, one on forehead on her ... profusely. Husband was intoxicated managed to escape Husband by ... & was brought to hospital by Auntie in law.

Res: Headache, ... of R side of face, bleeding from forehead wound L forearm numbness, bleeding from ...

Medical history: No known medical condition.
No past surgery.
No known allergy.

Stt : Married 4 years. Husband usually under the influence of alcohol. Husband 41 years ... victim of domestic violence. No children yet."

[31] On page 6 of Exhibit 9 she further wrote:

1° Survey : General appearance ; Dried blood all over body. R facial swelling & R orbital swelling" She then drew a face showing the two eyes and a forward-leaning capital "L" on the left of and above the eye on the left with an arrow pointing at the "L" with the words at the other end "Laceration 2 cm, & bleeding, clean, skull bone exposed, ... intact, tender on palpitation. Exploration & CA S depressed...."

[32] The finding and opinion of the doctor at Vaiola Hospital on 8 May 2018 which is on Exhibit 10 were that:

Examination & finding:

- Black eye on right side.
- Laceration on the right side of forehead and back of head (L + side)
- Swollen Lt hand but no fracture noted.

Opinion:

- The above injuries resulted from blunt force trauma from weapon used.
- No fracture noted on CT scan of head and Lt arm."

- [33] Dr. Taunaholo said that she wanted to see how heavy the hammer was that had caused the injuries, as the complainant had told her, so that she could judge if there was any risk of depressed skull fracture or internal cranial hemorrhage. She said that the police brought the hammer to her in the following morning, and upon seeing how heavy it was she was confirmed in her opinion that the case be referred to Vaiola Hospital. She said that the injuries she saw could not have been caused by a fall or by hitting a wall.
- [34] Mr. Taione **cross-examined** the doctor as to whether the injuries could have been caused by a fall on a concrete floor and she said no unless there was a corner, same as if there is a corner of two protruding walls, but there must be strong force.
- [35] She said what she could remember when she first saw the complainant at the hospital was that she looked scared and shocked, and that she did not show any sign of anger.
- [36] **I asked** and she said that having seen and studied the rock hammer, and the injuries received by the complainant, she could say that the hammer had caused the cuts on the complainant's head.

Giovani Finau

- [37] Giovani Finau, 36 years of age with 12 years in the police force, said that he interviewed, charged and wrote down the answers and statement of the accused on 9 May 2018. He produced them as **Exhibit 11**. In all, the accused did not admit or say anything which may be held to be evidence that he committed the offence with which he is charged.
- [38] He said that he and Officer 'Amone went and saw the complainant at the hospital. He said that she told them that the accused hit her with a hammer. He said that she was covered in blood and that the nurses were trying to stop the bleeding. He said he asked her if she would tell them what happened so that Officer 'Amone would write it down and she agreed and she related it while 'Amone wrote it.

[39] Mr. Taione cross-examined and I asked questions but nothing of substance was revealed.

Mele Valeti Lauteau

[40] The complainant was called again by the Crown. Before she was asked any question, Ms. Aleamotu'a asked me and I advised the complainant she did not have to say anything in answer to any question which would incriminate her and she acknowledged that she understood that.

[41] As to what Officer 'Amone had said that she had said to him and which he wrote down as her statement, she said that her answer was that she was guilty that she was lying in order that her husband did not get convicted. She said that her head was injured when she hit the table and fell on the floor. She said that she lied to the doctor and to the police because she was angry with her husband but that she loved her husband and did not want him to go to prison.

[42] Mr. Taione did not ask any question and **I asked** and she said that in photos 21 & 22 her Tshirt had blood on it when it was taken off at the hospital and that her shorts also had blood on it.

Submissions

[43] Oral submissions were made by both counsel. **Mr. Taione** stated that it was not disputed that bodily harm or injury did happen to the complainant but that it is disputed that it was caused by the accused. He submitted that the evidence was that it was the complainant who attacked the accused and scratched him and who threw the hammer at him and missed. He said that the accused in defending himself pushed her when she attacked him again and she fell against the corner of the hall way wall and the lounge wall. He submitted that she hit the corner of the walls with the back of her head and thereby sustained the cut to the back of her head, which was a straight cut.

- [44] He said that the complainant then attacked the accused with a mop and she fell and hit her forehead on the corner of the table and thereby sustained the L shape cut to the right side of her forehead, but that she then picked up the hammer and attacked the accused again and the accused threw her down on the floor. He said that it was only then that she noticed the blood from her face and she stopped.
- [45] He submitted that the complainant lied to the doctor at the hospital that the accused had hit her and caused her injuries with the hammer because she was still angry with him.
- [46] Mr. Taione submitted that if the accused had actually hit the complainant's head with the rock hammer, like the complainant had told the doctor, she would have already died. He said that the cut to the back of the head was consistent with the back of her head hitting the corner of the two walls because it was a straight cut, and also because there was no fracture to the skull, just as the cut to the forehead being consistent with her falling onto and hitting her forehead on the corner of the table, and also there being no fracture there either.
- [47] He submitted that the police could have and should have had the hammer sent down to Tongatapu for fingerprint dusting, but they didn't. He also submitted that no reliance be placed on the complainant's alleged statement because she denied she told them what was written on it and she denied that she signed it.
- [48] He submitted that on the whole, the Crown has not proved that the accused caused the complainant's injuries beyond reasonable doubt and that he be acquitted.
- [49] **Ms. Aleamotu'a** submitted the Crown had proved all the elements of the charge beyond reasonable doubt, because the complainant had described to the doctor what the accused did to her and how he had caused the

injuries to her, and she also told the police officers the same thing. Officer `Amone wrote it down as she was telling it to him.

- [50] She also referred to the evidence of the doctor who said that she drew a drawing of the complainants face showing the L shape cut to the right side of her forehead and how she found and concluded, after she saw and inspected the hammer, that the two cuts to the complainant's head had been caused by the hammer.
- [51] She also points out, in reply to Mr. Taione's point, that the complainant never said in her evidence that she had hit the corner of the two walls (tapa'i holisi) with her head or back of her head, and that she had only said that she had fallen against the wall and that she had fallen on the floor.
- [52] Finally she pointed out that when the police questioned the accused he never said anything about any of the attacks that the complainant has now said she had perpetrated upon him. Her point is that the complainant has fabricated her evidence and it is evident that the accused never knew anything about it then because she had not made it up then.
- [53] **Mr. Taione** in reply pointed out that the L shape cut would have been consistent with the complainant fall with the right side of her forehead hitting the corner of the table.

Consideration

- [54] When Ms. Aleamotu'a said in her submissions that what the complainant had stated in her statement was the truth, I said to her that that statement was not evidence. She then responded and said that it was because she had told it to the police and that it was evidence – not because it was written but because she had said it to them as well as to the doctor.
- [55] Now having reconsidered it, I agree with Ms. Aleamotu'a. What she spoke to the doctor and to police as to the cause of her injuries has become the fact which is being investigated by this Court, and the statement she made to the police is a fact which is now being investigated. S.89 (a) of the

Evidence Act makes such statement an exception to the hearsay rule. It provides as follows:

“89. The Court shall not admit hearsay evidence except in the following cases:

(a) where the statement forms part of the fact or transaction which is being investigated by the Court.”

[56] I also consider that this statement is not hearsay evidence in any event because the person who has made that statement, the complainant, has been called as a witness herself. S.88 of the Evidence Act defines hearsay evidence as follows:

“88. Where it is sought to prove any fact by evidence of an oral or written statement made by any person not called as a witness, such evidence is called hearsay evidence.”

[57] Accordingly, the contents of the complainants statement is very much a fact which is properly being investigated, and I quote it in full as follows:

“Ko `eku fakamatala teu fai `oku mo`oni mo totonu `i he`eku `ilopau mo e tui `e hoko `eku fakamatala ko e fakamo`oni `i ha hopo `e ala faka`ilo au ki ha hia kapau teu fai ha fakamatala ta`emo`oni pe teu tui `oku ta`emo`oni.

`Oku ou manatu lelei heni ki he `aho 07.05.18 taimi vaha`a `o e 7 – 8 po`uli na`a ku tangutu ai mo hoku hoa Toyo Lauteau `o fai `ema po talanoa `i loki na`e `eke mai pe na`a ku `alu au o `ai moa `i Tonga pea u talaange “Ikai” na`e `alu pe `ema talanoa ke toe fakalalahi pea `oho mai ai hoku mali `o halu`i hoku `ulu `o toho mai au ki loto fale `o fakatangutu `i homa ki`i mohenga `i loto fale pea lue ia `o to`o mai e hamala na`e tuku he ve`e matapa `o lue mai ia `o taa`i `aki au `o tau `i hoku fo`i la`e `o lavea pea ne toho`i mai au `o ne taa`i pea u pale`i hoku nima pea u `ohofi ia `o puke `a e kau va`e hoku mali mo `eku kaila “ke fakamolemole`i au kapau `oku `iai haku tonounou pea ke fakamolemole`i au” kae pehe mai hoku mali kiate au “`oua teu kaka”. Pea ne toe taa`i `aki `a e hamala `a hoku mui `ulu `o lavea peau ongo`i `oku fakapo`uli hoku mata peau ninimo peau hoholo ki lalo `o tokoto

he faliki ka na'e lahi ange 'eku ilifia he 'oku fakapo'uli hoku mata kau kei pipiki pe hono va'e mo kole fakamolemole pe ki ai pea ne hanga 'o tukuange au hoku 'ulu he na'a ne puke hoku 'ulu. Kau tangi mo 'eku ongo'i ki hoku sino 'oku tetetete na'a ku tu'u hake leva 'o tangutu he sea mo'eku kole fakamolemole ki hoku mali pea ne talamai keu fakamolemole'i ia pea u talaange 'io kou fakamolemole'i ia" peau talaange ke fakaava 'a e matapa pea ne talamai 'ikai pea kou fakamolemole'i ia peau talaange 'io peau talaange ke fakaava e matapa heku 'afu pea 'alu aipe ia 'o fakaava peau tu'u ki 'olunga 'o feinga ki he matapa he 'oku ou ongo'i faingata'a'ia 'aupito.

Na'a ku a'u ki he matapa 'o manga hoku ongo va'e kitu'a pea ala mai hono nima 'o puke hoku nima 'oma fefusiaki ai 'o homo hoku nima peau talaange ki ai ke ha'u kema tangutu 'o fakamokomoko mo talanoa peau tangutu he potu'i 'akau he lalo moli pea talamai hoku mali 'e 'alu mai 'ene tapaka pea hu ia ki fale kau lele au ki he 'api 'o Veilomani Vaka 'o kole tokoni ki ai he 'oku langa hoku 'ulu.

Ko'eku fakamatala he peesi 01 – 02 'oku mo'oni mo totonu 'i he'eku 'ilopau 'e hoko 'eku fakamatala koe fakamo'oni 'e ala faka'ilo au ki ha hia kapau teu fai ha fakamatala ta'emo'oni".

[58] I find that that statement is consistent with what the doctor said that the complainant told her. Dr. Taunaholo has written in her record as follows:

"According to the patient she had just returned to 'Eua today on the boat. This evening was sitting with husband talking properly. Was surprised for husband to suddenly grab her and started assaulting her with a Rock Hammer. Results of assault was L forearm and head. Head maintained 2 lacerations one on forehead .. profusely. Husband was intoxicated managed to escape Husband by ... and was brought to hospital by Auntie in law ..."

[59] I also find that it is also consistent with what Officer Finau said in his evidence. He said that the complainant told him at the hospital that the accused had hit her with a hammer.

[60] I also find that what the complainant said in her statement about what she felt – namely – that after she was hit (for the second time) on the back of the head her eye sight darkened (fakapo’uli) and she felt dizziness and she collapsed on the floor, but she still clung onto his feet and still begged for mercy ... her body then began to shake ... that she felt great difficulty – as being consistent with what the doctor observed on her because she still remembers what she saw. She said that when she first saw the complainant at the hospital, the complainant looked scared and shocked, and she did not show any sign of anger. She said that when Mr. Taione cross-examined her.

[61] I also have to accept the opinion of Dr. Taunaholo because she examined the cuts on the complainant’s head. She says that after also examining the hammer, she said that the cuts to the complainant’s head were caused by the hammer. She was therefore convinced that the complainant needed to be transferred to Vaiola hospital to ensure that her head was x-rayed and managed there to safeguard her against any depressed skull fracture and internal ^{cranial} ~~cervical~~ hemorrhage.

[62] I also accept and agree with Ms. Aleamotu’a that the accused never told Officer Finau who was interviewing him any of the things which the complainant now says she did to the Accused or how she had received her injuries. If the complainant had truly did what she now says she did to the accused, and as to how she received her injuries, there was every reason for the accused to have told Officer Finau of it because he would have had nothing to do with the complainant’s injuries. And as I have said, he did not tell the police because he couldn’t have known then that that was what the complainant was going to say in Court during this trial, 2 years later.

Conclusion

[63] Accordingly, having fully considered all the evidence in this trial, I am left in no doubt, let alone a reasonable doubt, that the accused did cause the injuries to the complainant’s head as described by the doctor. I am also in

no doubt that the accused seriously caused it for the purpose of S.107 (1) 2 (c) and (4) of the Criminal Offences Act, because he not only used a weapon to cause it but that it was a heavy steel rock hammer at that.

[64] I therefore find the accused guilty and convict him as charged.



NUKU'ALOFA: 15 September 2020.