

Sun + file

A
29/04/15

R E X

- **Prosecution**

1. SOSEFO MASALU

2. SAMISONI TAUFA

- **Defendants**

BEFORE THE HON. ACTING JUSTICE CATO

Mr Kefu, Acting Attorney- General for the Crown

Mr Tu'utafaiva and Mr Taione for the Accused

VERDICTS

[1] The accused, Sosefu Masalu, CR 143/2013 stood trial in the Supreme Court of Tonga at Nuku'alofa on a charge of manslaughter under sections 85, 86(1) (a) and 91 and 93 of the Criminal Code. In the alternative, he was charged with grievous bodily harm contrary to sections 106(1) and 2(a) of the Criminal Code. Alternatively, he was charged with common assault contrary to section 112 of the Criminal Offences Act. He stood trial together with Samisoni Taufu (CR 144/2013) who faced the same counts in his indictment manslaughter, in the

recd 29/04/15
HLC

alternative causing grievous bodily harm and also, alternatively common assault.

[2] The accused were charged each with one count of manslaughter arising out of joint unlawful enterprise. The particulars of the joint enterprise were that they caused the death of 'Inoke Pepa when Masalu on the 16th November 2013, unlawfully punched him causing him to fall on Taufa'ahau Road, his head hitting the road surface, causing a fracture to his skull, and then Samisoni Taufa together with Sosefo Masalu unlawfully kicked his head and body repeatedly, resulting in severe injuries to his head that caused his death.

[3] Both accused had individual manslaughter charges laid in the alternative that no joint unlawful enterprise was established. In the case of Masalu, the allegation again was that he had caused the death of Mr Pepa by unlawfully punching him causing him to fall on Taufa'ahau Road, hitting his head on the road surface causing a fracture to his skull, resulting in serious injuries to his head that caused his death. In the case of Taufa, the particulars of manslaughter were that he caused this by repeatedly kicking the deceased on the head, causing severe injuries to his head that caused his death.

- [4] The charge of causing grievous bodily harm involved particulars in relation to Masalu that he had wilfully and without lawful justification punched the deceased in the head causing him to fall on Taufa'ahau Road, his head to hit the surface resulting in a fracture to his head and severe injuries to his head. In the case of Taufa, the particulars were that wilfully and without justification kicked the head of Mr Pepa resulting in severe injuries.
- [5] A further alternative count of common assault was based on the allegation in relation to Masalu that he had wilfully and without legal justification punched the deceased and in the case of Taufa that he had wilfully and without legal justification kicked Mr Pepa whilst he was lying in Taufa'ahau road.

The Essential Elements of the Offences Charged

- [6] Before proceeding to consider the evidence, I direct myself on the essential elements of the crimes of manslaughter, causing grievous bodily harm and common assault.

Manslaughter

[7] In order for an accused to be convicted individually of manslaughter I must be satisfied beyond any reasonable doubt on the evidence considered separately;

- a) That the accused did an act on or about the 18th August 2012 that caused harm to Mr Pepa;
- b) That such act was a deliberate act; and
- c) That act was an unlawful and dangerous act; and
- d) That act caused Mr Pepa's death;

[8] I direct myself also in this regard that;

- (a) The 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.
- (b) Deliberate is used in the sense of an intentional act and not one that arose by accident. The Crown's case is and it must be proven beyond a reasonable doubt, that the accused's deliberate act caused the death of the deceased. Whether the

act was a deliberate one requires a determination as to the accused's state of mind when the accused did that act. That state of mind may be demonstrated by the circumstances in which the act was done, including the conduct of the accused and the statements made the accused before at the time of or after the accused did the act bearing upon this question.

- (c) An act is unlawful if it involves a deliberate application of force to another person without that person's consent.
- (d) Where, as, in this case, an assault takes place in the context of the use of a police power under section 100(1) of the Police Act, 2010, a police officer is entitled when attempting to exercise a power under the Act or another enactment, in this case a power of arrest, to use reasonable and proportionate force to exercise that power.
- (e) However, under section 100(2) of that Act a police officer may not use force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to that police officer or another person.

- (f) An act is dangerous if it is such that a reasonable person in the position of the accused would have realized that, by that act, the deceased was being exposed to an appreciable or significant risk of harm.

CAUSING GRIEVOUS BODILY HARM

[9] Likewise, in the event I do not convict an accused of manslaughter I have to consider the alternative count of causing grievous bodily harm in regard to that accused, the evidence being considered in relation to each separately. In this regard, I direct myself that the essential elements the Crown must establish beyond a reasonable doubt are;

1. The accused on or about the 18th August, 2014 did wilfully;
2. And without lawful excuse, (namely that he did not use reasonable or proportionate force to exercise a power of arrest under section 100 Police Act, 2010).
3. Cause grievous bodily harm to Mr Pepa.

[10] In this regard, I direct myself that grievous bodily harm means in this context harm that endangers life.

Wilfully means the accused intentionally did the act or acts causing grievous bodily harm.

[11] The act does have to be established beyond a reasonable doubt to be a material cause of grievous bodily harm. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause of death, or even a major or substantial cause of death. It is sufficient if it is a material cause and not one that is de minimis or inconsequential.

[12] In relation to lawful excuse, I direct myself again that under section 100 (1) of the Police Act, 2010 provides that a police officer is entitled when attempting to exercise a power under the Act or another enactment, in this case a power of arrest, to use reasonable and proportionate force to exercise that power. However, under section 100(2) of that Act a police officer may not use force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to that police officer or another person.

ASSAULT

[13] An assault means the wilful and unlawful application of force to the person of another without that other's consent.

Again, I refer to the provisions of section 100 of the Police Act, 2010

Common Purpose

[14] I also direct myself on what I have to find beyond a reasonable doubt to satisfy myself that there was established in fact a joint unlawful enterprise or a common unlawful purpose to which the accused was a knowing party. The law is set out for Tonga by Ford J in Ford J in Fakatava [2001] Tonga LR 76 when he said;

"it is not necessary that there should be any kind of elaborate pre-arrangement to constitute a joint enterprise- Hunter v Sara [1999] 105 A Crim R 241, but the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that was their common intention R v Peters and Parfitt [1955] Crim LR 501. The common intention or agreement is gauged from their conduct."

The Crown case on manslaughter here was that the accused formed a common unlawful intention or joint enterprise to unlawfully assault the deceased, and that as a consequence of the deceased incurring serious head injuries he died.

- [15] If I am satisfied beyond a reasonable doubt that there was such a common purpose, I must approach the case on the basis of those generally well known cases cited to me by the Crown on accessorial liability, in Tonga namely R v Anderson and Morris [1966] 2 QB 110; followed by Ford J in F v Fakatava [2001] Tonga LR 76 that at common law each party to a common unlawful enterprise is liable for acts done in pursuance of the joint enterprise [and] this includes liability for unusual consequences if they arise from the common purpose. In recent, years, however, the Anderson v Morris formula has been revised so that at common law, accessorial liability may only be imputed for a crime that is subjectively foreseen or contemplated beyond reasonable doubt by a secondary party or confederate as a possible incident falling within the scope of the common unlawful enterprise. I refer to the passage cited by Smith and Hogan , 10th ed, 2003, Criminal Law 162 said to be the approach advanced by the

Privy Council in Chan Wing Siu v R (1985) 80 CR App Rep 117, and approved by the House of Lords in Powell v Daniels. [1999] AC 1.

"The principle] turns on contemplation ...it meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

I direct myself, accordingly

The Evidence

[16] The incident occurred in the early hours of the 16th November 2012 at Vaini. The evidence establishes, to my satisfaction, that the deceased Mr Pepa had been drinking heavily during the day and in the evening at a kava club in Vaini with friends since the early afternoon the day before. Later that evening, or in the early hours of the 16th November, the deceased and two friends were passing the residence of Malia Pule'anga who was the wife of a police officer named Hala. He served at the Vaini police station where the accused were also stationed. That evening, Malia had held a celebration which had commenced about 10pm after completing

academic studies. Her husband was present and others. During the evening, concerns arose about the occupants of car which had approached the residence requesting information concerning a person who was not present. Malia was sufficiently concerned that, knowing Taufu was on duty, to text him. He arrived at the residence wearing official police uniform about half an hour later. He was accompanied by the co-accused Masalu, who was not on duty having completed an earlier shift. Masalu had been at the police station because he had expected to be met by friends to go out with socially. Taufu and he, however, spent some time together before Taufu responded to the text and he and Masalu went to Malia's residence about 11.30 which was not far from the police station at Vaini, also on the Taufu'ahau road. Sometime after he arrived, the deceased Mr Pepa and his two friends arrived. One of them, a witness, Annisbaymoney Taufu was allowed to attend the party but the others Mr Pepa and a friend, Solomone Vaka, for cultural reasons were asked to leave. Mr Inoke was annoyed about this. Some verbal abuse was directed at the police officers. I am satisfied that later in the evening Inoke returned about 2pm with a group of young men who created a disturbance which included throwing a rock in the vicinity of the residence. I am satisfied also that Hala and the accused left the residence and went out and attempted to quell the

disturbance which had included an invitation to a fight. I am satisfied that some abuse was directed at the police officers by the group. I have heard both police officers give evidence concerning their motivation for chasing the men.

- [17] There was evidence that, although commencing behind the others, Masalu moved more quickly, running in a western direction along Taufa'ahau Road. I accept that Taufa had put down his torch and that he and Hala had run more along the right hand side of the road to the intersection near the Vaini Mormon church, but that they could not catch any of the group, some of whom had run past the Church along a road which is to the right of the Mormon Church and the residence of one, Niua Taueli. A sketch plan was produced of the area which included measurements, as well as photographs. Meanwhile, Masalu, who moved more quickly than the others had attempted to grab one of the men who had no shirt. He was unsuccessful because the man was able to break away. Masalu then crossed over the road to chase and attempt to arrest the deceased who was running in the road about the area of the residence of 'Inoke Tesi and Paea 'Iloa. The evidence is disputed about what Masalu did then, and I will refer to that evidence later. The Crown alleges that Masalu punched the deceased in the face and he fell backwards to the

ground hitting the rear left hand side of his head on the edge of the road which caused his skull to be fractured. He seems to have become unconscious and motionless immediately. There is some evidence also that Masalu kicked Mr Pepa in the stomach. The defence contended that Masalu did not punch Inoke but merely attempted to grab him from behind and that Inoke during this movement slipped and fell backwards. Masalu also fell forward to the ground near to but probably to the side of Inoke. The defence also contended he did not kick Inoke, either.

- [18] Before I do so, however, I return briefly to Taufu. Having been unable to effect an arrest, he and Hala returned from the area near the intersection by the Vaini Mormon Church. The area is lit by an electric light on a lamp post which is situated at the corner of Taufu'ahau Road and the residence of Niua Taueli that is on the opposite side of the intersection from the Church. The distance from the corner of Niua Taueli's residence to the site where Inoke fell to the ground that is on the edge of the sealed roadway is not given on the sketch plan but considering the distance from C- G on the plan is probably a little over 23.5 metres. Taufu, in his evidence, asserts that he saw Masalu grab at Inoke and the pair fall to the ground before he and Hala ran towards the Church. Shortly after he said they came

back. He said Annisbaymoney ,who had followed the others from Malia' residence, was already present and attending Inoke when he and Hala returned which, he said, was a very short time after they had proceeded on to the intersection. The Crown alleged that when he returned he kicked Inoke twice, which he denied.

- [19] Shortly after it seems Inoke fell to the ground assistance was provided by his uncle and with others he was taken to hospital. Medical evidence was given by a doctor Mafi that he died a reasonably short time later. Later an x-ray revealed that he had a fractured skull and a laceration to the back of the head was also apparent. I am satisfied from the evidence of Dr Mafi and also the pathologist Dr Buadromo that the cause of death was the head trauma associated with Inoke falling on the back of his head possibly where a ridge in the side of the road shown in the photos may well have caused the laceration to the back of the head. The force of the fall left indentations in the scalp around the laceration consistent with road metal Dr Buadromo opined. I accept beyond any reasonable doubt that his fall was caused at least in part by the actions of Masalu in grabbing him, causing him to be spun around and, lose his footing. He fell backwards with the rear of his head hitting the road with a high level of force resulting

in trauma and fracture to his skull that caused complications and his death.

Evidence concerning Masalu's involvement in the death of
'Inoke

- [20] Malia Pule'anga said 'Inoke and two others Annisbaymoney Taufu and Solomone Vaka came back about 2 am – standing and cursing at police officers. They backed away when Taufu and Masalu approached them. They commenced to run who that were running. She saw Taufu was holding a torch. He placed it on the ground. He put it down on the frontage of our residence. She also started to walk down the road. Hala picked up the torch. Masalu accelerated in speed. Masalu grabbed a young man without upper body clothing and could not hold him. That occurred when he had just passed the white car. He was in the middle of the road. One of the group ran from the left hand side to the right hand side and she noticed Masalu grabbing hold of that person from the back. She said he used his whole arms to grab him. They both fell to the ground. That person was Mr Pepa. She said when they fell to the ground, the young man was on his back and Masalu was on his stomach. Masalu fell on the tar road. She said there were lights in

the area; streetlights opposite the Mormon Church. There were no other lights. She was about 60-70 metres from the person she saw to fall to the ground.

Hala was still chasing the remainder of the men. Hala and Taufa ran to the left to the turn at the Mormon Church. She saw Masalu stand up. Inoke was still lying on the ground where they had fallen down. She saw Taufa coming back from the turn. She noticed he walked towards the deceased. The deceased was lying still. His head was on the edge of the road and his feet were towards the frontage of that place. She did not see anything done to the deceased when he was lying there by Taufa. By this time she had come much closer to where Mr Pepa was lying towards the area of the police vehicle. (Seen in photo exhibit 1).

She said Hala walked up and bent over and shouted for someone to take Inoke to hospital. She saw the deceased, Taufa, Masalu, and Hala present. Other young men started to come back. Some of them were carrying sticks and rocks. A fight broke out between Hala, Masalu, Taufa and the young men. The fight was broken up. They returned to her residence. The young men walked towards her residence and shouted out they wanted Hala. They left eventually and came back the next day and attacked her home.

Under cross-examination, by Mr Tu'utafaiva she said she was standing at the frontage of Halatokoua's residence (shown on the sketch map) when she saw Masalu grab the deceased. That would according to the sketch plan be about 60 metres from the area where Mr Pepa fell. She said he was holding on to him from the back. Their heads came together as they fell.

Nai Tonga

[21] He lived opposite the Mormon Church on the corner residence across the road from where Mr Pepa fell to the ground. He resided at Niu Finau's residence which is shown on the map. He woke at 3am in the morning. He went to the side of the road. He looked easterly at youths walking towards him. There were about 5-6. They went around an area where there is a street light. He heard them challenging someone to a fight. He saw two young men start running. He knew the deceased and saw him running.

He focused his attention on the deceased. Two of the men ran past him towards Mormon Church. Masalu, he observed, turned and went to Mr Pepa. Masalu punched him and he fell to the ground. He said he hit him on the chest proceeding upwards. He indicated a swinging

punch. It landed and went up to the mouth. It landed on the right shoulder, and proceeded to the lower chin area. He said it came into contact with the side of the jaw. He said he saw someone running up from behind and then his focus returned to the deceased and he saw his head hit the road, in the area of marker 3 in the photographs. He was parallel with the road, and his feet were towards the cones. Masalu threw his wrist watch down which had apparently been damaged in Masalu's fall.

Tava or Taufu, he said, then arrived. He kicked the deceased. He said he kicked him in the lower jaw area, with his right foot. Hala came with a torch and grabbed Masalu, and Tava because there were a lot of young men prepared to attack them. He noticed Paula Inoke run up when the deceased fell. Malia was running from the rear. He said he did not know Tava's name at the time - only afterwards. He had however, seen him in police uniform. He had an early night before waking up.

Under cross-examination from Mr Tu'utafaiva he said that when Masalu crossed he ran right up to Inoke who was running on the right side. He said he had a side view. He agreed with the proposition put to him by Mr Tu'utafaiva;

" isn't what really happened, Mr Tonga, Masalu came up and tried to hold Inoke shirt of the right shoulder, whereby Inoke struggled to break loose and they fell together to the ground.

Answer Yes may be if he was trying to grab him, but then I change my focus to the people who were running up behind, then I turn to see them slamming down on the ground."

He further said he believed that may be Sefo was trying to hold Inoke because they both fell together at the same time.

He said Annisbaymoney came over and held Inoke's head up. Persons by the name of Rambo and Sukanaivalu arrived. He said to Mr Tu'utafaiva that Tava ran up and kicked Inoke in the head. He said, however, it was not a hard kick but rather a small kick just to slide off the cheek with his shoes. It had taken place after Masalu had got up. He explained the action as kicking or moving him with his feet. He said he was not sure whether he kicked Inoke's head or just moved it with his foot. He says he saw Hala running up with a torch and the torch was on and he dragged them away. Hala, he saw immediately after he saw Tava kicking. He nudged a shoebox used as a demonstration. He said "to

my mind, may be Tava was using his foot to check the status of Inoke but Inoke was still moaning at the time."

Paula Iloa

- [22] He was aged 19. He and his friends were in a hut at the back of his house and heard noises of a fight. He ran to an area inside a fence at his father's residence. He saw Inoke falling down. He fell facing up and head first. He said Hala, Tava and Masalu were around Inoke facing him. He did not know Hala or Tava before the incident. They were facing him as he was standing at the fence nearby. Hala was holding the torch, the next was Tava and he was the one he said he saw doing the kicking. He saw him kick him on the left side of the head. He said he had no firm recollection where. He approximated it as two kicks. He was wearing black working shoes. The head moved. He did not hear the sound of the kick. He said it was a kick and not just a foot to move the head. He said at first that he could not think he could demonstrate the kick. Then he was asked was it with a similar force as kicking a rugby ball and he demonstrated. Annisbaymoney, he said, arrived and stopped the kicking.

Under cross-examination from Mr Tu'utafaiva, he said he arrived there when the deceased hit the ground.

Almost immediately these three were present. He said other youths disappeared into the turn. He explained to Mr Tu'utafaiva that he had initially said he could not demonstrate the kick because he was somewhat shy. He maintained the kick hit the left side of the head. He admitted, however, that he could not see clearly because of the shadow (from the street light across the road). The shadow he said would cover the deceased head. He said that it was his interpretation that there was a kick because the head moved. He said that he only saw the foot raised and the head move. He admitted he did not see the foot hit the head. He inferred a kick. He said "yes but the foot was raised for the kick and the head moved, the head would not move for no reason." He said the foot did hit the head but he admitted that he did not see whereabouts on the head the kick landed. He said at another point in his evidence, that from where they were standing and the kick was made, he could not see where it landed but the kick was made. On the issue of his evidence that as an approximation, there were two kicks, to defence counsel he said he could not say whether more than two but he only saw two. He said Annisbaymoney came up and crouched between Inoke and the officers.

[23] Annisbaymoney Taufa

He said he had commenced drinking kava with the deceased about 5pm. He, Inoke, Solomone walked to Hala's and saw there was a "drink up". Solomone was drunk. He knew a relative of Hala's wife and it was against Tongan custom for him to be present at a "drink up". He was a neighbour. He was allowed in. The others were told to leave. The deceased had asked why he was being treated that way. He was drunk from beer. He drank spirits also. He said Hala, Masalu and Tava were chasing 'Inoke, Fine, and Lotu who were running.

He was about 40-50 metres away when Masalu struck 'Inoke from the side with his right arm. The elbow area of right swinging arm hit him on right shoulder. They were both facing town in a westerly direction. He was behind the deceased, who fell backwards. He said Masalu made a short kick on the side of his stomach. He did not see anything else. He said he saw Hala and Tava coming from the area of the intersection. He does not know what happened when Hala and Tava arrived. He then reached down and touched Inoke.

Under cross-examination, he said Masalu remained standing. He did not see Masalu fall to the ground. He was 40-50 metres away He was, he said in front of the police car when Tava came back(located in photo

exhibit 1) He says about 4-5 metres away from Inoke when he was on the ground.

[24] Suka Koluse

Since about 2-4 in the afternoon he had been drinking alcohol and beer. He admitted to being drunk. He left the club house after Inoke and Annisbaymoney. He said he was drunk. He ran over and saw the man on the road. He had been standing eating beyond the Church about a 108 metres away when he saw Masalu he said punched or use his arms against the deceased. He said they were kicking him so he tried to stop them. Sefo and Tava, he said, were kicking and punching the victim. He said then he did not know who kicked Inoke. He also later said he had not seen Inoke kicked. The uncle of the deceased, Mr Tevita Pepa, confirmed that when he took the deceased to hospital, Suka Koluse was present and had told him that the deceased had been hit by a torch and had fallen down. I did not find this witness to be credible in his evidence.

[25] Lisala Lavaka

He was one of those who attended the celebration for what was the end of an examination. He described himself as being very drunk. He said the group

challenged the occupants to a fight and they were throwing an object in the direction of the house that hit a tree. He said there were standoffs before the police chased the group. He said he saw Masalu made a hook swing on Inoke and they both fell to the ground. He said his lower right arm was swinging and made contact with right shoulder. He was at the frontage of Leimoni Teisina's residence shown on the sketch map. Under cross-examination, he said that the arm of Masalu was bent a little and it would have been on the chest of Inoke. He said other youths came back and commenced to fight.

- [26] Evidence was given by Doctors Mafi and Buadromo that the deceased, as I have said, suffered a serious head injury, a fractured skull from which complications including bleeding from the head to the lungs and died before any treatment could be administered.. As I have said Doctor Buadromo also said the laceration to the back of the head was consistent with his fall to the road, and she mentioned abrasions to the head around the chin and forehead areas which in her view were consistent with the use of a blunt object possibly with a punch or a kick. Significant force was required to cause the injury.

[27] Officer Sailusi Taukei'aho gave evidence of a record of interview he carried out with Masalu. In that record of interview, Masalu talked of verbal abuse from the youths who had challenged them to a fight. He said Taufa told him to chase them and catch one to question them about the other drunks. He said he had chased them and he caught one who was shirtless and he had struggled and got lose and run. He caught another boy he said and they had fallen onto the road. He said that when he got up Taufa was already standing there with Pule'anga. He talked of others turning up with sticks and stones, and going to arrest someone who prevented them from doing so because he threw a stone at them. Another person held them the youths back and they moved back to Pule'anga's residence. The youths continued also on to Pule'anga's residence where the youths asked for them. He was told not to deal with them anymore because it would make matters worse. He said there wasn't that much lighting where he caught the deceased but there was light. Later, when he returned to the police station, he learned that Mr Pepa had died. He declined to answer questions about his actions in relation to the deceased after caution, saying he would give his explanation in court.

Taufa's Evidence

[28] The accused, Taufa, gave evidence. He did not make a statement. He gave evidence of being on duty from about 4.30 and meeting Masalu at about 9.30. He said he had responded to a text from Malia because she was afraid of some drunks who had come to her place. He said he and Masalu got there about 1.30pm. He gave evidence of three people appearing and only one being allowed in. He told the others to leave. 'Inoke was not happy about this. Inoke had said nobody was going to make him leave. He had been challenged by Inoke to a fight. They returned after about 10 minutes. There were 6-8 youths. They were calling out and throwing stuff. He wanted to arrest them because they were drunk in a public area and they were disturbing the peace. They called him over for a fight. He walked over to them with Masalu and Hala behind them. They did not stop and he decided to chase them to apprehend them. He said he did not have any understanding with Masalu. He said Masalu went past he and Hala and he tried to grab with his right arm. He was not successful. Masalu then ran after another man to the right, and his right arm went around and he grabbed him around the chest. They fell down. Masalu was about 45 degrees when he grabbed the deceased. Inoke fell on his left knee whilst the rest of his body was thrown on the road. He demonstrated the actions of Masalu recorded by me in these terms, this not being disputed by counsel'

"As I understand, he said Masalu came across on a diagonal position with right arm making contact along the right upper chest and then somewhere pulled Inoke so that Inoke was facing back down the street and then he carried through and pass to the left hand side of 'Inoke's body as Inoke fell to the ground with his back to the ground."

He said he and Hala ran on and he stopped Hala at the corner because he could not see anything. He returned to where 'Inoke was and Annisbaymoney was there stroking his hair. He intended to arrest the deceased. The youths returned with sticks and throwing rocks. He was hit by a stick. They walked backwards to Hala's residence. It was about 4 o'clock. He denied kicking the deceased saying such suggestions were untrue. He denied that either he or Masalu had been drinking. He was not able to identify any of the youths. He denied that he chased them to assault them. He said he was not angered by their words or conduct. He maintained that he perceived a possible threat from the youths returning and that his intention was to effect an arrest to Mr Kefu. He wanted to arrest them for what they had been doing. He said he had told the others Masalu and Hala to catch one of them as they were running. He did not discuss this at the beginning. He maintained that Masalu had not struck Inoke. His swinging arm was to

grab him. He maintained he had not kicked the deceased out of anger.

Masalu's Evidence

- [29] Masalu's evidence was to similar effect as Taufa's and consistent with his own record of interview. He said he was with Taufa at about 1 o'clock. He said he was not on duty but the responsibility of an officer is 24 hours. He said at first he had walked over to the young men and told them to go to sleep and they left. Shortly after, they had come back and they were swearing, and shouting out for a fight. Taufa told he and Hala to chase and catch at least one of them to be caught for the charging purpose, that is to inquire of him who the rest of the drunks were so they could be charged later. He said that he had run after the deceased as he had crossed the road after being unable to hold the other man. He said he ran after the deceased who was running down the other side of the road. He approached him on the angle and grabbed his tee shirt or singlet. He said we were still in the course of running. He was trying to get his hand off my singlet and that is when he slipped and he slipped then as well. He said Inoke fell facing down but he was unable to see what part of his body came into contact with the road.

He said he landed on his elbows. He said his face did not hit the ground. He said when he got up Taufa was present and the youths with sticks arrived. He said he was on the ground for about 2 minutes before he got up. He fell on the road about 2-3 metres from Inoke. He backed away after that to Hala's residence. He denied kicking anybody. Under cross-examination, he said his purpose was to arrest Inoke. He denied hitting Inoke. He denied to Mr Kefu that he had responded out of anger. He said he had reached out for Inoke and denied a swinging motion. He said afterwards he had fallen to the right. Mr Kefu suggested his version of how Inoke fell was not accurate, and he denied this.

[30] The Submissions of Counsel.

Mr Kefu submitted that the police officers had acted out of anger as part of a joint unlawful enterprise, or individually has done so, and were not at the material time acting within the provisions of section 100 (1) of the Police Act, 2010. They were, he submitted, acting in retribution for the group's conduct and not with a view to lawfully effecting an arrest. He further said of Masalu that the method he used to apprehend Inoke was likely

to cause death or grievous bodily harm and consequently fell outside section 100(1). He suggested a tackle may have been more appropriate. He submitted that the evidence did reveal a punch and that this was supported by the pathologist's evidence of abrasions particularly to the chin, and the evidence of Nai Tonga particularly supported this, also. He submitted that Masalu's actions were a material cause of Inoke falling to the ground with fatal consequences, or, in the alternative, if I were to find Masalu did punch Inoke, the offence of causing grievous bodily harm or assault. He argued that Masalu's evidence that Inoke had slipped was a belated or contrived explanation and that there were certain inconsistencies between Taufu's account of the fall and Masalu's account as to where Masalu came to rest on the ground in relation to Inoke.

As to Taufu, he placed particular weight on the evidence of the witnesses Nai Tonga and Paula 'Iloa. He submitted both witnesses were well placed to see what had happened and the lighting was reasonably good also. Neither had any motive to give untrue evidence. Neither had been drinking. He submitted that I should accept their evidence. He submitted that I should find Taufu guilty in that he had contributed materially to serious injury by exacerbating the effect of the injury as part of a joint unlawful enterprise, or individually.

Further, if not manslaughter, then alternative verdicts were available.

Mr Tu'utafaiva conversely submitted that I should find both accused not guilty. He said that both were attempting to perform a lawful arrest, and that their actions were not unlawful either individually or as part of a joint enterprise and that the death of Mr Pepa was no more than an unfortunate accident. The group of youths had been creating a disturbance and breach of the peace, and that they were acting lawfully in attempting to effect an arrest. Masalu's actions were not unreasonable, and he fell within the provisions of sections 100 (1) of the Police Act. He submitted the evidence did not reveal a punch, and was consistent with a grabbing round arm motion that unsettled the deceased and that during this encounter, he slipped over backwards as Masalu had said with tragic consequences. He should be acquitted on all charges.

As for Taufa, he submitted the evidence of Nai Tonga did not support kicking as Mr Kefu submitted, and that Paea 'Iloa's evidence was unreliable, also pointing to his answers under cross-examination. He submitted that taking all the evidence into account I should have a reasonable doubt about the Crown cases, and acquit both accused on all of the charges.

Findings

[31] On the evidence, I find the following;

- a. The deceased, Inoke Pepa, had been drinking with others including Annisbaymoney for a very lengthy period prior to their arrival at the home of Malia Pule'anga at Vaini, and was probably very intoxicated. They arrived after the accused had arrived. I accept that Taufu, who was on duty, responded to a text from Malia to attend because she was concerned about the presence of some men in a car who had made inquiries of her as to the presence of a certain person.
- b. Malia and others were involved in a "drink up" as a celebration of the completion of academic studies. I find that Taufu and Masalu, who had completed his duty that afternoon but had visited the police station, both attended Malia's residence in response to her text. To that extent, they were at the time carrying out their police duties.
- c. The deceased, Annisbaymoney and Solomone Vaka, all of whom I am satisfied were intoxicated, having

spent a long time drinking kava and alcohol, at a club in the area walked past the residence of Malia Pule'anga and her husband Hala. Annisbaymoney, who was a neighbour, was allowed to remain but the other two were asked to leave, and did so after the Police officers had told them to leave. I find that 'Inoke was very annoyed at being asked to leave and questioned why. The reason was apparently a Tongan custom involving Solomone's presence as a relative of the occupants where a "drink up" was occurring.

- d. 'Inoke returned not long after without Solomone, but with a number of other youths. Taufu and Masalu and Malia's husband, Hala, who was also a police officer at Vaini but off duty at the time, and others were present. There was a commotion and a rock was thrown in the vicinity of the house. The police officers, Taufu, Masalu and Hala confronted the young men outside who I find had been aggressive. The young men, including 'Inoke, commenced to run away and the police officers chased them. I am satisfied, having heard the accused, that this was with a view to effecting an arrest for which by then had to my mind plainly reached the level of a drunken disturbance and breaches of the peace, and preventing any further breaches. I accept the

evidence of both accused on their motivation for giving chase. They were both I find at the relevant time in giving chase to affect an arrest acting in the course of duty. Masalu told the police, in his written record of interview, that he did this because he intended to arrest one and make inquiries of him as to the others so they could be charged, and I accept his evidence. Taufu also had proceeded with this motive. I reject the Crown submission that the accused were out for revenge or retribution, or were spoiling for a fight. I also accept what Mr Taufu said was that if he did not take action there was the possibility that the group would come back again with additional numbers and he wanted to avoid this. I observe that there was evidence that certain of the young men did, after Inoke had been injured, return with weapons, later attack the police officers and that this carried on back to Malia's home afterwards creating more disturbance until they left. In these circumstances, I consider the accused could not be criticised for taking the action they did.

- f. Section 100 (1) of the Police Act 2010 allows Police to use reasonable force to perform their duties. I do not agree with Mr Kefu that Masalu should have employed a tackle on Inoke rather than, as I find he did, attempt to apprehend or arrest him by grabbing

him from behind and to the right side. Masalu had already attempted to grab one of the group, who was without a shirt who had broken free shortly before he proceeded to attempt to arrest Inoke. I find that he attempted to grab Inoke forcibly from behind and to his right side as Taufa stated and Masalu said coming across on the angle, with what may to others, viewed from different perspectives, to have seemed like a round arm swing across the body of Inoke from behind. I find, having considered all the evidence, that he probably thrust out his right arm and grabbed Inoke around the upper chest area, in an effort to grab him by the singlet he was wearing, and probably also in an upwards movement. There was some evidence that suggested his lower arm below the elbow made contact around the shoulder of Inoke. That may appear to have been what happened from the vantage of the witness accepting this was a very quick movement, and it is inevitable in such circumstances that witnesses will have differing observations of what occurred. I accept, however, that Masalu did try to grab Inoke's singlet, lunging out and grabbing his singlet around the upper chest. I observe he had failed with the other member of the group seconds before because he had no shirt and was able to break free, and no doubt was determined that this should not happen again.

He was still running at pace, and his grasp of Inoke's singlet is likely to have turned Inoke around. Being intoxicated he was likely swung off balance so that he fell or slipped over backwards and his head forcefully impacted with an indentation possibly at the edge of the road. Masalu was also brought down or followed in the same movement falling also to the ground. I do not think it matters whether he fell to the left as Taufu recalled or to the right as Masalu recalled. The evidence as to the dynamics as to how Inoke came to fall is rather uncertain. I accept however, as I have said Masalu had tried to grab him, did so and that both fell shortly after to the ground. I find also that Masalu, when apprehending the deceased was acting reasonably within his power of arrest and his actions fell within section 100(1) of the Police Act 2010, and were not excessive. Accordingly, whilst the actions of Masalu were I find a material contributing factor in causing an inebriated Inoke to lose his footing and fall to the ground incurring a fatal head injury, because I have found his actions fell within section 100(1) of the Police Act and were not unreasonable, or excessive his assault on the deceased was not unlawful. I add that I did not consider that Masalu's explanation as to Inoke falling suffered because it was belated as Mr Kefu suggested. I consider it quite likely that in the

circumstances, Inoke did lose his footing and slip over, tragically hitting the rear of his head on the roadway.

g. I also find, it follows, that I reject the Crown's contention that was fundamental to its case, that Masalu punched Inoke in the head. The only witness who stated this in chief was Nai Tonga who resiled very far from this allegation under cross-examination from Mr Tu'utafaiva. Others spoke of a rounded or swinging arm action as I have said but not a punch. Nor did I consider that the pathologist's evidence that there were certain abrasions consistent with blunt force trauma about the face assisted. That was no more than a possibility, the pathologist stated. There was nothing in the nature of a signature about the abrasions to my mind to suggest they must have been caused by a kick or a punch, assuming they arose at the time of this incident.

h. Nor do I accept beyond reasonable doubt that, as Annisbaymoney had said in evidence, Masalu kicked Inoke in the stomach. No other witness suggests that this took place, and in these circumstances, I am not satisfied beyond any reasonable doubt that this occurred. It is to be noted that kicking did not form

part of the particulars against Masalu in the charges of individual manslaughter, causing grievous bodily harm or assault,

- i. I now consider the assaults alleged to be attributable to Taufu's kicking. I have already found that Taufu was not a party to any joint unlawful enterprise. I do not find that either officer acted other than in the course of duty. I reject any suggestion that their actions were a reprisal or in retribution. Mr Kefu submitted that there was still a Crown case that individually Taufu was guilty of manslaughter, if he was found to have kicked Inoke in the head after he had fallen to the ground, and sustained a serious head injury. He urged upon me that I should do this because two witnesses, Nai Tonga and Paula Iloa had said so. He also correctly pointed out that both were well positioned to see what had happened. There was street lighting from the corner where Nai Tonga was living, and across the road virtually from where Inoke fell. He had not been drinking and it was not established that he was anything other than an independent witness without motive to give false evidence implicating Taufu. Likewise with Paula Iloa, who, he said, was observing from an even shorter distance inside his father's property, adjacent to

where Inoke had fallen. He was also independent, was not intoxicated, and was aged 19.

- j. I accept the strength of Mr Kefu's submissions, but having heard their evidence under rather penetrating cross-examination from Mr Tu'utafaiva, I have been left in real doubt about the reliability of their evidence and observations. First, as I have recited above, at para 21 Nai Tonga's observations moved from kicking to simply moving Inoke's head with his foot. Paula Iloa, under cross-examination, (see para 23) when asked where the kick had landed, was, he said unable to say because his view had been obstructed by shadow from Annisbaymoney falling in the area of Inoke's head. It would seem he had inferred a kick took place because he saw the foot raised and shortly after Inoke's head moved. Masalu said, in his record of interview, there was not much lighting but there was light. In chief, Paula had first said he could not demonstrate the kick but later volunteered to do so. When it was suggested by defence counsel that he could not do so because it had not taken place, he said he did not want to demonstrate because he was shy. I did not find this answer convincing, but rather convenient. Further, later under cross-examination, when asked again about where the kick had landed he said he was not

able to see because he could not see the side where it had landed. When asked why he had said two kicks approximately, he said because that was the least number, which I also was concerned about, in terms of his accuracy. It is I think also important to bear in mind that actions moved quickly at the scene with Hala and Taufu returning from the corner in a very short time, and soon after other members of 'Inoke's group came on the scene. Annis baymoney must have been on the scene quickly also (indeed Taufu suggests he was there tending to Inoke before they returned) because he said he was about the police car when Taufu arrived near Inoke, about 4-5 metres from Inoke. He did not, when asked, say that he saw Taufu kick Inoke. Nor did Malia, who had also followed on, like Annisbaymoney, in the rear see Taufu kick the deceased. She said she was near the police car, where Taufu and her husband were present near 'Inoke. When asked by the prosecution, she said she saw Taufu approach 'Inoke but she did not see him do anything. I also heard the accused give evidence and record that there was nothing in the way he gave his evidence or in the content of his evidence that gave me reason to disbelieve him when he denied he had kicked 'Inoke. The uncertain state of the evidence on this issue means I have a reasonable doubt as to whether Taufu kicked Inoke

as alleged by the Crown and, accordingly, the Crown has not discharged the onus it bears to establish this essential element common to all counts that Mr Taufa faces.

VERDICTS

For the reasons I have given, I acquit both Mr Masalu and Mr Taufa of all charges they face in their respective indictments; namely manslaughter, causing grievous bodily harm or assault. They are both discharged.

DATED: APRIL 2015

