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Motuku Ve'evalu KAFALAVA
Maka Manase FILIHIA
Meili VALELE

JUDGMENT

BEFORE : THE HONOURABLE COOPER J
Counsel : Mr. Finau the Prosecution
Mr. Fili the Defendants
Date of Judgment : 29th October 2021

1. At the start of the trial each defendant faced a joint indictment alleging three counts: Murder and then in the alternative, Manslaughter and Grievous Bodily Harm.
2. The Crown lodged a proposed amended indictment whereby the first two defendants would face those counts the third defendant a single count of Common Assault. Discussions between myself and the Crown and Mr. Fili for all defendants led to an adjournment over night for the Crown to consider whether they would pursue that application to amend in the light of R v Jogee [2017] A.C. 387.
3. That having happened, the case resumed the following day; the Crown stated they abandoned that application; Mr. Fili for the defence having no observations, the case then proceeded on the original joint indictment.
4. Count 1 alleges Murder contrary to sections 85, 86 (1) (a) and 87 (1) (b) Criminal Offences Act.

5. The elements the prosecution must prove beyond a reasonable doubt are :
 - I. The defendant in question, on or about 5th October 2019 ;
 - II. Did an unlawful act, namely assaulted Fanaafi Misifani, intending to cause him bodily injury;
 - III. At the time he knew that act was likely to cause death, and
 - IV. He was reckless whether death ensued or not.
6. Count 2 alleges Manslaughter contrary to section 85, 86 (1) (a) and 92 Criminal Offences Act.
7. The elements the prosecution must prove beyond a reasonable doubt are :
 - I. The defendant in question, on or about 5th October 2019;
 - II. Did an act that harmed Fanaafi Misifane;
 - III. That such an act was deliberate; and
 - IV. That act caused Fanaafi Misifane's death.
8. Count 3 alleges Grievous Bodily Harm contrary to section 106 (1) and 2 (c) Criminal Offences Act.
9. The elements the prosecution must prove beyond a reasonable doubt are :
 - I. The defendant in question, on or about 5th October 2019;
 - II. Wilfully and without lawful justification;
 - III. Caused grievous bodily harm to Fanaafi Misifane.
10. At the commencement of the trial Mr. Kafalava pleaded guilty to Manslaughter; Mr. Filihia pleaded guilty to Grievous Bodily Harm.
11. I asked what the basis of Mr. Filihia's plea was and was told that it was an acceptance that he struck the victim once to the back while the victim was on the ground.

12. Despite several requests this was never reduced to writing.
13. Mr. Valele maintained his pleas of not guilty.
14. The case was then opened in Tongan and the Court followed the English translation in tandem.
15. During the evidence the defendants were referred by the prosecution witnesses by their first names Mr. Kafalava was referred to as “Valu”, Mr. Filihia as “Maka” and Mr. Valele as “Meili”.
16. Crown’s evidence :

Detective Fusikata.
17. He has served for 8 years with the Forensic Unit of the Tongan Police Force.
18. Through him the photographic exhibits were put into evidence, as follows :
19. Exhibit 1; Holonga area over-view; Google satellite image (1: 5000) .
20. Exhibit 2; Holonga area a zoomed-in view; Google satellite image (1: 1333.333...) .
21. Exhibit 3; an aerial view sketch; Holonga homicide scene; created by the witness.
22. Exhibit 4; Scene of Crime photograph bundle.
23. Wherein Photo 15 is an photograph from outside Mr. Valele’s residence
24. Photo 16 where the Tanetane branch, exhibit 8, was recovered.
25. Exhibit 5; photograph bundle of three items seized from the locus; scaffold pole, metal pipe and a Tanetane stick.
26. Exhibit 5; photographs 7 and 8 indicate area of staining with blood like substance.
27. Exhibit 6; a scaffold pole.
28. Exhibit 7; a metal pipe

29. Exhibit 8; a Tanetane branch. The Officer gave evidence that at the time it was seized he believed it to have been freshly broken from the plant. His evidence was that by time of trial the stick was lighter and more brittle having dried out; it would be harder when first found and raw.
30. Exhibit 9; Demonstration photographs. All the photographs in this exhibit bundle taken on 21st October 2019.
31. Photographs 1 - 8; Mr. Kafalava's demonstration photographs :
- Photograph 1 residence of deceased as told by Mr. Kafalava
- Photograph 2 behind that residence where the drinking took place.
- Photograph 3 Mr. Kafalava pointing to road that runs to the cemetery
- Photograph 4 he is pointing to the area where brawl started by a gate; there are three gates to cemetery.
- Photograph 6 where iron pipe found ,exhibit 7, he used in the attack came from.
- Photographs 7 & 8 show the area where the brawl continued to and (photo 8) where victim ended up lying down. The sand in that image covered the blood staining.
32. Photographs 9 - 25; Mr. Filihia's demonstration photographs :
- Photograph 9 Mr. Filihia pointing to the victim's residence.
- Photograph 10 pointing to where he said drinking was taking place.
- Photograph 11 indicating where he parked his car first outside the victim's residence, Photographs 12 & 13 the direction he drove his car thereafter.
- Photographs 14; where he parked his car besides Mr. Valele's residence.
- Photograph 15 where he walked after parking his car as he went to, photograph 16, Mr. Valele's parents' residence.
- Photograph 17 shows the area he took the iron pipe, exhibit 6, from outside Mr. Valele's parents' home.

Photograph 18 close up of spot where he pulled this iron pipe, exhibit 6, from.

Photograph 19 Mr. Filihia standing in the entrance to Mr. Valele's parents' drive and pointing back towards the cemetery. Photograph 20, in the road, pointing in the direction of the cemetery.

Photographs 21 - 24 pointing to where brawl was taking place when he arrived.

Photograph 25, showing how he then ran back towards the Valele residence.

33. Photographs 27 - 33; Mr. Valele's demonstration photographs :

Photograph 26 Mr. Valele's hut within the Valele family land.

photograph 27, the direction he went as he started to move towards the brawl.

photograph 28, where he broke the Tanetane branch as he went towards the fight.

photographs 29 – 32 showing his progress and arrival at the scene of the fight.

photograph 33, where the victim was lying on the ground.

34. Exhibit 10 are the photographs taken of the deceased, Fanaafi Misifane, attended by Dr. Maile, as seen in the first two of the 20 photographs in that bundle.

35. (Exhibits 11 to 15, the photographs and measurements of the iron pipes; the medical report and the three records of interview, respectively, were adduced later in the trial).

Cross examination

- I. It was his job to take photographs of the items used in the attack.
- II. He was unaware of a machete used to attack Mr. Kafalava.
- III. He was not asked to photograph a machete.
- IV. Nor did he have any knowledge of any other weapons used.
- V. Exhibit 2 points 'B' and 'C' about 15 meters apart.

- VI. Exhibit 4, Scene of Crime photographs were taken at night and the following morning.
- VII. The point shown by marker '1' in exhibit 4, photograph 4 if transposed to exhibit 2 would be within the area marked 'C'.
- VIII. That was the area this officer focused on that night.

Re-examination

36. Added nothing further

Kalo Misifane

37. She is the widow of the deceased. Her son, Epenisa, died January 2021.
38. Of 5th October 2019 she was at home that evening with her husband and children. Five house guests came for a drink up in the kitchen at the back of the house. They were all drinking beers. Her husband had returned from Australia that day after 6 months' seasonal work.
39. He arrived back at 1600 hrs and they went into town to do some shopping including buying the beer and they arrived back to their home about 2100 hrs. They started drinking and had about 3 cans and they were all in a happy mood.
40. Epenisa, Samisoni Palele, Palako, Taufu and Fapiano she remembered as being there.
41. About 2200 hrs Valu came in. At the time she was cooking and looking after the younger children. Whilst her husband and their guests were not drunk, Valu she described as being "too drunk".
42. He came into their home and started grabbing beers and other things from their table. She thought he knew Palako and that was why he had arrived, but he had not been invited. She had never seen him before, and only found out his name subsequently.
43. A disagreement started, her husband having asked him what he was doing there. Valu tried to justify his presence saying Sitino is his uncle. She did not know anyone called Sitino. Valu was angry and drunk. Her husband told him to leave and they started arguing until Valu went outside.

44. Their guests followed outside and the arguing continued. The guests gathered, drinking at the shelter outside in their garden¹.
45. At this time they went to a local store by the Government Primary School in Holonga. When they returned, about 10 minutes later, an unoccupied red car was parked outside their home, on their land, just inside their fence².
46. They parked their vehicle to the right of their home.
47. The driver of that vehicle was not Valu, but another male, who was arguing with their guest. Valo was also there. She returned inside and was aware her husband told the driver to leave; she said so as to protect him.
48. The driver got into the red car, reversed and her husband following on foot. Valu did not want to get back into the car and didn't get in. Her husband was trying to protect the driver from their guests and get Valu get back into the car, though she did not expand upon what she meant; to protect them from what precisely she did not say.
49. She saw Sonni punch Valo to his chest. At that Valo ran away and the others all chased him.
50. The red car remained in the road parked outside the entrance to their property³.
51. Epenisa, Soni, and her husband chased Valu towards the cemetery. At that time she did not see anything in their hands.
52. The driver drove his car away.
53. Her husband and son and another person, presumably Soni, then returned. She did not know how far they had pursued Valu.
54. Her husband called out to her and in response she started preparing the food for his dinner.

¹ As shown in photograph 10, exhibit 9.

² Photograph 9, exhibit 9 captures that area.

³ Photograph 9, exhibit 9; it would be where Mr. Filihia was standing in that photograph.

55. She was unaware when he left the house again; she had gone to attend a sick child and did not finish preparing the food. Next time she saw her husband he was lying on the ground dead.
56. She had no idea what had happened in the intervening time. Standing close to where her husband was were 'Uheina, Lolonga, Mele Valele and others she did not know. He was lying on his chest and facing down the road. Neither Valu nor the driver of the red car were there.

Cross examination

- I. Drink up inside kitchen. Valu came into the house. Husband chased him away. The guests then moved to the shelter outside once Valu went outside. There were 5 guests and husband made 6 in total.
- II. When they went to the store Valu had left their home.
- III. On their return the red car , its driver and Valu were all present. That was second time Valu came to the house.
- IV. That was when Samisoni punched Valu. Soni, Epenisa and her husband chased Valu. He was chased twice, the first time they chased him out the house.
- V. Palako was sitting outside her house in the shelter where drink up continued. Not sure if Palako invited Valu. She was surprised when Valu turned up and wanted to speak to Palako.
- VI. Taulafa and Palako came back after chasing Valu.
- VII. 15th Oct 2019 statement put to her and the following extract adduced:
- VIII. "They were chasing each other up to the road and they were gone and that was all I knew what happened. And then my son Epenisa came and told me my husband had passed away."
- IX. She reiterated that her husband did come back and asked him to prepare his food; she was just outside their house at that time still taking care of their sick son.

- X. She knew that Epenisa said he had used a machete to attack the others. She was informed that Epesina had injured someone.
- XI. Epenisa was involved in the fight and was himself also beaten, so he told her. He told her he was assaulted and not sure by whom because it was dark.
- XII. He reported that he used his hand to block a strike to his head and then fell to his knees.
- XIII. An iron pipe was used to hit him and he hit that unidentified person with a machete.
- XIV. The brawl took place late Saturday into early Sunday morning.

Re-examination

- 57. Valu called the driver of the car "Maka".
- 58. She heard Valu tell those chasing him that he was from Holonga too.

Finau Filimoe'atu

- 59. She recalled the events of 5th October 2019. She was at her home, which is close to the cemetery in Holonga. In reference to exhibit 2; Goole Satellite view, where she then lived is the property between points 'C' and 'D' on that exhibit.
- 60. It was after midnight and she was using her phone when she heard a noise, which she could not describe.
- 61. She went to the living room and looked through the front door. She sat and did not see anything but the noise continued. She carried on looking in the direction where the noise came from and saw a red car parked to the side of the cemetery.
- 62. She could see the road clearly illuminated by street lighting at the corner of their residence.
- 63. As the car parked she ran a short distance towards the road. Before it came to a stop she heard a bang.

64. She saw Mr. Valele. If someone were to face the front of her home, the direction he ran was right to left in front of their residence, then he re-traced his steps but with a stick in his hand.
65. She had no doubt it was Mr. Valele, she knows him and recognised him that night.
66. As he returned now with the stick his mother and sister were running after him. It was at that point that his mother shouted that someone is being killed, the police should be called.
67. As she heard those words Mr. Valele was making his way back the way he had come with the stick, then went out of sight.
68. As the mother said this, then the witness heard the voice of Sitaita Palele speak.
69. *Before the witness continued with her evidence concerning the words spoken by Miss Palele she was asked to kindly pause, momentarily withdraw and the court went into Chambers.*
70. *While Sitaita Palele had provided a witness statement the indication was prosecution had lost contact with her.*
71. *With the Crown it was then ascertained that there were three witnesses that had given witness statements but were now missing and, there being no objection to this course, the witness was released until the following week, and the Crown were given until 1400 hrs that day to make enquiries and report back on their progress.*
72. *With the attendance of those witnesses secured, including Miss Pauleti, the case continued on 30th August 2021.*
73. After Mr. Valele's mother shouted out those words, Miss Pauleti shouted out : "Can't you see there is a killing going on."
74. Miss Filimoe'atu only ventured further out to look when the police arrived but did not see anyone lying on the ground.

Cross-examination

- I. She was taken to her witness statement and agreed she had told the police this :
“I heard a bang on the road which was close to where the street light was.”
- II. When she heard that bang she was just in front their residence to the corner where the street light was.
- III. She could not say what caused that noise.
- IV. She knows the voices of both Mr. Valele’s mother, Meli and also Sitaita.
- V. The witness clarified the position of the red car by reference to exhibit 9, photograph 28; that when she first saw it it was parked towards the back of the white car in that image.

Re-examination

75. There was none.

Enifila Filimoe’atu

76. She was 13 years old at the time of the events and 15 years old when she gave her evidence.
77. That Sunday morning she found a Tanetane stick with blood stains on it in front of her neighbour’s, Alepina Tauvaka’s, land.
78. She picked it up and threw it into the neighbour’s hedge.
79. She was shown the photograph of the Tanetane branch in exhibit 5, photograph 9, but could not say whether that was the same as she was referring to.
80. She was then shown the branch, exhibit 8, but could not say that was the same branch she had seen and picked up.

Cross-examination

- I. She had found the branch she was referring to on the Sunday morning.
- II. It had blood stains on.
- III. She could not say that exhibit 8 had any blood staining.
- IV. The blood staining to the stick she saw was small she said, then she corrected herself and said it was not so small.

The court then sought clarification from Miss Enifila Filimoe'atu

- I. She had never seen again the stick she was describing .
- II. She thought it was about the same length as exhibit 8, but thicker.
- III. By marking exhibit 8 with clear sticky tape she demonstrated that the blood staining covered for about 5 inches of the end of the stick she was referring to. She also said that there was splattering of blood on the stick beyond the area of solid staining. She thought half the circumference of the stick had solid blood staining.

Fapiano Kali

81. He was one of the guests who had been at the drink up at Misifane's house that night. He lived close by in Holonga.
82. It could have been 1900 hrs or 2000 hrs they started drinking, but he could not remember exactly. Also there were Soni Palele, Epenisa and Paulako as well as Misifane all drinking when he arrived. Valu had not arrived at that time.
83. The mood was fine on his arrival, no one loud or drunk.
84. He had 2 or 3 beers when he got there, but had come from having a drink with the Viani rugby team and they had been having vodka.
85. He did not think he was drunk when they arrived in Holonga at Misifane's residence but conceded there was a lot he could not now remember.

86. They were drinking in the kitchen at the back of the property and Valu came in, he was not sure from where. But, he was surprised to see him there.
87. Valu started talking and started an argument. He was loud and everyone tried to quieten him down, but he carried on.
88. Misifane gave his guests a bottle of drink and told them to step outside.
89. There was a time when Maka was there with Valu when the argument continued outside at the shelter. He did not know when the car arrived or from where.
90. Misifane had been trying to get Valu to leave.
91. Soni punched one of them, either Maka or Valu, but he could not say which.
92. Misifani was talking to them at the time. He did not see Misifane punch anyone.
93. Of Maka and Valu, one of them went to the car and left and the other ran. They then started challenging the others to a fight. The others in the shelter then chased after them.
94. There was Epaniser, Soni, himself and Misifane who all chased them up the road towards the cemetery. Misifane had a Tanetane branch, Epaniser had a machete, he himself had a machete, he did not know what Soni had with him.
95. He took a short-cut through the bush to get to the cemetery.
96. When he got there he saw a person in the middle of the road with, what at first he described as a stick. Initially he did not see anyone on the ground, then got closer and found Misifane was down.
97. He was lying there with his head facing the street, the rest of his body on the grass verge, his right ear resting on the ground.
98. He saw one person who he could not identify, who was hitting Misifane's head with a pipe.
99. He estimated the pipe's diameter to be about 2 inches across, by reference to a chair leg in the court room.

100. The person hitting Misifane with the pipe shouted out “Come and fight, if not he will die”; shouting that they should join the fight or Misifane would be killed.
101. No one went so that person just hit Misifane with the pipe.
102. Those were the only two people there. No one from the group that chased Valu was there when this was happening. He and Epaniser and the others formed a group but did not approach and stood back.
103. The witness referred to the vehicle in photograph 7, exhibit 4 to indicate the distance they were stood back from what he described was happening. Comparing that to exhibit 9 photograph 4 one can see that was a distance of about 15 meters.
104. He did not know if the person striking Misifane had an injury himself.
105. Misifane’s face was covered in blood. He could not say whether he was breathing. The ground was blood stained as in exhibit 4 photograph 3.

Cross-examination

- I. He conceded that in his police statement he mentioned 8 people at the drink up, with Sione and Uilou also there and Valiu.
- II. It was Soni who punched Valu.
- III. He accepted that he armed himself with a machete from the house and chased after Valu, taking the short cut to the cemetery.
- IV. He did this to frighten Maka and Valu and struck the metal fence of the cemetery to scare them, which he did because he saw someone standing over the person on the ground, albeit he did not know who the latter was at that time.
- V. He was unaware whether Epaniser had assault Valu with a machete.
- VI. Misifane had a Tanetane branch he described as being the length of his arm and only used it to strike a tin roof.
- VII. He did not know why Misifane had done that.

- VIII. He did not assault anyone with the machete he had.
- IX. The other person had a pipe.
- X. He conceded when he took the machete he had not seen anyone with a pipe at that stage.
- XI. He only saw a single strike to Misifane lying on the ground.
- XII. He denied he had any intention to cause grievous bodily harm or kill.
- XIII. He denied they had provoked the defendant group. They followed them as they were calling for Fapiano and his group to come and fight.
- XIV. Did not know if his group were really going to engage in a fight.

Re-examination

- 106. Maka was driving, Valu was running.
- 107. Fapiano and his group were drunk and ran after them.
- 108. Misifane did not use his stick to hit anyone.
- 109. Did not run with the machete to scare them away.

Sitaita Palele

- 110. She was lying down about to sleep at about 2300 hrs that night when she heard a noise. She was knew there was a drink up going on at a neighbours' home that evening, it is the property directly behind where she lives.
- 111. Her brother, Samisone Palele was a guest there.
- 112. She heard the sound of dogs barking, also the voice of Misifane's wife, Kalo, calling to someone to "Come back".
- 113. Sitieta went out of her property through the broken gate between their residence and Misifane's and onto Misifane's property. Kalo was at the door, all the others had gone, she did not know where to.

114. She identified area where she was standing at that point by reference to exhibit 9, photograph 1, about where the dog is in that photograph.
115. She ran a short distance along the road to the cross road and was stood there with Misifane's sister by the Mango tree when her brother, Samisone arrived and said that Fanaafi was dead.
116. She and Sonni and another all walked to where his body was lying. There was no one else there at that time. An iron pipe was lying next to his body.
117. Having said she would recognise the pipe again she identified exhibit 6, the scaffold pole as the pipe she was referring to.
118. Part of it was covered in what she assumed was blood. She picked it up and tossed it to the side.
119. She observed that Fanaafi was lying facing the ground, chin on the floor, with both arms to his side. The right had side of his face had fresh blood running down it.
120. His head was in the road and his legs towards the verge.
121. Samisone moved his head to see if he was alive. She could see his head had been bashed in.
122. The right side of his forehead looked like if one were to touch it with a finger it would pass straight through into his brain, the skull having been so badly damaged. He had already passed away.
123. They returned home and then the police arrived.
124. She did not ever see anything in her brother's hands.

Cross Examination

- I. She could see several broken branches around the scene, but did not see any in the road itself.
- II. She confirmed position of the deceased's head as she saw him lying on the road and stressed how badly damaged his head was.

Re-examination

125. There was none.

Tonga Valele

126. On the night in question he remembered Maka and Valu dropping off his son Meili and a young lady too; Noa (Latanoa Lea'aepenbi).

127. The other two left, but he heard their vehicle return and then his son came and asked if he could spare \$5 for the others to buy petrol.

128. After 5 or 10 minutes he could hear swearing, then the noise of a vehicle approaching. He went to investigate and saw Meili standing at the rear of the vehicle.

129. Mr. Valele senior asked what had happened and someone said their brother had been injured.

130. Mr. Valele senior identified that he was in the living room of his residence by reference to exhibit 9, photograph 17. That image shows the front of his residence and, the living room is on the far right hand side as one faces the front of his home.

131. It was from there he saw what was happening outside.

132. He was concerned about the figure he saw standing at the rear of his vehicle parked outside his home. He saw another person running towards where the noise of the swearing was coming from.

133. From where he was in the living room he could hear arguing and swearing and then he saw a vehicle coming which parked outside his house, and he also noticed his son, Meili, standing, looking towards direction of the argument.

134. Maka drove towards his residence and he went to meet him in the road. Maka said his brother was injured. He told Maka to come, but Maka said no, his brother was hurt. He then parked his car to the side of their land.

135. He then went to their residence and pulled the pipe out of the ground from in front the house.

136. The witness identified it in court; exhibit 6.
137. As Maka pulled it out he told him to stop. At the same time he could hear the shouts of people where the argument was taking place saying they were going to kill each other.
138. He went to check on his children. He then heard the sound of running. He went back to the road, something was happening and he saw a body lying in the road.
139. He was about 10 meters away. Did not know who it was albeit the area was lit by street lighting.
140. He saw Maka there by the body with Valu, close to the person lying down. He was not sure what Maka was doing. Valu twice struck the person lying down. He did not see where the blows landed. He was using something to hit the person with.
141. He did not know if Maka had anything in his hands.
142. Meili was standing near Maka and Valu, but the other side of the road. His father called to him and he walked back to wards him.
143. He did not see anything in his son's hands.
144. After Maka and Valu called to Meili to go with them, but he did not and waited for the police to arrive.
145. He was taken to his witness statement and confirmed it stated there was a time before when he saw Maka and Valu being chased, Maka in his car, Valu on foot.
146. People were chasing them and swearing. He saw blood from on injury that Valu had.

Cross-examination

- I. He did not see Valu get struck.
- II. Those who were chasing Maka and Valu had shouted to "Kill them".
- III. He did not see anyone with a machete.
- IV. First time he saw Fanaafi, he was already on the ground. He saw no stick near him.

Re-examination

147. It added nothing of relevance.

Mele Valele

148. She was about to sleep that night when she heard a call from Lea. At the same time heard the noise of a vehicle driving fast.
149. She ran outside and heard a shout, she described as a battle cry : “Let’s kill each other”.
150. Then heard a voice shout to Meili : “My brother is hurt”.
151. Meili was outside their home at this time, looking towards where the calling was coming from.
152. He had been out earlier that evening and had been dropped off from a maroon car with his girl friend Latanoa, had asked for some money for petrol. His mother had given him \$5, a loaf of bread and a tin of fish and told him to go and rest. He gave the money to the people in the car.
153. She did not see who else was in the car.
154. Meili lives in his own hut, not in the same building as his parents⁴.
155. Shortly after she was in her room, about to go to sleep when she heard someone calling out for Lea and she could hear a fight going on. Some was shouting “Ta ta ma’ate⁵”, as if challenging another to a fight.
156. She said when she heard this she was sure someone would die.
157. She heard the sound of people running towards their residence. She ran to outside the front of their residence in the road⁶. She was stood there next to her husband.
158. She witnessed Maka run to their residence and take the pipe, she identified it as being exhibit 6, he was shouting that his brother is badly injured. She tried to stop him, but he ran with the pipe down the road.

⁴ Exhibit 9, photograph 26.

⁵ “Fight to the death”.

⁶ She marked the Court copy of Exhibit 9, photograph 27 with an “M” to show where she stood.

159. She told him not to do whatever he was planning or he would lose his job and someone might lose their life.
160. The other person kept shouting that his brother was badly injured. She could see Valu; he was sitting without a T shirt. She had moved closer towards the direction of the cemetery.
161. By reference to exhibit 9 photograph 28 she identified that Valu was sitting in the area where the white vehicle appears in that image.
162. She could see no wound, but saw blood coming from his back; she was not sure how much bleeding there was.
163. Maka ran to Valu, then she did not see Valu for some time.
164. Then Maka ran and she noticed three people running from the cemetery in her direction. She did not know who they were. One had a machete and one a stick, she did not know who had what.
165. Maka ran to them.
166. In reference exhibit 9, photograph 25, from the entrance to Finau Filimoe'atu's residence Valu appeared. He came out of the gate with an iron pipe. She could not tell what length it was, only that it was rusty. She identified exhibit 6 as the pipe in question.
167. Valu went to the group running in Mrs Valele's direction.
168. The group the victim was amongst came running as if to hit someone. She saw Valu was face to face with the group and he swung and hit. She could not see if the person struck had anything in his hands.
169. As she saw Valu swing and hit, it was clear to her someone was going to die. She called 922 and at the same time she cried out "There's a killing taking place."
170. Valu's blow she saw connect with the victim on the left side of his jaw/neck, his head span to the side.
171. Valu then said "This ends today". She said it was clear the victim had passed away.

172. She also saw Maka striking out with his pipe but she could not tell if his blow hit the man on the ground or just the floor.
173. She did not hear Maka say anything.
174. She thought Maka struck once and Valu hit the victim 3 times in all, when he was hit the first time, and went down and she did not see him move again.
175. She could not recall if Maka's blow had been struck after all of Valu's or amongst Valu's.
176. Meili was standing close by, she did not recall anything in his hand.
177. There was a lot of blood on the ground around the victim. The other two from his group she did not see again and when the victim was struck he was on his own.
178. She shouted to Meili to hold back Valu.
179. She ran to the neighbours for help, but they did not assist.

Cross-examination

- I. Her witness statement dated 7th October 2019 was put to her, page 4, 2nd sentence :

“They came and then Valu hit the deceased with iron pipe and he fell down. And then Maka hit one person who came with a machete and after that hit, the machete fell to the ground and that person ran away.”
- II. Of that excerpt she stated she had seen a machete. That person with the machete she did not know his identity.
- III. Within the group that ran in her direction one had a machete and one had a stick.
- IV. She did not see the person who fell to the ground hit a tin sheet with a stick, nor hear the noise of a tin roof being struck.
- V. She did not hear a machete hit a fence.

- VI. Maka hit the person with the machete and then Valu hit the victim.
- VII. She stated that both Maka and Valu hit to protect themselves from these three.
- VIII. Valu struck the victim to the ground with a single blow and then struck a further two while he was on the ground.
- IX. She was not sure if the blow from Maka connected with the victim, or whether he stuck amongst Valu's blows or not.
- X. She did not see Meili with a Tanetane stick.

Re-examination

- 180. She was asked who in the group that came from the direction of the cemetery had the machete and who the stick ? She was allowed to refresh her memory from her witness statement.
- 181. Having done so she stated that the group of three ran, Maka hit one who fell to the ground and rolled over and that person then left with one other.
- 182. Valu, she said, hit to protect himself.
- 183. Those two latter strikes were so Valu could protect himself.

Officer Samuela Tau'alupe

- 184. He was based at the Mu'a police station on the night in question. He received a call from Nuku'alofa police station reporting a fight involving sharp objects in Holonga.
- 185. At 0008 hrs with his partner Officer Soane Ulutaufonua they drove their police vehicle to Holonga.
- 186. They arrived and saw a body by the side of the road. He then contacted his supervising officer in Mu'a and Scenes of Crime officer and waited for them to arrive.

Cross-examination

187. There was none.

Samisoni Palele

188. He arrived with his friend Fapiano at Fanaafi Misifane's house at about 2100 hrs. He had started drinking whisky at about 2000 hrs and drank that for about an hour. He went to Misifane's home and was drunk by then. There he started drinking beers.

189. While they drank Valu showed up. There were six of them before Valu arrived; Samisoni, Epanizer and Sione Manu. Unuoi Piutai, Fabiano and Fanaafi Misifane.

190. He described his level of intoxication as drunk, but "not bad drunk".

191. When Valu came in Fanaafi asked him what he was doing there. Valu was sitting, without a T shirt and had an injured shoulder; he had bruises and was bleeding. First Fanaafi told him to leave yet he remained, then he told him to leave again and he then left, he did not know where.

192. Fanaafi told them all to go and carry on drinking in the shelter outside.

193. Fanaafi then went somewhere with his wife. They were then at the shelter when a small car arrived and parked at the side of the residence, Maka and Valu got out.

194. Valu asked for a bottle of drink (alcohol). One of those two helped themselves to a bottle that was already mixed.

195. Fanaafi arrived back at this time and told them to leave.

196. They reversed the car out and parked in the road.

197. An argument then developed between Fanaafi and the Maka and Valu. He did not know exactly how that started. He was telling them to hurry up and leave.

198. Samisoni walked over to listen to what the argument was about. He could not explain how it started but he and the others were suddenly chasing Maka and Valu.

199. From where the car had been parked outside Fanaafi's house to the cemetery he chased them.

200. Samisoni, with Epaniser and Fapiano chased Valu. They ran along the road, Epaniser ahead and someone else bringing up the rear. They chased them to the cemetery. Maka was in his vehicle and Valu on foot. They never actually caught up with Valu. He had nothing with him, but he did not know whether Epaniser or Fapiano did.
201. The chase ended at the cemetery, his group fell back.
202. His evidence was confused as to what happened next, but there was a time when he was running with Fanaafi, then Epaniser shouted “Attack or Fanna will be killed”.
203. He found Fanaafi on the road. He was bleeding heavily from his head. He touched the left side of his head. He thought he was dead.
204. He did not see what had happened to him. He added that he could not remember everything as he was so drunk. He said that he and Epaniser then both ran.

Cross-examination

- I. He stated he did not know whether it was he who had punched Valu’s chest.
- II. He said that Fapiano left after they had been drinking in the shelter and did not chase Valu⁷.
- III. He did not know if Epaniser had a machete in his hand, nor whether Fanaafi had a stick.
- IV. His statement of 7th October 2019 was put to him and the section, page 3 paragraph 2 : “Whilst I turned did not know where Fapiano was, but heard Epaniser call out ‘Help’ ”.
- V. The witness thought his version of events that he had recounted in his evidence in chief was correct, but he said that he had blacked out through alcohol at some stage, though that fact was not recorded in his witness statement.
- VI. He did not hear Fanaafi hitting a metal roof with his stick, nor hear Fapiano hit the gate to the cemetery with a machete.

⁷ CF paragraph 200.

VII. As he ran the first time the intention was to chase Valu, they fell back when someone shouted “Attack or [Fanaafi] would die”.

VIII. He denied that he caused Valu extreme provocation.

Re-examination

205. The cry of “Attack or Fanaafi would die” were words shouted to mean they had to act to save him.

206. It was a cry from Epaniser for help.

Latanoa Lea’aepenbi

207. She was Meili Valele’s girlfriend at the time and still was when she came to give her evidence.

208. She had been living in the hut at the back of the Valele residence with Meili. They had been there when she heard Maka’s car arrive at speed.

209. She could then distinguish the noise of a fight taking place.

210. From the car there was a shout of “Meili !” and the car came to a halt under the Breadfruit tree. Maka called out for Meili. He got up and ran outside. She called for him to come back but he did not and kept running and she then followed and stood outside the Valele residence.

211. Maka was parking his car. Then he walked to where she was and pulled the iron pipe from the ground outside the Valele home.

212. As he did this he was saying something to Meili’s parents, but she did not know what.

213. Valu struck Fanaafi.

214. When she noticed him next he was standing in the road under the street light. He had already hit Fanaafi and Fanaafi was on the ground.

215. Meili broke a Tanetane branch from a bush on his parents’ residence.

216. She then saw Meili strike Fanaafi with the branch to his back once.

217. Then he fell back and stood closer to where the cemetery is located.
218. She then saw Maka run to where Fanaafi was; Valu was also there at that time.
219. Maka then struck towards where Fanaafi was lying.
220. She thought it was towards his right shoulder and more than once.
221. Meili's mother and sister were there with her.
222. The order of the attack was Valu, Meili then Maka.
223. She did not hear Maka or Valu say anything at that time.
224. She could clearly see this happening because of the street lighting.
225. After the first blow Fanaafi was down and she did not see him move again.
226. Meili was the first to return, Maka and Valu were still standing over Fanaafi's body, then they returned to the car
227. They called for Meili to leave with them.
228. Meili said nothing.
229. She and Meili returned to his hut.
230. He did not say anything at first, then asked her to go and hide with him.
231. She described Valu as having been without a shirt, Maka in a white T-shirt and Meili also without a shirt.

Cross-examination

- I. When Valu struck Fanaafi, Maka was still parking.
- II. Fanaafi was struck, he went down, then Meili and Maka arrived at the scene.
- III. She was taken to her witness statement dated 5th October 2019. And the passage where she had stated that she had seen Fanaafi attacking from the side which was dark. She agreed and stated she recalled that.

IV. He was attacking, but it was not true that he had a stick.

V. She heard no noise of a gate to the cemetery being struck, nor a tin roof of a building being hit.

VI. She had not seen anyone with a machete.

Re-examination

232. When she saw Valu hit Fanaafi it was just those two present.

233. This concluded her evidence. The Crown then adduced a further photographic exhibit.

234. The prosecution had provided photographs of each of exhibits 6 and 7 their diameter measured, their length and their respective weights.

235. Those measurements were photographed and recorded within the bundle of 10 images that became exhibit 11 and was adduced by agreement between the parties.

Dr. Maile

236. He qualified as a Doctor in 2013. He was the attending physician in this case.

237. The deceased, Fanaafi Misifane, arrived at the Emergency Department on 6th October.

238. He drafted the medical notes, which he produced and those became Exhibit 12.

239. There had been inflicted an open skull fracture; separated and open. Brain matter was visible.

240. Numerous teeth had been loosened.

241. The Doctor referred to the photographs of the deceased, exhibit 10.

242. Photograph 8 showed a skull depression fracture that would have needed significant force to have caused it.

243. The Doctor's opinion was it was caused by a single strike, very likely with a metal pipe.

244. The injuries on the other side of the head, photographs 9 – 12, he believed were caused by multiple strikes.
245. That side of the head had sustained most injuries including an open skull fracture that revealed brain matter⁸.
246. He believed a different weapon had been used, a heavier weapon on the right side, a lighter one on the left.
247. A Tanetane stick would not have caused those injuries.
248. There were abrasions to the knees detected.
249. There was bruising to the upper back.
250. The Doctor stated that could have been caused by the strikes to the head, from above and in front of the victim, whilst lying on the ground, the weapon reaching as far as the top of the back.
251. The severe trauma on the left probably caused death, the depression fracture on the right would not necessarily have caused death.

Cross-examination

- I. The heavier pipe caused the injury to right side of the head.
- II. But, it would have been possible for either of the pipes in question to have caused the right side injury.
- III. The right side a single strike, the left multiple.
- IV. The injury to the knee in photograph 17 consistent with running and falling though could not say exactly when that would have happened.

Re-examination

252. None.
253. Defendants' Police interviews

⁸ Exhibit 10, photograph 11.

Mr. Kafalava's interview

254. Mr Kafalava was interviewed on 7th October 2019 at 1645 hrs, he declined the services of a legal representative.
255. He told police he had been with his co-defendants on the afternoon in question and he had been drinking alcohol, he drove to Nuku'alofa and then they returned to Holonga.
256. He described joining the drink-up at Fanaafi's residence and that Fanaafi had questioned his presence there. That he left, wandered about, found Maka and his car. The two of them returned to Fanaafi's house and parked outside his home. Again Fanaafi asked why they were there and told them to leave.
257. As Maka drove off Fanaafi had a stick in his hands waiting for Mr. Kafalava.
258. Mr. Kafalava told him to drop the stick so they could fight and that Fanaafi punched him all the way to the graveyard. He and Maka were then chased by the group, who were armed with "sticks and a machete" and they met with Meili.
259. He then stated this :
- "I went on to Fanaafi where one of the guys attacked me with the machete which injured my back, so I walked off thinking it was Fanaafi who attacked me.
- I walked off, Maka and Meili were behind and at this point Fanaafi was already lying dead on the ground, after being hit .
- I was aware that he fell on the ground following Meili's beat with a stick."
260. He stated that he then fetched a pipe and returned and struck Fanaafi on his head once as he lay on the ground, with a the pipe. And, that caused Fanaafi's death. This was done in revenge for the injury he had sustained
261. He then drove off with Maka and went to hospital to be treated for his injury.
262. On being charged :
263. Mr. Kafalava replied, "The charge is true" and signed that endorsement.

Mr. Filihia's interview

264. He was interviewed on 10th October 2019 at 1111hrs. He declined the services of a legal representative.
265. He and Valu went into town to get some shopping, meeting Meili and another on the way. They then returned.
266. He described Valu arguing with the people at the drink up and that he, Mr. Filihia, told "...the drunk people at the house, it's okay". They left, picked up Meili's girl and came back to Holonga.
267. There was arguing with the people at the drink up and he was told to leave. He, Mr. Filihia, had parked there but was told to leave and was punched by Fanaafi.
268. He saw the group fighting Valu by the graveyard.
269. Mr. Filihia armed himself, first he stated it was a stick, then he described it as a tent pole. That he did so to assist Valu. That he ran about 23 meters to join Valu who was fighting and pulled him back when he got there. Valu was fighting a boy with a machete. Meili was fighting too and had something in his hand.
270. At question 82 he described a time when he and Fanaafi were fighting. He had the pole but was not sure what Fanaafi had.
271. At question 100 he stated that he was fearful of Valu being killed.
272. He rejected as a lie that he and Valu had attacked Fanaafi on the ground.
273. He admitted the pole he used became blood stained and he discarded it in the road as he made off.
274. On being charged :
275. Mr. Filihia replied "The charge is a lie." and endorsed that by signing the record.

Mr. Valele's interview

276. He was interviewed on 9th October 2019 at 1310 hrs. He declined the services of a legal representative.

277. He was with a friend of his, Ricky, on the afternoon in question and went into Nuku'alofa. They later got a lift with Maka and Valu and returned to Holonga with them.
278. Maka became aggressive towards him and Ricky, called Ricky "haughty" and "an arse hole". Ricky then ran off fearing he would be beaten up. Mr. Valele said he apologised and the other two agreed to his request to pick up his girlfriend from Tatakamatonga.
279. As they drove there they passed Ricky and Valu got out of the car and beat him up and they drove off.
280. Mr. Valele said there was no reason for this other than Maka and Valu are "bad drunks".
281. They picked up Mr. Valele's girlfriend and drove back to Holonga. They saw Ricky again and Maka stopped the car and Valu took a piece of pipe that was under the car seat and assaulted Ricky with it, injuring his ear.
282. Mr. Valele was angry but said nothing about this as he was scared of them.
283. He got dropped at his house and asked his mother for petrol money to give Maka.
284. While he was talking with his family he heard a noise from the graveyard; it was a quarrel. He saw Maka and Valu's car there.
285. He saw Valu ran towards the disturbance as Maka parked the car Mr. Vavlele was standing close enough that he also got chased by Fanaafi and Epenisa. Valu had a pipe in his hands.
286. Mr. Valele had a Tanetane branch. He took from outside his house.
287. He denied that he used it to hit the victim.
288. His co-defendants attacked the victim but he did not join in. He only stood and watched them.
289. After the close of the prosecution case no defendant gave evidence.

Consideration

290. It now falls to me to consider the verdicts in this case arising from the death of Mr. Fanaafi Misifane the night of Saturday 5th going into Sunday 6th October 2019.
291. I note that in respect of the police interviews, especially Mr. Valele's, there was a case put as against the other two defendants, not least that they had been violent to others throughout the day in question, for example to his friend Ricky and made unprovoked attacks, often armed with metal pipes.
292. What one defendant says about another in his interview can never be evidence against that other defendant.
293. It is important to highlight that those parts of the interview of Mr. Valele, or indeed any defendant against another, have not been taken into account in any way and forms no evidence against any other defendant or part of my consideration.

Self defence

294. In considering the this aspect of the case, there are two crucial limbs :

Did the defendant believe or may he have believed that it was necessary to use force to defend himself from an attack or imminent attack on him or others⁹ ; and

Was the amount of force the defendant used reasonable in the circumstances, including the dangers¹⁰ the defendant believed them to be ?

295. That, once raised by the defence it is for the prosecution to prove beyond a reasonable doubt.

Provocation

296. The law in regard to this defence is set out at section 88 to 90 Criminal Offences Act. I will not rehearse it here, but deal with the relevant considerations below.

Motuka Ve'evalu Kafalava

297. On his own word he had been drinking alcohol that afternoon and in the evening went to the drink up at the victim's home. Fanaafi questioned why he was there.

⁹ *Williams* (1984) 78 Cr App R 276, 281; *Beckford v The Queen* [1988] AC 130, 144

¹⁰ *Keane and McGrath* [2010] EWCA Crim 2514, para [4]. See also *Hayes* [2011] EWCA Crim 2680

298. This accord with all the Crown witnesses who were there. Mrs. Kalo Misifane described him as “too drunk” and that he had not been invited, she had never seen him before in her life. That he started grabbing at beer and other things on the table.
299. Fapiano Kali recalled his being loud and starting an argument.
300. It is common ground that Mr. Kafalava was asked to leave by Fanaafi and that he did so and then returned in the red car Maka Filihia was driving. Fanaafi asked both to leave and the car was driven off the property, onto the road and both Mr. Kafalave and Mr. Filihia lingered.
301. Again it is common ground that their return to Mr. Misifani’s land was uninvited and plainly unwanted as yet again Mr. Kafalava was asked to leave.
302. Fapiano Kali recalled that Samisoni had hit either Valu or Maka. Certainly Mrs. Misifani recalled that too and it was Valu who was struck; she must have been the most sober there given the detail of her evidence and that she was also concerned with cooking and child care and not only drinking, as the men were that night.
303. That led to Maka driving off in the car and the evidence of Mrs Misifane was that Mr. Kafalava refused to get back in the car.
304. The evidence of Fapiano is that this led to Valu and Maka challenging those at the drink up to a fight.
305. That in turn led those at the drink up to arm themselves and chase Maka in his car and Valu on foot in the direction of the graveyard.
306. It appears to me that this part of the evidence is not insignificant.
307. I judge that this is what happened so I am sure; that Maka Filihia and Mr. Kafalava were indeed challenging those at Fanaafi’s to a fight.
308. The reason I consider this must have happened , not only Mr. Kafalava’s concession in interview that he had challenged Fanaafi to a fight, but also the way that Mr. Kafalava was belligerent from the outset at the drink up and Maka Filihia joining in; that they were uninvited and kept returning and also from the words he undoubtedly used later when he was striking Mr. Misifani on the ground.

309. Taking those instances, before and after this point in the evidence I am sure that the challenge was made by those two, to Mr. Misifane and his guests, who then responded by arming themselves and the chase towards the graveyard.
310. From the evidence it is also clear that at this time, Maka and Valu were not armed, but were chased by a group who were.

Provocation

311. In the case of Mr. Kafalava I find there could be no defence of provocation. He was intent that night in causing a violent disturbance by his pugnacious conduct from the start.
312. Even on his own word in interview he challenged Fanaafi Misifani to a fight, he being that set upon violence.
313. Further, I accept the evidence of Mrs. Misifani that he refused to get into Maka's car as they were being asked to leave for what was the third time and his staying on foot at that moment, I infer was so as to be more able to engage in the violence that he was encouraging the guests at Fanaafi's to, firstly by his conduct; drunkenly attending their party repeatedly against their wishes and trying to take their drinks and then resisting leaving each time they bade him to.
314. He was set upon confrontation and brought it out in this group of private people who wanted to drink and enjoy their company undisturbed and on their own private land.
315. Though the defence of provocation under section 89 Criminal Offences Act is raised, Mr. Kafalava did not give evidence. Not only that, but of the injury he is said to have suffered, there is no evidence as to its cause or extent.
316. Accordingly for me to conclude that he had lost all self control from the provocation of being chased by the armed group Fanaafi was in or his injury on being attacked ; there is insufficient evidence.
317. Not only that, but if Fanaafii armed, and I am sure he was from the preponderance of the evidence, it was only with a Tanetane stick, a strike from that would at worst produce a bruise or a reddening of the skin.

318. Further, and crucially, provocation could not apply, ab initio, by virtue of section 90 (1) (b) because of his belligerent behaviour from the start, then, with Maka, challenging Fanaafi and his guests to fight, as I have found he did, he acted "...from a previous purpose...to engage in an unlawful fight..." as defined by that subsection, so as to not be able to avail himself of that defence.
319. In his interview at answer to question 39, though not supported by evidence on oath, Mr. Kafalava poses the question whether provocation could be a defence in circumstances when a defendant attacked, not the person who had "unlawfully assaulted him" (as required by section 89 (a)), so availing himself to the defence of provocation, but attacked another because of an honest and genuine mistake.
320. This raises an interesting point, but only in theory.
321. Mr. Kafalava did not give evidence so there is not the required evidential basis for me to go on to consider this.
322. Further, from what I have found, he is deprived of the defence of provocation by section 90 (1) (a), it therefore follows that point does not even arise and is precluded from being considered.

Self-defence

323. Again, without his having given evidence on oath it is extremely hard to see how the evidential basis to consider this defence could be made out.
324. That aside, even if properly raised it plainly fails because when, on his own word in police interview¹¹, he struck the defenceless Fanaafi, lying on the ground, using a pipe aimed at his head.
325. Even on Mr. Kafalava's word, his acts were out of all proportion as against a person, lying helpless, unarmed and offering no threat at all at that moment, so they never could be said to have been self-defence. That in itself would disprove self defence beyond all reasonable doubt.
326. In any event, I reject Mr. Kafalava's account in interview as untrue.

¹¹ Answers to questions 41 to 43.

327. The evidence from independent witnesses was of his attacking his victim repeatedly to the head, first knocking him to the ground with a strike from a metal pipe and then at least two more blows.
328. As he did so, calling out words described as “Come and fight, or he will be killed” and behaviour that caused Mrs Valele to call the police instantly and exclaim out loud that someone was going to be killed.
329. That someone could only have been the person on the ground; Mr. Misifane.
330. That night all he wanted to do was kill his victim, and he did so in the most brutal way.

Verdict: Mr. Kafalava

331. I have absolutely no doubt, when I consider these strands of evidence and the medical findings that it was Mr. Kafalava who repeatedly beat Mr. Misifani to the head with a metal pipe causing his brains to come out and contributed to his death, and that he did so with every intention of killing him or, at the very least, was reckless whether death ensued or not.
332. Therefore on analysing all the evidence I am of the clearest view that he is guilty of the murder of Mr. Fanaafi Misifani and I find him guilty of count 1.
333. Count 2 his plea becomes a nullity and I return no verdict in respect of Count 3 in the alternative.

Mr. Maka Filihia

334. Again, analysing what he said he accepted doing in his police interview, it is plain that he also attacked Mr. Misifane with a metal pole¹².
335. The pole used was undoubtedly the piece of scaffold, exhibit 6 and the defendant accepted this in his interview¹³.
336. There is to be carefully considered the evidence of Mr. Valele senior, Mrs Mele Valele and Latanoa Lea'aepenbi.

¹² Answer to question 81.

¹³ Answer to question 67 and confirmed as such by the parties during the trial.

337. Mr. Tonga Valele said how Maka took the pipe from in front of their house, that was planted in the ground. He saw Valu strike the victim on the ground twice. As for Maka, he was not sure what he was doing and did not see anything in his hands.
338. Mrs Valele saw Maka take the piece of scaffold pipe , exhibit 6 and then use it to strike towards Fanaafi on the ground after Valu had struck Fanaafi with his pipe.
339. The first blow from Valu, striking Fanaafi's head and snapping it around sending him to the ground and followed by a further two strikes to his head.
340. Latanoa Lea'aepenbi saw the strikes Valu dealt out, first sending Fanaafi to the ground and continuing thereafter, all to the head.
341. She then saw Maka run up and strike, she thought Fanaafi's shoulder.
342. Taking all this together and adding the medical evidence; there can be no doubt that the single strike of Mr. Filihia towards Mr. Fanaafi struck the victim on the right side of his head, above his temple and caused the depression fracture.
343. The eye witnesses must have been mistaken as to where Maka's blow landed. The medical evidence proved it beyond a doubt.
344. This was at a time when Fanaafi was defenceless on the ground.
345. I conclude that Mr. Filihia's culpability is on the basis either as joint principal or as a secondary party.

Provocation

346. I have considered the defence of provocation. I note that Mr. Filihia did not give evidence. Therefore what he says he perceived or apprehended by way of impressions or fears has not been put before me as evidence on oath, tested by cross-examination.
347. In any event, turning to the defence of provocation, for exactly the same reason as for Mr. Kafalava, it can not apply to Mr. Filihia.
348. Both he and Mr. Kafalava had joined the party at Fanaafi's uninvited and stirring up trouble by going back repeatedly. I have found that both this and their shouting, challenging Fanaafi and his guests to a fight, mean that the exception in section 90 (1)

(b) Criminal Offences Act is made out, by his causing the others to engage in an unlawful fight with him and Mr. Kafalava, so that provocation could not ever be a defence.

Self defence

349. As for a suggestion that he acted in self defence or defence of another, I am sure that is unsustainable on the evidence. He joined in the attack of a defenceless man, who was lying on the ground, unarmed and no longer moving. He bludgeoned him to the head with a heavy metal pipe.
350. That can never be self defence and on that basis the prosecution have disproved self-defence to the criminal standard.

Verdict: Mr. Filihia

351. This attack by Mr. Filihia either contributed to the death of Mr. Misifani, who died of the blunt force trauma wounds to his head, or, considering R v Jogee, at paragraph 12¹⁴, they were the actions of someone who was encouraging the principal as a secondary party.
352. A person armed as Mr. Kafalava was, having already struck the victim so as to knock him to the ground, I judge would plainly encourage another joining in, in a similar attack, with a like weapon, also aimed to the head.
353. Mr. Filihia's actions I find would also assist Mr. Kafalava's.
354. "Most people are bolder when supported or fortified by others than they are when alone."¹⁵
355. I find that Mr. Filihia clearly intended the death of Mr. Misifani or, at the very least, was reckless whether death ensued or not, and conclude this by virtue of the weapon he used, its size and weight, where he aimed on his victim's body and struck his victim and that his victim was on the ground both defenceless and unmoving at that moment.

¹⁴ [2017] A.C. 387

¹⁵ R v Jogee, Ibid. paragraph 11

356. It follows, that in a group attack, joining in as he did, so as to bludgeon his victim after the initial blow or blows of Mr. Kafalava; whether Mr. Kaflava struck again thereafter, or not, is irrelevant.
357. That strike of Mr. Filihia's I am sure amounted to encouragement or assistance whether it had a positive effect on Mr. Kafalava's conduct or not; but the intention to encourage or assist in the death of Fanaafi is so surely made out in that act, that I have no doubt that Mr. Filihia is guilty of the murder of Mr. Misifani, following the decision in *R v Jogee*; considering and adopting *R v Calhaem* [1985] QB 808.
358. I therefore find him guilty of Count 1, Counts 2 and 3 being in the alternative, his plea to count 3 is vacated and count 2 I am discharged from returning verdicts upon.

Meili Valele

359. To understand his involvement I turn first to the evidence Finau Filimoe'atu. She was an independent witness and I accept her evidence.
360. She saw Meili Valele run from where the attack on Fannafi was taking place, arm himself with a Tanetane branch and run back to where Mr. Misafani would have already been lying incapacitated.
361. By comparing Finau Filimoe'atu's evidence with Mrs Mele Valele, it is quite clear to me so I am sure, that as the lately armed Meili ran back to Fanaafi lying on the ground, his mother was crying out the words "There's a killing taking place."
362. Finau Filimoe'atu did not see what happened. Meili Valele went out of her sight as he drew near to Fanaafi.
363. Both Mr. Meili Valele's parents stated that they did not see anything in their son's hand at this time and neither gave evidence that he struck the victim.
364. Given the independent evidence of Finau Filimoe'atu I am quite sure that whilst I can accept parts of their evidence, Meili Valele's parents were determined to minimise their son's involvement and did not tell the whole truth.
365. Latanoa Lea'aepenbi's evidence was more reliable.

366. She is the girlfriend of Meili Valele. Her evidence was candid. Her evidence was against his interests and I judge the only reason that was so was because she was trying to tell the whole truth. Taking her evidence, along side Finau Filimoe'atu I am persuaded, so that I am sure, that Meili joined the attack .
367. But, as to where he struck his victim, I conclude it must have been to his head.
368. The reason I am sure of this is because of the evidence of Enifila Filimoe'atu.
369. She recovered a Tanetane branch from the scene the next morning. It had extensive blood staining including blood splatter marks on it.
370. Again, like her sister, she was a completely independent witness and I accept her evidence.
371. The coincidence of what she found and where and when is too much. I conclude so that I am sure that exhibit 8 was not the Tanetane that Meili Valele was armed with, but the branch Enifila Filimoe'atu found was.
372. It could only have got that much blood on it by direct contact with the wound Fanaafi suffered and where he was bleeding; that was only his head.
373. No one else, on the evidence, was bleeding in such a way so that the stick could have been stained as it was, other than it having been the weapon to strike the victim's head when already grievously injured.
374. On the evidence, so I am sure, that was what Meili Valele did.
375. Having considered all the competing evidence I conclude, so that I am sure, that Meili ran and struck the helpless Fanaafi to his head at a time when he was defenceless and his head pouring blood from open wounds.
376. The strike was of such a force to stain the branch, but also to mark it with splatters of blood.
377. I note that Meili Valele's involvement, as I have found it to be, came at the time of the bludgeoning of Fanaafi by his co-defendants with metal pipes to his head. It took place

as his mother screamed out that she feared the victim was being killed. And, as I have already stated, the blow struck the victim to his wounded head whilst defenceless.

378. From all this I infer it was very likely that his intention was that of encouraging and assisting the others in the killing of Fanaafi and that is probably what he had in his mind.

379. I also note the evidence of Latanoa Lea'aepenbi, that Meili wanted her to go and hide with him after the killing. That could be suggestive of terrible guilt on his part.

380. Yet, Meili was always on the periphery of these events.

381. He was not present crashing the drink up.

382. He had returned home and was quietly there eating with his girlfriend.

383. Again, he has not given evidence.

384. In his interview he stated that he was armed but stood by looking on while the others attacked the victim.

385. Because of the surrounding evidence that I have identified that can not be so.

386. When he joined the attack there could have been no defence of another, as the victim was on the ground incapacitated.

387. On the evidence before me I am satisfied that he contributed a single strike with the Tanetane branch.

Verdict: Mr. Valele

388. Given his later involvement, that he was not with his co-defendants goading the guests and Fanaafi at his home and not part of the group challenging them to a fight; given that his weapon was a stick that would very unlikely ever cause a serious injury nor could it kill, as the pipes surely can and did; and even though he struck where and when he did and as his very own mother shouted that warning; on careful analysis I find that I only think it probable his intention may have been to kill. I can not be sure from all the surrounding circumstances.

389. Therefore what is the correct verdict on the basis of his involvement, as I find it to be, there not being proven an intention to kill ?
390. R v Jogee at paragraph 96 deals with this very situation.
391. “If a person is a party to a violent attack on another, without an intent to assist in the causing of death [...] but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter.”
392. That being precisely the situation here.
393. For exactly the same reason as his co-defendants, self-defence, as is argued on his behalf, can not succeed.
394. He beat a man, already knocked down, incapacitated and unarmed and defenceless, striking him to his head.
395. That is so plainly incapable of being an act of self defence that I reject that argument out of hand.
396. Given all I have found about the actions of Mr. Meili Valele on that night, I conclude he is to be found not guilty Count 1 murder, Count 2, guilty of manslaughter and count 3 being in the alternative I am discharged from returning a verdict on that count.
397. All defendants are to be remanded into custody and will be sentenced together on 26th November 2021 at 0900 as I order a pre-sentence report to be compiled for Mr. Valele. A production order will be required for each.
398. I would like it noted that in this case, as with many other criminal cases, the ability to present to a court the audio recording of a witness who telephoned the emergency services and was recounting what was happening at the scene, as Mrs. Mele Valele did in this case, would be of vital importance and the police and emergency services should work together to make such vital evidence available to courts in the future.

NUKU'ALOFA
29 October 2021



★ N. J. Cooper
JUDGE

The image shows the official seal of the Supreme Court of Tonga. The seal is circular and contains the text "SUPREME COURT TONGA" around the perimeter. In the center, there is a royal coat of arms featuring a crown and a shield, flanked by two figures. A handwritten signature in black ink is written over the right side of the seal. Below the seal, the name "N. J. Cooper" is printed with a small star to the left, and the word "JUDGE" is printed below the name.