

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

CR 164 of 2012  
CR 165 of 2012  
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**R E X**

**V**

- 1. SIONE SIUELI ANGILAU**
- 2. TA'UFO'OU FALE'OFA**
- 3. SEFO MOALA**

**BEFORE THE HON. JUSTICE CATO**

Mrs Langi and Ms Macomber for the Crown  
Mr Fa'otusia for Mr Angilau and Mr Fale'ofa  
Mr Moala in person

**REASONS AND VERDICT**

[1] The accused Sione Angilau, Ta'ufu'ou Fale'ofa and Sefo Moala were charged jointly that on or about the 6<sup>th</sup> January 2012 at Kolofo'ou they did attempt to commit armed robbery by shooting Viliami Kulu on his leg whilst trying to take a bag belonging to him contrary to sections 4(1) and 154(1) and (2) of the Criminal Offences Act (Cap 18).

[2] They were also charged with willfully and without lawful justification caused grievous bodily harm to Viliami Kulu on or about the 6<sup>th</sup> January 2012 by shooting him and causing severe injuries to his leg contrary to section 106(1) and (2) (d) of the Criminal Offences Act (Cap 18).

[3] The Crown case was that the three accused had on the 6<sup>th</sup> January 2012 carried out an attempted robbery at the Asco Service station in Nuku'alofa. This had been planned for some time. The robbers wore hoodys, two had wigs and their faces were covered with bandanas. They approached Viliami Kulu who had alighted from his motor vehicle (a twin cap vehicle) and had deposited cash at the station. Mr Kulu would collect cash from various of the companies outlets and deposit them at these premises. The time was late in the evening of the 6<sup>th</sup> January, when the robbers approached Mr Kulu and demanded money they thought he carried with him in a bag. He had already, however, deposited the money and had returned to his vehicle. A shot was fired in the air by one of the

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robbers who was holding a sawn off shotgun. Mr Kulu was grabbed by a second man and he retaliated. There was a short struggle. At about this time a second shot was fired, this time into his upper thigh with the shotgun. A second robber was holding a .22 pistol. He also fired into the leg of Mr Kulu. The robbers made off in Mr Kulu's vehicle without any money. Mr Kulu was taken to hospital where he spent about 10 days recovering. A large number of pellets had to be extracted from his upper rear leg area with some remaining, and a .22 bullet was located also in his leg. He was left with a residual limp and there was wasting in the muscles. There was no suggestion by the defence that the injury received did not amount to grievous or serious harm.

- [4] The Crown contended that after the robbers made off in Mr Kulu's car. In the vicinity of the area of the robbery, a woman walking along the street with her child identified Mr Moala in the back seat of a car. She said she had seen him on a previous occasion. She was unable to identify anybody else.

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[5] After that, the robbers took the twin cap vehicle and abandoned it in a remote area on the outskirts of Havelu. The Crown case was that a fourth man, an accomplice by the name of Mele Foliaki had received a call from Mr Angilau on a phone that had been given to him by Mr Fale'ofa prior to the robbery. He proceeded to meet the robbers near the Ocean and Light school in an area near where the robbers had left the car abandoned, and had take them to their various destinations. He dropped off Mr Moala and Mr Angilau at a residence in Veitongo and Mr Fale'ofa to his residence in Kolonga.

[6] During the course of taking Mr Fale'ofa home, it was alleged by Mr Foliaki that Fale'ofa admitted that he had shot Mr Kulu with a .22 pistol, and that Moala had fired the shot gun. He told Mr Foliaki they did not get any money.

[7] On the 16<sup>th</sup> January, 2012, the police searched Mr Angilau's premises where he and Mr Moala resided. After the tactical response squad had entered the residence and found no one present, Mr Angilau was

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then brought to the premises. A search of the house by another team of police officers followed during which a number of hoodys were located. There was evidence that hoodys were worn by the robbers, who were also masked with bandanas, with two of them wearing wigs underneath their hoodys. A search outside the house revealed a .22 revolver secreted under a stone. This contained four rounds of bullets. Inspection revealed that it could hold 9. It was the Crown case that the .22 bullet extracted from Mr Nuku in hospital was consistent with the kind of ammunition used in the 22 and an armourer employed for many years by the army gave evidence of this. The shot gun was not located. Nor were any wigs at the residence, although a number of hoodys were found, at the home.

[8] Later, after the search had been completed, police brought Mr Moala and Mr Fale'ofa to the premises at Veitongo. Later all three were taken into police custody. Mr Moala and Mr. Fale'ofa declined to make any statements. Mr Angilau did make a statement essentially denying his involvement saying that he was at home with Mr Moala during the evening of the 6<sup>th</sup>

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January, 2013 and after ringing his girlfriend had gone to sleep. That statement was produced in evidence.

- [9] The Crown case was heavily dependent on the evidence of the accomplice Mr Meli Foliaki. In opening, the Crown indicated that this witness had initially denied being involved but later, having been pressed by a policeman, who had known his mother, to tell the truth he made a confession. Later, he approached a senior officer offering to give evidence for the Crown. As a consequence, charges against him were withdrawn and he was released from custody. After the opening, I inquired whether in the light of the defacto indemnity arrangement that had been entered into between Mr Foliaki and the police, the witness was competent to give evidence. Mr Moala, who was unrepresented and Mr Fa'otusia for the other accused opposed the accomplice's evidence. The following day, before evidence commenced, Mrs Langi produced an indemnity document in which immunity from prosecution had been sought from the Attorney-General by the Solicitor-General in exchange for the witness giving truthful

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evidence. My ruling and comments on this matter were given separately.

[10] I admitted the accomplice evidence of Mr Foliaki, but before doing so I ensured that the indemnity document had been read and he understood it. I also impressed upon him that he must tell the truth. He responded that he would.

[11] In Tonga, under section 126 of the Evidence Act, it is provided;

"An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence. "

Accordingly, even if I were to accept the evidence of Mr Foliaki, in relation to the complicity of an accused, I could not convict that accused unless corroborative evidence were present relevant to his case. Although it might be argued that in section 126 corroboration meant only independent evidence that in a material

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particular confirmed the accomplice's evidence, I approached the issue by adopting the higher Baskerville [1916] 2 KB 658 standard which had been the approach taken in English law before the need for corroboration was abolished in relation to this kind of evidence. That standard required me to identify in relation to each accused considered separately evidence that was credible and independent of the accomplice that not only confirmed the testimony of the accomplice in a material particular, but also implicated the individual accused in the offending. I will turn to this issue later.

[12] The evidence of Mr Foliaki was that he was 32. He said that he was approached by Mr Fale'ofa on the 19<sup>th</sup> December with whom he was acquainted to do a job for him to do. He told Mr Fale'ofa that his van was well known. Mr Fale'ofa told him he would call him and tell him what was going to happen. On the 23<sup>rd</sup> December, 2012, there was further telephone contact between him and Fale'ofa whom he called Ta'u. The intention was that Foliaki and he would meet up with Mr Moala, go into the town and look at what was to be done. Mr

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Moala was unable to attend so he said he went with Mr Fale'ofa to town for some beers. On the 24<sup>th</sup> December, he said that he was called again by Fale'ofa. He and Fale'ofa then went into town and sat opposite the Asco station near the side of an internet café. He said again that Mr Moala was too busy to come. They waited until about 11pm when they saw a double cap vehicle arrive – supposedly the van that would deliver what he described as the pay in. He said that Mr Fale'ofa said that this vehicle carried money from two other petrol stations as well. After that he went and had some beers with Fale'ofa and was informed the job was Sefo's.

[13] On the 4<sup>th</sup> January 2012, he said that Mr Moala and he picked up Mr Fale'ofa. They went and looked to see where they were to meet and where they were to be dropped off. On the 6<sup>th</sup> January, 2013, he went and picked up Mr Fale'ofa from Mailetaha after he had come by bus from Kolonga. They went and picked up Mr Moala from Veitongo. After, that he said he and Mr Moala went into a Chinese shop where Moala brought two wigs (fake hair) and bandanas. Later, about 5pm they returned to Veitongo where they ate. At that time,

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Mr Angilau was also present. Moala said they would leave at 10.20 pm. The men were in their hoods and had long pants and shoes. One was wearing white shoes. Others wore black. He dropped them off at the Sunshine rental car property. He said he was supposed to pick them up from a place on the Hihifo road later.

[14] At about 12pm he got a call from Mr Angilau saying that they were coming. However, he said it was Tau's number (that is Fale'ofa's phone) that he had. He waited for them at the agreed destination near the mango tree where the Ocean of Light School is.

[15] He saw the same vehicle that he had earlier seen earlier delivering the pay in. Moala, Fale'ofa and Angilau were in the vehicle. He dropped Mr Moala and Mr Angilau at Veitongo and took Mr Fale'ofa to Kolonga. On the way Mr Fale'ofa told him that the man attacked him and he shot him with the .22 gun, and to his surprise he heard another shot. He also said they had got no money.

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[16] He said he had seen Moala get off at the Sunshine rental with the shotgun. It was a short weapon. He said the men were wearing hoodys, fake hair with the hoodys on the outside and bandanas around their mouth or nose area. He was shown the .22 revolver and said he had seen that with Fale'ofa.

[17] He said he had two telephone numbers one a Digicel and one a TCC number. He explained that the roles had been discussed before the men had been dropped off. Moala and Fale'ofa were to carry the guns and Angilau was supposed to grab the money. He had known of this since the 4<sup>th</sup> January. He said he and Mr Fale'ofa were close friends and that only when they were meeting to organize had he become friends with Mr Angilau and Mr Moala. He said on the evening at Veitongo they had all discussed what was going to happen that night.

[18] He said he had been charged the following week. He had told a lie in his first statement. He knew a police officer who persuaded him to make a confession. This officer had been friends with his late mother.

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[19] Under cross-examination, it was put to the witness by counsel for Mr Angilau, Mr Fa'otusia, that Angilau was elsewhere as was Mr Fale'ofa on the 6<sup>th</sup> January, 2013. Both men filed late alibi notices and leave was given for them to do so. Mr Foliaki said that was not true they were all together. He said there was no mistake in what he saw. Mr Moala who was unrepresented suggested Foliaki's story had been made up after he had been in the police station and he had wanted to be released. Mr Foliaki denied he had made the story up. He said he had often been to Veitongo. The witness also gave evidence that his TCC number was 7797633 and Digicel 874350.

[20] At the commencement of the trial, Mr Moala had asked the Court to order the production of telephone records from the TCC Company, relating to Mr Foliaki for the relevant period which I did. The Crown also sought the Digicel records. I granted a further order requiring those documents to be produced. They were unavailable when Mr Foliaki was cross-examined but I reserved leave for him to be recalled so that Mr Moala could further his cross-examination of him. These

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records when they were produced proved to be extremely valuable items of evidence for the prosecution. Mr Foliaki was recalled for cross-examination on them by Mr Moala and Mr Fa'otusia for the other accused.

[21] There was other evidence given which tended to support the evidence given by Mr Foliaki. The car driven away by the robbers was indeed the double cap vehicle used by the complainant Mr Kulu. This was located by police in the vicinity of the Ocean of Life school. Mr Kulu said in evidence that he had resisted, and fought with one of the would be robbers before being shot. In fact the evidence established that he had been shot not only by a shot gun but a .22 bullet had entered his leg and had been removed. He had not know of this later shot from the .22 pistol , it seems. He had heard a first shot into the air. Evidence was given that in fact this shot had blown out part of the roof of the petrol station, suggesting that came from the shot gun. He said the robber who had fired this shot was the man who shot him in the thigh. That was the man who had presented the gun held in both hands. He had said importantly

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that after this shot he saw the person who he was fighting with (which was not the man with the shotgun) get into the driver's seat, and the guy that was to the right of him enter into the passenger seat. He said the gun holder got into the back of the double cap vehicle. He said he had been 20 days in hospital. 123 pellets had been taken out of him, and he now limped.

[22] I consider that his evidence of where the shooter was in the car significant. The reason is that a later witness 'Alisi Fa'uhiva, aged 32, was walking with her child after work when she heard what sounded like firecrackers. She then saw a vehicle drive by quickly and it was a silver double cap. She said she was able to see a person whom she had seen before at a drinking party. She said after this she went across to the service station and she could see some blood. A man was down and somebody shouted out the robbers went by in the van. In cross-examination by Mr Moala, she said to him that the vehicle was travelling fast. She maintained it was double cap van. In answer to a question from Mr Moala whether a van shown in the photograph which had been abandoned in the vicinity of

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the Ocean of Life School was the van in question she said that it was. She was careful however to say she did not know or recall the registration number. She affirmed in further questioning by him that she had seen Mr Moala in the van. She said it was not so dark that she could not see him in the back seat because the street light was on. She was questioned concerning whether she was drunk. To my mind what supported her evidence is the fact that Mr Kulu saw the man who had presented the shot gun at him and later fired a shot at him get into the back seat. Mr Foliaki had said that Mr Moala was the person he saw leave the car at Sunshine rental with a shotgun before the robbery.

[23] There was confirmatory evidence also from Ms Lute 'Otumo'unga that at about the time of the robbery in early January 2012, two young men came in looking for fake hair. She recalled only one being brought. She said one of the man had tattoos on the outside of the forearm. Mr Moala did not have any tattoos on the outer arm but has on the inner arm, a point he volunteered in his criticism of this witness. She said it was not common for men to purchase fake hair.

[24] Mr Alingatoni Langi gave evidence that he was at the station in the vicinity of Mr Kulu. He heard the men demanding money, and the three of them were wearing hoodys. He heard gunshots and a gun was pointed at him which he said was a small one. The men wore hoodys and some kind of masks. He identified the gun found at Veitongo and photographed by police as the same gun. This gun was produced and shown to him. He said he also saw a big gun. He was not challenged on his identification of the pistol as the gun he saw.

[25] Mr Palu Nuku an employee of the Asco petrol station said he heard the manager say there was no money it was already in the safe. He heard gun shots. He said he noticed one had a hood on and two were wearing wigs. He could not see their faces. He said one was taller and the other two were shorter. I record that the complainant referred to the shorter man carrying the gun and presenting it at him. I do not consider that I can draw any inference concerning physical descriptions of the gunmen or their associate. Understandably, witnesses closely involved in the action will give

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descriptions that vary. I do not place any weight on evidence of physical description and Mr Fa'otusia in his closing address submitted to me I should not.

[26] Evidence was given from a number of police officers of a search of the Veitongo premises on the 16<sup>th</sup> January, 2012. No challenge was made to the regularity of the search warrant. However, the complaint was that the search was not carried out in the presence of any of the occupants and to that extent was illegal. Consequently, it was submitted that the evidence obtained which included the gun identified as being held by one of the robbers by Mr Langi should be excluded. I inquired of Mrs Langi whether it was a requirement under Tongan Law that an occupier be present before a search pursuant to warrant could take place. She advised me it was an internal police practice requirement. Whilst that is a sensible requirement because it protects police against the suggestion that evidence located may have been planted, there may be circumstances where this is not practicable, yet a search urgently is required to collect possibly incriminating material. In those circumstances, I would consider a search could take

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place without the occupant being present. Here, it was contended by Mr Angilau that he was not present when the search took place. I am satisfied having heard from a number of police officers that he was present having been brought to the premises by police when the house and grounds were searched. Located in the house were a number of hoodys but nothing of any other apparent significance. I record that hoodys are comparatively common in Tonga and I do not place any significant weight on this evidence, aside from noting it is consistent with the description given of the men wearing hoodys by Mr Foliaki and others. I do, however, place considerable weight on the .22 pistol located in the grounds about 15 - 20 metres from the residence. I reject any suggestion that was raised by Mr Moala and or Mr Angilau that this was planted. I do not consider there is a scintilla of evidence of this at all. The importance of this evidence is obvious. Two of the alleged robbers, Mr Moala and Mr Angilau it was accepted, were the occupants of this property at the time. They were the only occupants. This is evidence which strongly confirmed the evidence of Mr Foliaki that one of the robbers, Mr Fale'ofa, carried this gun which

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was identified by a witness Mr Langi as the weapon presented at him. The fact that this gun was located at premises occupied by two of the men identified by Mr Foliaki as would be robbers is obviously very strong confirmatory evidence. I will say more about its value as corroboration later.

[27] Mr Moala made much of an allegation, again to my mind unsubstantiated, that there had been an earlier unlawful search of the premises on the 7<sup>th</sup> January. I do not find that this was so. In any event, no incriminating evidence was adduced arising from such an alleged search. I accept the police evidence that the tactical response group did enter and clear the premises on the 16<sup>th</sup> January, 2013. I accept that Mr Angilau was brought to the premise before any search was commenced. I reject any suggestion that the gun was planted. I reject any suggestion of an unauthorised search of the location on the 7<sup>th</sup> January 2012, also.

[28] I record here that I have closely considered the credibility of the evidence of Mr Foliaki. There were criticisms made of him by Mr Moala and indeed others

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that he was a drug dealer and that he was a supplier of marijuana. He denied this. It was suggested his evidence was manufactured so as to secure his liberty. It was said to be untrue. Leaving aside the issue of corroboration to one side, I record that having heard his evidence, observing his demeanour and directing myself to take care before accepting his evidence because history has shown how craven villains may wrongly implicate others so as to gain advantage, I accept his evidence as truthful. I consider that he well understood that his future security from prosecution depended upon his telling the truth and I did not detect any suggestion that he prevaricated and was giving false evidence. I consider his evidence was well supported by the evidence I have referred to above, in particular the location of the complainants' car near the Ocean of Light school. The identification of Mr Moala in the backseat of this car by 'Alisi Fa'uhiva I found persuasive taking into account the well known frailties of eyewitness identification. I accept she had met Moala on a previous occasion and the location of the gun presented at the scene at Veitongo on premises occupied only by Mr Moala and Mr Angilau further to my

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mind confirmed the account given by the accomplice. I also find the evidence concerning two men purchasing a wig of some weight also. I heard no evidence that Mr Foliaki had been convicted of drug dealing offences.

For reasons which I will outline below to the extent that it was suggested in evidence that telephone conversations and contact with him by the accused were drug related and not in regard to robbery, I reject this as a deliberate effort by the accused to distance themselves from more sinister involvement in armed robbery. I remind myself however, that mere acceptance of Mr Foliaki's evidence is insufficient to form a basis for conviction against any accused unless there exists corroboration implicating that accused.

[29] During the course of the trial, telephone records of calls made from Mr Foliaki's phones (Digicel and TCC) were produced, as well as other records involving Mr Moala and Mr Fale'ofa. An analysis of those records which the Crown was able to do, those records being produced in evidence, produced additional confirmation of the integrity of Mr Foliaki's evidence, as well as in my view

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corroboration of it. Between the 23<sup>rd</sup> December, 2011 and the 6<sup>th</sup> January 2012, 27 calls were recorded from the Fale'ofa's phone 8761761 to that of Mr Foliaki. He called Foliaki's Ucall (TCC) number 11 times and his Digicel number on 16 occasions. Between the 31<sup>st</sup> December, 2011 and the 6<sup>th</sup> January 2012 Mr Fale'ofa called Foliaki on his Digicel number 7 times, three times on the 4<sup>th</sup> January and once on the 6<sup>th</sup> January at 2040 hours. He also spoke to him on Digicel once on the 4<sup>th</sup> January 2012.

[30] At trial when giving evidence, Mr Fale'ofa denied under cross-examination that he knew of and had made contact with Mr Foliaki on the Digicel number. He said Mr Foliaki did not have a Digicel number. The Ucall he said was in relation to securing marijuana. Further, he denied any telephone contact on the 6<sup>th</sup> January 2013. He admitted Mr Foliaki and he were acquaintances. I find that Foliaki not only have a Ucall number as he said but a Digicel number as well and that there was connection between those two phones on the dates recorded on the telephone records and Mr Fale'ofa's phone. It was not suggested to Mr Foliaki when he gave

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evidence by either Mr Moala or Mr Fale'ofa that he did not have such a Digicel number when he was recalled to give evidence, a point made by Mrs Langi.

[31] Neither Mr Moala who also denied despite recorded contact on 10 occasions between 29<sup>th</sup> December 2011 and the 6<sup>th</sup> January 2012 that he had ever rung Mr Foliaki's numbers. There was evidence he had on 3 occasions on the 4<sup>th</sup> January and three times on the 6<sup>th</sup> at 7:46, 8:44, 8:51. He said he would contact Foliaki through Mr Fale'ofa who would contact him directly. Later, he said he had rung him but he maintained he had not called him on the 6<sup>th</sup> as the records showed. I found the responses and denials of both Mr Fale'ofa and Mr Moala to the telephone contact with Mr Foliaki unsatisfactory. Further, I find that both disowned contact, Mr Fale'ofa with the Foliaki Digicel number and Mr Moala it seems with all telephone contact with him in answers given to the prosecutor. I consider these were deliberate lies advanced to distance themselves from telephone contact in relation to the robbery. Although Mr Foliaki admitted some Ucall connection, he denied digicel connection and many of the calls at

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relevant times were Digicel. Mr Moala in a later question by me seemed to admit he had from time to time rung Mr Foliaki. He could, however, give no reason why calls had been received by Mr Foliaki from his number. Nor was there any suggestion somebody else had used his phone. I find his answers unsatisfactory and again his distancing himself from telephone contact with Mr Foliaki a calculated and deliberate lie. As such I find that these lies were capable of being corroboration of Mr Foliaki's evidence in the case of both Mr Fale'ofa and Mr Moala. R v Thorne (1978) 68 Crim App Rep 6, at 18

[32] I also record in relation to Mr Moala that I consider the evidence of 'Alisi Fa'uhiva in relation to seeing him in the back seat of the twin capped vehicle in the vicinity of Asco motors and approximate to the time of the robbery, credible evidence that implicates the accused. Further, I consider the location of the 22 pistol identified as the one pointed at Mr Langi at the Veitongo property occupied by Mr Moala and Mr Angilau at the relevant period strongly corroborative of the

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involvement of Mr Moala and Mr Angilau in the attempted robbery and violence.

[33] Accordingly, I find there is corroborative evidence against all three accused separately considered in relation to the evidence of Mr Foliaki. There is one further item of evidence which, if not corroborative also of Mr Angilau and Mr Fale'ofa is at least strongly confirmatory of Mr Foliaki's evidence and their involvement. Mr Foliaki said that he received a call from Mr Angilau that they were coming after the robbery and to meet at a certain place. There is evidence of calls made between Mr Angilau's phone and Mr Fale'ofa's phone between 23:39 - 23:45 hours on the 6<sup>th</sup> January, 2013. The importance of this evidence is that Mr Foliaki appeared to say in evidence that it was Fale'ofa's number he had with him when he got a call from Angilau saying they were coming. The phone records were obtained at the commencement of the trial. I do not see how Mr Foliaki could have received that call from Mr Angilau unless he had Mr Fale'ofa's phone. This was explained by Mr Moala as Mr Angilau making a call it seems to Mr Fale'ofa from Veitongo when they were

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together for drugs. Mr Angilau confirmed also that he had called Fale'ofa three times for drugs. Fale'ofa also confirmed this and said that he had been rung about 11 or 12 by Mr Angilau for drugs. He was unable to give any explanation why Mr Foliaki had received a telephone call from Mr Angilau at around this time on his phone and he denied he had given him his phone. Mr Foliaki had said Angilau never had his numbers. I did not believe the accounts given by the accused that this was drug conversation and I find the evidence deliberately false. Mr Fa'otusia complained that it was unfair to consider the phone calls without their contents, but in my view it is their frequency and coincidence when considered with denials or explanations I regard as deliberately false that provide important probative evidence against all three accused.

[34] I have already said that I found the witness Foliaki a credible witness and although, he may have had some drug dealings with some of the accused, which he denied, I am satisfied he well understood the importance and condition upon which his further indemnity from prosecution depended as I have said.

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There was nothing in any of the alibi evidence which to my mind raised any reasonable possibility that the accused were not as Mr Foliaki said involved in an attempted robbery on the 6<sup>th</sup> January 2012.

[35] Mr Moala and Mr Angilau said they were together it seems all night at Veitongo going to a birthday party for a relative of Mr Moala's elsewhere the next day. I find that they were at Veitongo that evening in all probability but that was after the robbery when they were taken there by Mr Foliaki. I also accept Mr Foliaki's evidence that Mr Fale'ofa said that he had fired the .22 gun and was responsible for the bullet that was located in Mr Kulu. I do not accept the evidence of Mr Angilau that he was at home either. I did not find helpful the witness he called in support of his evidence. He had little idea of dates. Mr Angilau in his record of interview said he had simply fallen asleep after talking on the phone to his girlfriend. It seems he was wide awake later in the evening however he says attempting to call Mr Fale'ofa for drugs according to his trial evidence. I reject his evidence on this point and I also reject that of Mr Moala. I also reject the evidence of Mr

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Fale'ofa that he was at home in Kolonga. Although his cousin was called to support this, she broke down when she was asked by the prosecution about the accused's mother who was named in the alibi notice as being present. She said Fale'ofa's mother had been dead for some years. I do not accept the evidence of Mr Fale'ofa nor his witness that he was present at Kolonga at least at a time when the robbery took place. I find it remarkable that the accused in his alibi notice appeared to give false information to his lawyer concerning his late mother's presence. I find the alibi evidence deliberately false.

[36] I have avoided any consideration as to whether the accused or any of them had criminal propensities. I have judged the case only on the evidence, considering the case of each man individually. I have no reasonable doubt at all that all acted in concert pursuant to a joint plan to carry weapons and rob the Asco Service station of a delivery of money ( contained in a bag) on the 6<sup>th</sup> January 2012. That failed simply because they arrived too late and the money had already been deposited. Plainly, but for this the robbers would have been very

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likely to have succeeded in their plan which was to steal a bag of money intended for deposit. Equally plainly, force or threats of violence were anticipated and violence followed. I find that part of the plan to which all of the accused were party involved the carriage and use of loaded weapons. I accept that Mr Moala had the shot gun and Mr Fale'ofa the .22 pistol. I accept beyond any reasonable Mr Moala fired two shots, the first into the air and the second into the thigh of Mr Kulu after he had commenced fighting probably with Mr Fale'ofa who I also accept beyond any reasonable doubt fired a shot into Mr Kulu's leg. Although Mr Angilau did not have a weapon, I find beyond any reasonable doubt that he must have known that the others were carrying weapons this being part of the plan, and that their use for the purpose of intimidation or the suppression of any possible resistance was part of that plan. In my view, there was a serious or very substantial risk in a plan of this kind that a person who resisted the robbers would be shot. I find that Mr Angilau accepted that risk as being within the scope of the plan, and accordingly he also with Moala and Fale'ofa is guilty not only of attempted armed robbery as charged, but also of

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causing grievous bodily harm as well. I add that it was not contended by any of the accused that Mr Kulu did not suffer grievous or really serious harm. I find that although a large number of pellets were taken out of his thigh, a significant number remained. He was in hospital for about 10 days, and reported in evidence that he limped. The doctor's report indicated there was muscle loss and a possible loss of flexion in the leg. The evidence did not reveal what damage the .22 bullet caused but in any event all are jointly responsible for the damage the shot gun pellets caused. I find all the essential elements of armed robbery and causing grievous bodily harm are established.

[37] Accordingly, I find all three accused guilty of;

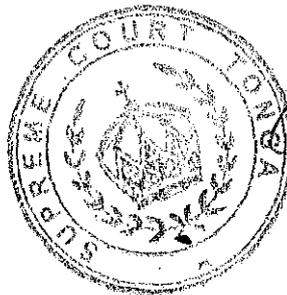
- i. Attempted armed robbery at the Asco service station on the 6<sup>th</sup> January 2012;
- ii. Causing grievous bodily harm to Mr Kulu on the 6<sup>th</sup> January 2012 .

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

**CR 164 of 2012  
CR 165 of 2012  
CR 166 of 2012**

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[38] All three are remanded in custody for sentence. Probation reports are ordered which should cover the history and circumstances of each prisoner prior to returning in Tonga, if they are indeed all deportees and any relevant criminal history prior to and during their time in Tonga. A victim impact report is also requested.



*[Handwritten signature]*

**DATED: 11 JUNE 2013**

**JUDGE**