

Sean and pl.

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

CR 222-225 of 2019

BETWEEN:

R E X

-Prosecution

AND:

**SIAFA NAI
KONA'I BLOOMFIELD
VILAKETI BLOOMFIELD
TANGI TIUFILUSI NAI**

-Accused

VERDICT

BEFORE: JUSTICE CATO

Counsel: ✓ Mr. J. Lutui, Director of Public Prosecutions with Mr. J. Fifita for the Crown
Mr. S. Tu'utafaiva for the accused Kona'i Bloomfield and Vilaketi Bloomfield
Ms. 'A. Kafoa for Siafa Nai
Mrs. F. Vaihu for Tangi Tiufilusi Nai

Date of Verdict: 16 September 2020

1. The accused were tried on various charges in a joint indictment arising out of fight at the Talieva Bar in Nuku'alofa on the 4th February 2019. The charges the accused faced were;

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Mr Siafa Nai

Count 1: Murder contrary to sections 85, 86(1)(a) and 87 (1)(b) of the Criminal Offences Act

In the Alternative to count 1,

Count 2: Manslaughter contrary to sections 85, 86(1)(a) and 92 of the Criminal Offences Act

In the Alternative to count 2,

Count 3: Causing Grievous Bodily Harm contrary to sections 106 (1) and (2)(a) of the Criminal Offences Act

Mr Kona'i Bloomfield

Count 4: Murder contrary to sections 85, 86(1)(a) and 87(1)(b) of the Criminal Offences Act

In the Alternative to count 4,

Count 5: Manslaughter contrary to sections 85, 86(1)(a) and 92 of the Criminal Offences Act

In the Alternative to count 5,

Count 6: Causing Grievous Bodily Harm contrary to sections 106 (1) and (2)(a) of the Criminal Offences Act

Mr Vilaketi Bloomfield

Count 7: Manslaughter contrary to sections 85, 86(1)(a) and 92 of the Criminal Offences Act

In the Alternative to count 7

Count 8: Causing Grievous Bodily Harm contrary to sections 106 (1) and (2)(a) of the Criminal Offences Act

In the Alternative to Count 8,

Count 9: Common Assault contrary to section 112(a) of the Criminal Offences Act

Mr Tangi Tiufilusi Nai

Count 10: Causing Grievous Bodily Harm contrary to sections 106 (1) and (2)(a) of the Criminal Offences Act

In the Alternative to count 10,

Count 11: Serious Causing Bodily Harm contrary to section 107(1),2(c) and 4 of the Criminal Offences Act

In the Alternative to Count 11,

Count 12: Common Assault contrary to section 112(a) of the Criminal Offences Act

Mr Sione Bloomfield who appeared on the indictment charged with one count of common assault contrary to section 112(a) of the Criminal Offences Act pleaded guilty to this charge before trial, and is yet to appear for sentence.

2. The trial lasted for 10 days between the 30th August and the 11th September 2020. At the conclusion of the evidence and submissions of counsel, I adjourned to consider my verdicts to the 16th September 2020.

3. Before considering and giving verdicts, I set out material aspects of the evidence, and also the law as it is relevant to the various charges each accused faced in the indictment.

The Evidence

4. Inspector 'Etuata Siale gave evidence of a general kind relating to various exhibits. He pointed out that the boots worn by Kona'i Bloomfield were working boots but not with steel plated toes.
5. He also introduced exhibit one, the first video, which showed live footage of the beginning of the fight involving the deceased, Mr Sione Feimoefiafi, and Mr Tangi Tiufilusi Nai. The evidence suggests that the deceased was on top of Mr Nai, near the front door of the bar which looked out on to the Taufa'ahau road and was opposite the Sanft building that is situated on the other side of the road. Mr Tangi Nai appeared to push the deceased in the back near the entrance shortly before the fight began. The fight is seen to very rapidly violently escalate with Mr Kona'i Bloomfield and Mr Siafa Nai, both strong and well developed men, grabbing the deceased and taking him outside the bar. During this period and whilst still in the bar, Mr Siafa Nai is seen to punch in a very determined manner down onto the head of the deceased and shortly after stomp in the area of his head about three times. In the vicinity of the bar, Mr Vilaketi Bloomfield is seen nearby as the deceased is dragged outside the bar. Vilaketi is said to have said any other deportee want to be tough. Vilaketi also is heard by a witness Freda Lavoloto say beat him to death. The deceased was dragged on to the street. The phone video clip (exhibit 1) stops at a point where the deceased is taken outside the bar.
6. A further exhibit, 4, is a series of still photographs taken at 5 second intervals from a security camera positioned outside. It records various actions of the men as they leave the

bar. Exhibit 4, photo 2 shows Kona'i and Siafa taking the deceased out of the bar and the deceased falling on the sidewalk (16:04:02). Exhibit 4 photo 3 shows the deceased on the road with Mr Tangi Nai standing over him, and, at this point, Mr Kona'i Bloomfield is slightly further away on his knees (taken at 16:04: 08 hours). The photograph does not show clearly what Mr Tangi Nai was doing at this point and I shall return to this aspect of the case later. Mr Vilaketi Bloomfield in a grey with red stripe t-shirt is seen slightly off the pavement approaching the deceased. In the next still photograph, Siafa Nai is seen walking back to the sidewalk (photo 4, 16:04:13) but in (photo 5, 16:04:17) he appears to be around the deceased who may be attempting to get up off the ground. He is seen near where the deceased is positioned bending over him, in photo 6 (16:04:22). At this point, Kona'i Bloomfield is seen walking away in the direction of the bar. Mr Tangi Nai is seen appearing to walk away also. The Crown, in its submission, contends that this is the area where eye witness evidence suggested that the deceased was facing the Sanft building and had attempted to get up, when Kona'i and Siafa returned to further assault him before dragging him a little nearer the bar to his final resting position where he lay with his head on the road in the direction of the ice cream shop adjacent to the bar before police arrived, assisted him to get up and took him to hospital where he later died several hours later. The position he was taken to in the middle of the road closer to the Sanft side, when his head was in the direction of the Sanft building was about 6.75 metres from the entrance to the bar. The area where he ultimately was dragged to was a little closer to the bar. There are blood spots in these areas which are mentioned in the exhibited plan.

7. Still photo 7 at 16:04:28 seconds show Mr Tangi Nai walking towards the bar suggesting he may have paused earlier and remained outside for a short time before returning to the bar. Kona'i is looking towards the deceased from an area in the road and only about a metre from where the deceased appears to be lying. Photo 8 appears to show the blue denim jeans of Kona'i near the deceased at 16:04:33. Photo 9 appears to show the deceased surrounded by Kona'i and Siafa at 16:04:42. Kona'i is seen standing in a similar position at 16:04:42, photo 10. At 16: 04; 53 in photo 12 the owner of the bar Freda Lavulo emerges from the bar and is on the road approaching the area where the deceased was lying. Nearby, in front

of her, is Kona'i. In photo 13, at 16:04:57 Kona'i and Vilaketi Bloomfield can be seen, and in photo 14, 16:05:02, Freda is seen in this area, also. In photo 15 (16:05:22) Freda, Vilaketi and a third man either Siafa or Kona'i can be seen. Photos 17 (16:05:32) and 18 (16:05:37) pictures Freda apparently talking with Siafa Nai with Kona'i nearby and a security (in red) talking with Vilaketi. Photo 21 sees Kona'i and Siafa with Freda returning to the bar area. Freda remains outside photo 24 (16:06:17) Siafa Nai engages in conversation with a man on the pavement. This is the final resting place of the deceased before he is assisted by police to get into a car and is taken to hospital.

8. Of importance is a video clip taken of the final stage of the assault (exhibit 2). It shows clearly both Saifa stomping heavily on the deceased's head and Vilaketi delivering the final stomp. Kona'i is nearby taking no part in the action, and may be discouraging further action, and Freda is apparently trying to prevent any more assaults. This video commences after the deceased had attempted to get off the ground and does not feature any of the assaults that were allegedly administered to him at that point, that is before he was dragged closer to the bar. Those assaults are off camera and feature in the evidence of eye witnesses. Also of some importance is a series of still photos taken from a security camera inside the bar. No evidence was given as to what the background cause of this fight was. Photo 3 appears to show Tangi Nai punch or manhandle the deceased who is wearing a white T shirt with number 3 on the front from the rear. Photo 2 of exhibit 3 appears to show him talking with a group of men one of whom appears to be Tangi Nai in a blue grey T-shirt with a cap. Nearby in pPhoto 3, 16:03:13 can be seen Vilaketi. Photo 4 at 16:03:18 shows the men commencing to fight. Vilaketi is nearer to the entrance.
9. Photo 5 suggests both men are on the floor (16; 03; 23) with Vilaketi nearer the men on the floor. Kona'i appears to be looking down at the men in photo 6 (16:03:28). In photo 7 (16:03:33) a large man in a white t-shirt with short sleeves (Siafa Nai) is seen looking down nearby where the men were fighting on the floor. Vilaketi and Kona'i in a singlet are nearby with Kona'i looking down and crouching over in photo 8 (16:03:38) The action escalates

from photo 9 16:03:43 hours with little shown on this still. It would seem that by 16:03:57 the men were exiting the bar (photo 2, exhibit 4), Kona'i (in a white singlet) and Siafa in a white short sleeved T-shirt can be seen dragging the deceased who is on his knees on the sidewalk at 16:04:02 (photo 2, exhibit 4)

10. It would seem that from the commencement of the action inside when Tangi seems to punch or manhandle the deceased from behind and the fight starts to the time when they emerge from the bar is about 59 seconds. The period of fighting outside is from photo 2, exhibit 4 (16:04:02) to approximately when it appears to have ceased and Freda and others are ushering the men away on photos 17 or 18 of exhibit 4 (16:05:32-37) is about 1 minute 30 seconds. In short from dragging the man out into the street to the time the action appeared to end was about a minute and a half; from the beginning of the fight about 2 and a half minutes.
11. Exhibit 2 or video 2 commences in so far as the action is concerned at around the time of photo 15 of exhibit 4 (16 :05: 22) when Freda has emerged and can be seen talking with Vilaketi with a man present, either Siafa or Kona'i who can both be seen in this video. In this video, Siafa Nai is seen approaching the deceased who appears motionless on the ground and lifts up his leg to stomp him on the ground. Kona'i is seen at this time but does not assault the deceased. Vilaketi, however, appears to push Kona'i, and remonstrates with Freda and then proceeds to stomp the deceased also in the head

Freda Lavulo

12. She was the Managing director of the Tali'eva company that owned the bar. She said that about 4 pm she was in her office and she heard a commotion and rushed around the bar to stop it. She saw a person stomping on the victim and that person had slippers on. She said that Vilaketi pushed her away. She said that Vilaketi said beat him to death. She was held at the bar by Vilaketi. The men left the bar.

13. She said she saw three outside. They were Vilaketi, Siafa Nai and Kona'i and she yelled out to Kona'i to stop. They were alternating stomping on his head. She said that the three men were stomping one after the other. This caused her to go outside. When she went out the deceased was bleeding from his nose and mouth.
14. She said that the deceased was sitting close to where Vilaketi and the others were, but at a different table. She said that when she arrived at the bar all she could see was a sort of white slipper a person stomping on the victim's head. She did not see a punch. The only thing she saw was the stomping.
15. Mr Tu'utafaiva said that, in her police statement, she had said someone had shouted beat him to death but had not mentioned that it was Vilaketi. She suggested that Vilaketi had stopped her interfering in the fight.
16. She said she was at the door area when she saw the man alternatively stomping, a couple of metres into the street. They stomped more than once. None of them stomped on him together. She said she was quite sure that she saw Kona'i stomp wearing shoes Timberland, more than once. She said that she was inside and saw the man in white T-shirt stomp first and then Kona'i and that is when she called out to him. That was immediately after the man in white t-shirt did it. This happened when they moved to the middle of the street.
17. She said that she saw the stomping from inside the bar, then went outside and that is when she saw Vilaketi. She said that the stomping took place in the area on the video. She saw some stomping from the entrance and she came outside and saw the stomping with Kona'i and the other man and she tried to stop Vilaketi stomping. She then said she saw the

stomping by the man in white and Kona'i first, and then went to the area and tried to stop Vilaketi.

18. In re-examination, the video (exhibit 2) was played to her and she confirmed it was Vilaketi she had heard say beat him to death about three times. She also said from the entrance she saw Kona'i stomp and then when she got outside she saw the man in the white T shirt stomp.

'Alosi Maka

19. She was the bar manager, and had started working about 4pm. She saw a man with a yellow t shirt and stripes attacking the deceased who was at the other end of the table whom she knew as Sione, Kona'i Bloomfield tried to step in and stop him. The deceased walked off with his beer and is reported to have said with tragic prescience don't be angry, that is devil's work.
20. She noticed Tangi Nai followed Sione and punched him in the back. Sione turned around and they had a scuffle. She saw Nai was on the bottom and Sione was on top. Kona'i, Vilaketi and Siafa were surrounding him very close to the front door. She said that Siafa had taken a stool but the security guard took it from him. They assaulted and kicked Sione inside. Siafa grabbed Sione by his T-shirt and Kona'i grabbed him by his hair and dragged him outside.
21. She saw Kona'i kick Sione when he was facing the Sanft building. She said Siafa kicked him in the head and Freda was stopping him, and then Vilaketi returned and kicked to the head. She told them when they returned to the bar that they will die from that assault and Vilaketi said to me shut up or he would smash her. She could see that the deceased was bleeding. She was standing by the door when she saw this activity.

22. She said she could see through the door and saw Kona'i kick first when Sione was facing the Sanft building and that was before she saw Siafa stomp him on the video which she was shown.
23. She said that they were stomps and more than one. It was after that they dragged him (Kona'i, Siafa and Vilaketi) and he was facing the ice cream shop (that is closer to the bar) Siafa and Vilaketi kicked him.
24. She said Sione Bloomfield, Vilaketi, Kona'i and Tangi were at the same table before the fight. Siafa was not seated at that table.
25. She said that Kona'i had tried to punch the deceased outside and not inside the bar. She maintained that Kona'i stomped with reasonable force with the deceased on the ground and outside. There was one stomp that she said she saw. She confirmed that Kona'i stomped in the middle of the road before the others did it when the deceased's face was pointing back to the ice cream shop. She said that the area Kona'i had stomped was about a couple of metres away from where his head finally lay.
26. She was examined on her statement as to what Vilaketi said to her and maintained that he said this when he returned from outside and not inside as her statement seems to suggest.

Siaosi Mafile'o

27. He was a driver for MEIDEC, and saw the fight from a conference room in the Sanft building directly across the road. He said that he saw two of them drag him to the road and

one guy walked around. One had a T-shirt and one a singlet. He saw the man wearing a white short sleeve shirt punch and the deceased fell to the ground. He punched him to the head. He only noticed one punch. He said that he saw the guy lying on the ground, and he was picked up by his shirt on the back neck area, and punched from the top. He then said that the man in the singlet had done the punching, in answer to a question put by myself.

28. Then he saw the man in the short sleeve stomp with considerable force – multiple stomps with considerable force landing at the back of the head. He had his head pointing in the direction of the ice cream shop. He then went back to his meeting and when he looked out he saw a man in a grey T-shirt deliver the last kick.
29. Under cross-examination from Mr Tu'utafaiva for Kona'i, it was suggested that the person in the singlet did not throw a punch. He said that he did.
30. He said there was a stomp before the video. He said that there were numerous stomps from the man in the short sleeve T-shirt.
31. He said he saw the punching around the area of the cone. He said he turned around to his director after he saw the punch.
32. He then said he was not mistaken about the man in the white T shirt throwing the punch.
33. He said that he saw the stomping and then the director called out and he sat down, and 4 - 5 seconds later he resumed watching. After the punch he said he had sat down for four to five seconds, then he returned to watch and he said that it was the stomping from the man

with short sleeved T-shirt that he saw and then he returned to his seat for 6 to 7 seconds not too certain and then he saw the kick from the last person. He said he watched the stomping for about 2-3 seconds before he was called away

34. He said that the punching was quick 3 to 4 seconds.
35. Ms Kafoa put to him that he did not see Siafa stomping, and he maintained that he had.

Kailani Tupou

36. He was another MEIDEC employee who watched from the Sanft building. He said that both men, one in a white T-shirt and one in a singlet, were punching and kicking. He said that they started punching at the beginning of the road and they dragged him to the middle of the road. At the beginning of the road they had kicked and punched at the same time. The person who was punched was slightly on his knees. One had his hands on his hair and the other on his shirt. They both punched him. He demonstrated an upper handed movement. Most of it, he said, was to the top of the head and the right side.
37. He said after the punch there was a kick. There were a lot of kicks to the head. Both of them were kicking.
38. Then he was dragged to the middle of the road. He was left in the middle of the road but closer to the other side, that is the side of the road closer to the Sanft building. He said that when they turned away the person tried to get back, and they turned back to him. He said they did the same thing to him..

39. They then dragged him to the other side of the road that is to the bar side.. He said that there were three men, and one man in a grey and navy blue T-shirt. This time they punched and kicked him and the man in white shirt stomped about ten times. All the punches were to the head area. When they dragged him and punched him and threw him on other side of the bar this person did not move. The stomping then continued. The person was already on the ground and had not moved. The person who did the stomping was in the white T-shirt. The person in the white singlet stopped and he was pointing like he was encouraging the kicking. Another short man in a grey and red singlet with a woman came out. The Crown accepted that, if a man with a blue T-shirt had been involved this could not have been Mr Tangi Nai who, the Crown accepted, had returned to the bar.
40. He said that the woman came out and tried to stop the person in the white singlet. It was at this time a person in a grey and red singlet pushed the woman and pointed at the person and said stomp him to death. He pushed the lady away and then said beat him until he dies. This time he said that the person in the white singlet seemed like he was saying “enough “but he could not hear what he said. This time the person in the grey and red singlet came and did one stomp.
41. He said there was 10 or more stompings when the deceased had attempted to get up on the Sanft side of the road and was assaulted again. The man who did the stomping and that was the man in the White T-shirt.
42. Then a woman came out and in the final stage the person in the white T-shirt did the stomping and the person in the grey had landed the final stomp.
43. He said he did not see the man in the white singlet do any stomping but he did kicking and punching when they came out of the bar.

44. Under cross-examination from Mr Tu'utafaiva, he said that he watched it from beginning to end. He said it took about 2 minutes. He said he was more focused in watching the fight than the director. It was put to him that when dragged out the men did not do the punching but the witness maintained they did. He said with considerable force to the head. He said kicking took place (not stomping) to the head in the area just off the sidewalk, on the road. He did not count the punches or the kicks. He said he saw more than one kick. He was not sure how long the kicking and punching took. The kicks had considerable force. These kicks were to the head and face He said he did see punches and kicks but he could not be certain about the number of punches and kicks.
45. He said that the dragging was not all one movement. They dragged him out and assaulted him. Then dragged and assaulted him.
46. He said that he saw the man in grey there and he said that he was delivering punches.
47. He said the man had his head in the direction of their building when they turned around when he tried to get up. He was on his knees towards the Sanft building. He said that the two men came back and assaulted him when he tried to get up. He said they were the man in the white t-shirt and the man in white singlet. They punched and kicked him again and dragged in the direction of the bar and it was at this time when they laid him on the ground and the person in the white T-shirt stomped on him that the person in the grey and red landed the final stomp.
48. He said the police helped the victim get up and he got into the police car. He said that the Police came long time after. The police stood him so he could get into the police car.

49. He maintained to Mr Tu'utafaiva that when they came back to the man as he tried to get up they did kick and punch. He said that he saw the stomping from beginning to end. He maintained there were 10 forceful stomps, and to the head. He said the man in the singlet was at the side. He suggested he was encouraging. Mr Tu'utafaiva said that he did not mention encouragement in his statement. He said this occurred when the man stood up that is when there was the stomping and the other man stood around. He said that he did not see the man in the singlet stomping.
50. To Ms Kafoa for Siafa Nai, he said the punches were to the side of the head, his face and top of his head. They were alternately punching and kicking. One of them punched whilst the other kicked.
51. He said he saw the stomping when the man tried to stand up. The stomps were to his head. The stomps were continuous over a short period of time.
52. To Mrs Vaihu for Tangi Nai he said the man in grey (he identified Nai in exhibit, 4 photo 2 as the man in the grey shirt) punched twice. Outside the bar with the other men. Right to the head. More than twice. He said he could see force clearly from upstairs.
53. He did not agree with Mrs Vaihu's suggestion that while the person was bending over that he was pulling up the person. He said that the man returned to the bar.

Maka Taufaloa.

54. He was a driver for MEIDECC, and also attended a meeting at the Sanft building around 4pm.
55. He seems to see only some stomping more than once and he says a punch to the person when he was on the road with his head in the direction of the Sanft building. This came from the person in a white T-shirt. It was a strong upwards pointed. He said under cross-examination that the deceased was trying to stand up when he was punched and fell down.
56. He admitted that he had mentioned kicking but not stomping to the police. He said that he thought they were the same thing. He said, in re-examination, that the deceased was on his knees when he was punched. He also said that the time he saw the punch and the man was trying to stand up was in exhibit 4, photo 9.

Viliani Filikitonga

57. He was a teacher at Tupou High School. He was working for another business which was situated on the second story of Uata building above the Talieva bar.
58. He heard a commotion and went outside. He saw the deceased in the area where the vehicles park. Then two men dragged him to the middle of the road. The man in the white T-shirt hit the side of his face and punched on his head. The deceased was lying flat down in the road. He said he saw about 10 kicks and stomps. The kicks were to the side of the face and the back of the head. He said another person with a white singlet came and tried to stop. He then went to get his phone and when he came back and at this time the deceased had his head in the direction of the Tali'eva bar.

59. He took the second video exhibit 2 with his phone. He said the man in the white shirt had continued the stomping and the person from the bar came over to stop it.
60. He said that before he unlocked his phone, he saw a stomp from the man in the white T-shirt. He said the man in the grey shirt tried to stop the man in the white singlet from stopping the other man. He saw about 4 stomps before he switched on the phone. He said the man in the singlet had told the man to stop and he tried to pull him back. It was then that he saw the man in the grey singlet tried to pull him away. He described himself as being overwhelmed by what he had seen. He maintained that earlier there were about 10 stomps and before the video he saw about 4.
61. Dr 'Eliesa Ma'u said that Sione Feimoefiafi died at 2108 hours on the 4th February 2019. He was received into the hospital at 1515 hours. He said he saw him at about 6:30 when there was a report of vomiting and he was quite conscious. He later suffered complications and died before they were able to affect a cat scan to determine the injuries to the head.
62. Dr 'Ana 'Akau'ola, a radiologist gave evidence that there was a subdural hematoma with resultant brain oedema which had caused a significant shift in the midline. There were hairline fractures of the right temporal as well as medial wall of right orbit narrowing. She said that significant force would have been required on to cause the trauma to the right side of the head and the right eye and to have caused the fracture.
63. She said that the trauma to the head caused pressure to the brain area. She said trauma caused the bleeding plus direct injury to the brain as well and caused the swelling. It could have come from numerous impacts.

The Law

Common Purpose

64. The Crown advanced its case on the basis that from the assaults in the bar by Saifa, with Kona near him and having hold of the deceased also, before taking him outside where he was dragged by Saifa and Kona'i and further assaults, punching, kicking and stomping took place, at different locations resulting in head injuries to the deceased from which he died several hours later in hospital, there was a common purpose or common intent evidenced to deliver the deceased a beating in retribution it would seem for his fighting with Tangi Nai earlier in the bar.
65. In this regard, the judgment of the Supreme Court of the United Kingdom in *R v Jogee* [2016] UK SC 8; [2016] UK PC 7 is important. It restated the law on confederate complicity for offences arising out of joint enterprise or common purpose situations and was critical of the judgment of the Privy Council in *Chan Wing – Sui* [1985] AC 168 which had based complicity on foresight of consequences, rather than intention. In *R v Talia and Vea* Cr 119 and 121 of 2017, 1st August 2018, I considered *Jogee* and wrote in para 22 of the judgement;
- “Jogee involved aiding and abetting where there was a common purpose and a discussion of whether foresight of consequences or intent was the appropriate standard to judge accessory liability. The Court came firmly down on the side of intent, rejecting previous authority that favoured foresight of risk.”
66. Also mentioned in that judgment, is an important passage in *Jodee* which is relevant for the present case. In para 95 of the judgement it is said;
- “In cases where there is more or less a spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the Jury to find that there was some form of agreement,

express or tacit. But, as we have said, liability as an aider and abettor does not depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If D2 joins with a group which he realizes is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and or intended that should happen if necessary. In that case if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.”

67. As I pointed out also in *Taliai and Vea*, English law on the definition of murder is wider than Tongan law. Tongan law requires on a charge of murder proof of a specific intention to kill by the perpetrator; whereas, in England and many other jurisdictions, murder arises where the perpetrator intends not to kill but also if the jury is satisfied that he intends only to inflict serious bodily harm on the victim. Aside from this, however, the principles remain the same for the determination of accessorial liability for offences arising out of a common purpose. *Jogee* is an advance on the foresight approach which could place the accessory on a murder charge in a less favourable position than the principal where the prosecution must prove in order to secure a conviction for murder that the principal intended to kill or cause really serious injury. See Lord Hutton at para 55, Lord Steyn at para 56, and Lord Mustill at para 57 in their discussion of accessorial liability for murder in *R v Powell and R v English* [1999] 1 AC 1. Still worse when the standard of accessorial foresight of real or substantial risk is assimilated to foresight of probable consequence, see *R v Pirie and Carter* [1987] 1 NZLR 66 (CA)

68. Cases of this kind that is those involving outbreaks of violence that occur quickly and evolve over a short space of time often involve concerted action. In these circumstances, it is open for a Jury to readily find that each accessory who aided, abetted or encouraged the furtherance of a common purpose did so intending to commit an offence. Where the principal is found guilty of murder, the accessory should not be found guilty of murder but only manslaughter if his or her intention was only to further a violent attack by participating in violence falling short of murder. At para 96, of the Court in *Jodee*, observed;

“If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results.”

69. Nor is it necessary in a case of common purpose or of concerted action to prove which of the offenders aiding and abetting the other delivered the fatal blow. The fact that they were not acting pursuant to a pre-arranged plan is irrelevant. Authority for this proposition is *Mohan v R* [1967] 2 AC 187; [1967]2 ALL ER 58. There, two men were engaged in a concerted attack with weapons on the deceased, and not pursuant to a pre-arranged plan. It was not possible for the Prosecution to prove which of the two men committed the fatal act. The Privy Council ruled that did not matter. Lord Pearson said;

“It is, however clear from the evidence for the defendants, as well as from the evidence for the prosecution, that, at the material time, both the appellants were armed with cutlasses, both were attacking Mootoo and both struck him. It is impossible on the facts of this case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm. Each of appellants was present and aiding and abetting the other of them in the wounding of Mootoo.

That is the feature which distinguishes this case from cases in which one of the accused was not present, or not participating in the attack, or not using any dangerous, but may be held liable as a conspirator or an accessory or by virtue of a common design if it can be shown that he was party to a pre-arranged plan in pursuance of which the fatal blow was struck. In this case one of the defendants struck the fatal blow, and the other of them was present aiding and abetting him. In such a case the prosecution does not have to prove that the accused were acting in pursuance of a pre-arranged plan.”

70. The principle issues that emerged in this case in so far as complicity was concerned was whether the principals, Mr Siafa Nai and Mr Kona'i Bloomfield, in their attack on the deceased, the more complicit of the two in my view being Siafa Nai, were guilty of murder or manslaughter. At the end of the case, it was not contended in their cases that any lesser verdict than manslaughter such as causing grievous bodily harm was appropriate. I accordingly direct myself on murder and manslaughter in these terms in accordance with the Criminal Offences Act of Tonga;

Section 85

“Homicide is the killing of a human being by any means whatsoever and is either culpable or non-culpable.”

Section 86(1)(a)

“A culpable homicide consists in the killing of a human being by an unlawful act.”

Section 86(2)

“A culpable homicide may be murder or manslaughter.”

In this case, the Crown particularized murder as applying under section 87(1)(b).”

This section provides;

“culpable homicide is murder if the offender intended to cause to the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not.”

71. The essential elements the Crown must prove under section 87(1)(b) definition of murder beyond reasonable doubt against Mr Siafa Nai and Mr Kona'i Bloomfield considered separately are these;

1. That the accused Siafa Nai on or about the 4th February 2019 at Nuku'alofa together with Kona'i Bloomfield;
2. did an unlawful act namely assault by stomping repeatedly on the accused's head intending to cause bodily injury to Sione Feimoefiafi;
3. and that at the time he knew this act was likely to cause death; and
4. he was reckless whether death ensued or not.

72. As against Mr Kona'i Bloomfield it is particularised also that he repeatedly stomped and kicked his head causing death, and the same elements must be proven beyond a reasonable doubt in the case against him. .

73. I direct myself also that an assault is the intentional application of force to another without that other's consent as stomping or kicking another in the head would be without consent.

74. Bodily injury involved an injury that is to the body, and injury is a hurt calculated to interfere with the health or comfort of the victim.

75. Intention to cause bodily injury means that the accused *actually* intended to cause bodily injury and in deciding this I am entitled to consider not only what he accused may have said about the matter but his actions before at the time of and after the alleged offence.

76. The most important essential element in this charge and one which was emphasized by the defence in this case for both accused was that the accused „at the time of the assault or series of assaults, knew that the bodily injury that he intended was likely to cause death. This is a subjective test and means that the offender must be shown to have known beyond

any reasonable doubt that it was likely that death would result from his unlawful act namely the assault causing bodily injury. It is not sufficient that he ought to have known this by an objective assessment of the risk

77. Likely means more than something that is merely possible. It must be shown beyond reasonable doubt that it was a likely or probably consequence of his intention to cause the deceased bodily harm that he would die. Nor in Tonga, as I have said, is it sufficient that he appreciate the bodily injury would result in serious harm to the victim. There must be an appreciation by the accused that death was a likely consequence. and no lesser condition.
78. Throughout the case, I looked for evidence that would require me to direct myself on intoxication as it affected proof of a specific intention but I am satisfied there was nothing that raised such an evidential burden for me to do so and the defence agreed.
79. The case in relation to Mr Vilaketi Bloomfield was in count one of manslaughter, secondly in the alternative causing grievous bodily harm, and in the alternative to this count 9 common assault. It was alleged as particulars that he did cause the death of the deceased when he stomped on his head.
80. In relation to manslaughter, I must be satisfied if I find beyond a reasonable doubt that there was a common purpose to beat the deceased up, or concerted attack, that by his deliberate actions and conduct Vilaketi Bloomfield intended to encourage or give assistance to an unlawful act which all sober and reasonable people would realise carried the risk of some harm to another but without an intention to assist in the causing of death, but death in fact resulted. See Jogee considered in para 68 above, taking into consideration also that in Tonga murder is confined to intentional killing or intentionally causing bodily

harm and having foresight of the likelihood of death and does not extend, as it does in England, to also intentionally causing really serious harm

81. If do not find that he was complicit in any common purpose should I find there was one to attack the deceased and beat him up, I must consider whether the Crown has established the following elements of manslaughter beyond doubt against Vilaketi, namely;

1. That the accused did an act on or about the 4th February 2019 (stomping) that caused harm to the deceased;
2. That such an act was deliberate; and
3. That act was an unlawful and dangerous act;
4. That act caused the deceased death.

82. His act does have to be a material cause of death. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause of death, or even a major cause of death. It is sufficient if it is a material cause and not one that is insignificant or inconsequential.

83. If I acquit him on this I have to consider the other counts of causing grievous bodily harm and common assault as alternatives to as alternatives.

84. Mr Tangi Nai is charged with causing grievous bodily harm meaning harm endangering life, and in the alternative serious causing harm and in the alternative to this common assault. Mr Nai pleaded guilty to the third count common assault which the Crown did not

accept in discharge of the indictment. . The particulars to which he pleaded guilty to count 12 was that he did without lawful justification punch the deceased without his consent.

Verdicts.

Common Purpose

85. First I deal with the central issue of whether there was a common purpose to beat up the deceased in which there was a concerted effort by those forming the common purpose or joining it at some point to further it. I find beyond any reasonable doubt that there was. It is clear to me from viewing the video footage in exhibit one that very quickly the fight ascended from a one on one on the floor with it seems the deceased on top of Mr Tangi Nai, to one where Mr Kona'i Bloomfield and Mr Siafa Nai took matters into their own hands and together grabbed hold of the deceased. This was not merely with a view to subduing the deceased, separating them and stopping the fight which they could readily have done, both being well built and strong men, but inside they went further. It is unclear from the video what part Kona'i did aside from grabbing Mr Feimoefiafi in the bar, but he must have been aware that Siafa Nai was involved in actions that went well beyond merely subduing the deceased. In the bar shortly before emerging, Mr Siafa Nai is seen to punch very hard down upon the head of the deceased, a punch that could reasonably be regarded as a pile driver of a punch to the head, and he is further seen to stomp in the vicinity of Kona'i down on the head of the deceased before the two of them drag the deceased out into the road. The inference I draw from the decision of both men to carry on assaulting the deceased is that they were both determined to exact retribution for the earlier fight that the deceased had been engaged in with Mr Tangi Nai.
86. I find also that Vilaketi Bloomfield encouraged the men in these actions by shouting out words beat him to death in the presence of the owner of the business Mrs Freda Lavulo who was close by and held back, I find, by Vilaketi before the men left the bar. I accept her evidence as to what transpired at that stage. In my view, Viliketi who was close by

when Konai and Siafa grabbed the deceased inside the entrance to the bar encouraged these men to beat the deceased, and when they got outside he was at times near them, and by his presence\could be said to be further encouraging the assault, himself being involved in administering a final stomp when the deceased was on the ground in the final phase of the assault. Indeed his determined attitude to carry on the assault is recorded in the video when he appears to push Kona'i out of the way and remonstrates with Freda.

87. Outside, I find in a very short period of time, Kona'i and Siafa continued with what was a brutal attack on the deceased. He was seen being dragged on a still photograph in exhibit 4 and falling down, in the vicinity of Kona'i and Siafa. Vilaketi is seen also in this area which is only a short distance from the entrance of the hotel.
88. Again, I accept the evidence of Freda that she saw Kona'i from the entrance and called out to him to stop stomping on the deceased's head. I accept that although this was a fast moving event the fact not only did she call out to Kona'i and moved out it seems after this to the outside but she can recall his shoes being Timberland shoes which were exhibited. I also accept that she saw Siafa Nai stomp on the head of the deceased, a later event probably being most exactly captured in exhibit 2 the video from the phone produced by Mr Viliami Filikitonga. Mr Nai brutally stomps on the deceased head as he is apparently lying motionless on the footpath in the ultimate position. She also says she saw Vilaketi stomp on the deceased and that is also captured on the video clip.
89. I accept that the Crown's submission there were two general phases of the action outside the bar. The first was from the entrance to a place where there is blood closer to the Sanft building across the road. This is only about 6 metres from the entrance of the hotel. There, I accept that Kona'i and Siafa had dragged the deceased to that area, left him momentarily it seems and returned back where he was trying to get up and returned to assault him again.

In this phase it seems that it was Saifa who administered a series of stomps but in this off camera action, Kona'i is present and not, in my view, as a mere spectator.

90. In this first phase, I accept also the evidence of 'Alosi Maka, the bar manager. She said Siafa had originally picked up a bar stool before it was taken away from him by security. The inference I draw is that he was very angry at what may have been the sight of the deceased being on top of his brother and possibly getting the better of the fight. There is some evidence that Tangi Nai had punched or grabbed the deceased from the rear and that had led to the men falling to the ground and fighting near the entrance to the bar.
91. I accept her evidence that she saw Siafa grab the deceased by his shirt and Kona'i by his hair and drag him outside and saw Kona'i kick the deceased. She said that there were stomps and more than one and she could see this through the door. She said she saw Kona'i stomp once in the middle of the road when the deceased's face was pointing back to the ice cream shop before the others, that is Siafa and Vilaketi kicked him. The distance to this area was only about 6 metres. Stomping is an action that is likely in my view to remain imprinted on the recollection of a witness. This seems to have taken place in the second phase after the deceased had been dragged a short distance when he tried to get up, and had been facing the Sanft building assaulted and then taken closer to the bar a short distance where he ultimately lay. It must have been in that period before the video clip from the phone is seen because in that Kona'i does nothing and seems to have stopped, altogether.
92. Siaosi Mafile'o from the Sanft building across the road appears to see one of the men punch the deceased and he fell to the ground. I was not sure whether he meant Siafa or Kona'i did the punching near the cone outside the bar but I am satisfied there was a punch and the deceased fell to the ground. He confirms that he saw the man in the short sleeve Siafa Nai stomp with considerable force, multiple stomps as the deceased was pointing in the

direction of the ice cream shop. He also saw Vilaketi deliver the final kick. He said that there were stomps before the video 2 was played.

93. Kailani Tupou said the man in the white T-shirt and the one in the singlet Siafa and Kona'i were punching and kicking him at the beginning of the road and dragged him to the middle of the road. They both punched and kicked when the man was on his knees before he was dragged to the middle of the road. He talks of their dragging and leaving him in the middle of the road (the end of the second phase) They kicked and punched him there in the middle of the road. This was after he had been dragged to the middle of the road. They were upper movement punches most of them to the top and the right side.
94. He said he saw the man in the white T-shirt stomp about ten times in the middle of the road. Later he saw the man dragged closer to the bar. The person he saw do the stomping was the man in the white T-shirt. He said he saw a woman and a man in a grey and red T-shirt. He said he saw this person push the woman and he did one stomp. This was the final stomp. He said he did not see the man in the white singlet do any stomping but he did kicking and punching when they came out of the bar. He said the fight took about 2 minutes and he had watched it all from the conference room in the Sanft building.
95. He said that the two men had assaulted him when he had tried to get up in the middle of the road, being the man in the white T-shirt and the man in the white singlet. They had punched and kicked him again and had dragged him back in the direction of the bar.
96. He said when he saw the ten stomps delivered by the man in the white T-shirt the man in the singlet was by his side. The stomps were continuous over a short period of time. From this again, I draw an inference that Kona'I was no mere spectator to Saifa's stomping but

by his presence then and throughout until the final stage could be said to be encouraging Saifa's actions in a common purpose which was to seriously assault the deceased.

97. There is a suggestion in the evidence of Viliami Filikitonga who was also a spectator from premises near or above the bar that the man in the white singlet (Kona'i) may have tried to prevent Mr Siafa Nai from any more stomping in the later stages. This may be the case and the video suggests that he had ceased assaulting the deceased and that Nai had persisted as had Vilaketi. The fact that he appears to have appreciated that the stomping and violence had gone too far at that final stage as the deceased lay motionless and Freda had come out of the bar to the area where he lay obviously to stop the men assaulting the deceased, is in my view of no assistance to him in absolving himself from what was clearly up to that point a common and concerted attack. I find that even if he expressed a desire not to go on with it, the damage was done. Even though Nai was responsible for most of the stomping in the final on camera stage, I consider that Kona'i was present for most of it, and by his presence punching, kicking and occasionally stomping also could be seen to be giving encouragement and in that sense assistance to Nai, to carry on with the beating. There is evidence that I accept from Freda and 'Alosi Maka who had no apparent motive to lie that Kona'i did stomp earlier, and from others such Mr Kailani Tupou, who had a good view of the action, that he was engaged in kicking, as well.

98. In summary, I consider that there is ample evidence in this case to confirm that this was a concerted attack on the deceased by Kona'i Bloomfield, Siafa Nai, and Vilaketi Bloomfield. I absolve Mr Tangi Nai from being an accessory to this concerted attack or being part of a common purpose. I have looked closely at Exhibit 4/photograph 4 which shows Tangi Nai on the ground outside in the vicinity of the deceased. Mr Kailani Tupou said that he was punching and he might well have been, but Mrs Vaihu in her cross-examination brought out that the witness had not told this to the police when giving his earlier statement. In any event, Mr Nai shortly after seems to have gone back into the bar, and the Crown accepts this. He may have been simply continuing on the fight that he had

been involved in earlier for a short time, that is individually rather than in concert. The fact that he went back into the bar and did not further engage with the others in the violence in the middle of the road, suggests to me that he was not part of any common purpose to beat the deceased. I cannot be sure that what he did on the ground if anything was with a view to assisting the others to beat the deceased or effect retribution as part of a group or common purpose. I shall return to Mr Tangi Nai shortly.

Murder or Manslaughter

The case of Mr Siafa Nai.

99. In my view, the actions of Mr Siafa Nai were plainly the most brutal that afternoon in the beating he handed out and the rather vicious actions that he demonstrates in the videos. It is not possible to isolate the individual act that caused death, but I have no doubt that Mr Nai intended to do the deceased bodily harm, and that his actions together with those of his confederates was a material cause of the death of Mr Feimoefiafi. I find that Mr Feimoefiafi sustained head injuries and died as a consequence of the brutal beating he received at the hands of Siafa Nai, Kona'i Bloomfield, and Vilaketi Bloomfield. It was a senseless and brutal death, at the hands of these men.
100. I have considered the case of Siafa Nai and very closely on the central issue of whether he subjectively knew or appreciated beyond reasonable doubt that his actions namely the stomping was likely to cause death. I have difficulty on this central issue. I consider that he must have known that what he was doing was likely to cause very serious harm, but that is not the standard by which he must be judged in Tonga under section 87(1) (b) of the Criminal Offences Act. The test for murder under section 87(1) (b) is whether he knew Mr Feimoefiafi's death was likely, that is was beyond any reasonable doubt a probable consequence of his actions. I have not overlooked his very determined and forceful stomping on the video clip (exhibit2) in which he appeared to raise his leg as he stomped

with considerable force; or the vicious punch he delivered to the deceased's head as well as the stomping inside the bar (on video exhibit 1) as a manifestation of his merciless disposition that afternoon, and preparedness to use very significant force in what I consider was a cowardly concerted attack on a defenceless man. However, he was not wearing working boots but slippers or as others call them thongs or jandals. He was essentially in bare feet. In these circumstances, I have a reasonable doubt about this essential element, namely whether he actually appreciated at the time he did these acts that what he and the others did as part of the common purpose was likely to cause death. Accordingly, I acquit Mr Siafa Nai of murder but he is found guilty of manslaughter under section 86 (2) of the Criminal Offences Act and is duly convicted and remanded in custody to await sentence.

The case against Kona'i Bloomfield

101. The particulars of involvement of Mr Bloomfield allege stomping and kicking. I have found he was involved in this activity, brutal activity, but to a lesser extent than Mr Siafa Nai. However, he like Mr Nai dragged the deceased out of the bar, assaulted him by kicking and later I accept was seen to also stomp probably on only one occasion, and by his close presence with Nai he could be said to be actively and knowingly encouraging his brutality until it seems he may have come to his senses at the end, and appreciated that the beating should cease, but by then it was too late. That possibility is evidence that helps me however to come to the view that, although he was very much a part of the brutal events that day, he did not actually appreciate until perhaps the end beyond a reasonable doubt that any stomping or kicking either as a principal or in concert with Siafa Nai would likely or probably cause the death of Mr Feimoefiafi. He did not have heavy capped work boots on, either. In these circumstances, I have a reasonable doubt about this and I acquit him of murder but, as with Mr Siafa Nai, he is convicted of manslaughter under section 86(2) and is remanded in custody for sentence.

The case against Mr Vilaketi Bloomfield.

102. I have no doubt that that he was an accessory also to the common purpose or concerted action to beat up the deceased principally engaged in by Siafa Nai and Kona'i Bloomfield, and having intentionally engaged in activity with them which fell short of a murderous intent, is as the Crown appeared to concede in its framing of the indictment guilty also of manslaughter. I find beyond reasonable doubt he was a willing participant in concerted action or common purpose to beat the deceased as I have said. His admonition to the others to beat him to death in the bar at the commencement of the violence was indicative of his hostile attitude and support or encouragement to the others to engage in seriously beating the deceased up from the outset, his attendance around the action outside of the bar and his final aggressive stomp on the accused as he lay prone on the ground when Freda was outside trying to prevent any more action means that I have no doubt that he intended serious harm to the deceased, the consequence being his unintended death. I find his action in any event, aside from common purpose, was unlawful and deliberate, dangerous and the stomping was a material contribution to the deceased's death as I have defined this to mean. His action to stomp around the head of a man prone and defenceless and in the face of Freda trying to stop the fight was a vicious final act, in a series of vicious acts perpetrated by others but I have no doubt with Vilaketi's support and encouragement. I infer from all the evidence I have heard concerning him, his encouragement for the others to do serious harm short of a killing and by his participation also. He is convicted of manslaughter, and is also remanded in custody for sentence.

Tangi Tiufilusi Nai

103. Mr Nai may well have been somewhat ironically the instigator of these tragic events. He may well have gone outside to carry on the fight in the pavement area, before having the good sense to return to the bar which the Crown accepts. I am unsure as I have said what role he played in the events outside. I do not find that he was a party to a common purpose to attack the deceased, as opposed to possibly continuing an individual fight or skirmish if that is what he did outside on the footpath. I do not see any basis either for being sure on the evidence that he engaged in any assault other than that which he has pleaded guilty to namely common assault, associated with a punch. He is convicted of common assault, and

discharged from the more serious counts in the indictment, that is causing grievous bodily harm or serious harm His bail is continued and he will be sentenced on a date to be fixed.

104. I thank all counsel for their assistance in this case.



A handwritten signature in purple ink, appearing to read "C. B. Cato", is written over the seal and extends to the right.

C. B. Cato
J U D G E

NUKU'ALOFA: 16 September 2020