

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM NO: M.6613/95

BETWEEN:

THE POLICE

Informant

A N D:

MALAGAMAALI ELIESA  
TULAGA alias SAPE ELIESA  
of Vailoa Faleata

Defendant

Counsel: G Latu for prosecution  
K M Sapolu for accused

Hearing: 29 & 30 January 1997

Judgment: 30 January 1997

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JUDGMENT OF SAPOLU, CJ

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The Court's judgment in this case was delivered orally on 30 January 1997 and I indicated to counsel that my judgment will be reduced to writing.

The accused has been charged under section 79 of the Crimes Ordinance 1961 that at Mulinu on 10 December 1995 he wilfully and without lawful justification caused grievous bodily harm to Esekia Leituposa a male of Savalalo and Salelavalu, Savaii. The accused was also charged under section 80 of the Crimes Ordinance 1980 that on the same date and at the same place he wilfully and without lawful justification caused actual bodily harm to the victim.

Grievous bodily harm means serious bodily harm. And counsel for the accused conceded early in the proceedings that the injuries sustained by the victim in this case constituted grievous bodily harm. So the matters in dispute were whether the accused caused these injuries wilfully and without lawful justification.

Essentially the evidence shows that at about 4.00am in the morning of Sunday, 10 December 1995, the victim, who was at the time a prisoner at Tafaigata prison, was at the area where the accused was a nightwatchman for one Herman Ulberg and where the Special Projects Development Corporation (SPDC) has its dredging machine, the "Palolo". The accused was with one Minute Fiti who was acting as nightwatchman for the SPDC's dredging machine on the night of this incident. When the SPDC's nightwatchman left to go and checked on his motor boat and the dredging machine, the accused observed a man without clothes going past. That was about 4.00am in the morning. The accused called out twice to that man but he did not stop. The accused then went and obtained his shotgun which he says he kept for his own protection particularly as he has a physical handicap which makes him walk with a limp. He then went with his gun to look for the man he had seen and he found him behind a parked suzuki vehicle. The accused recognised the man to be the victim. He says that he knew the victim because the victim had previously stolen clothes and pineapple from where the accused was employed as a nightwatchman at Mulinuu. The accused had also previously warned the victim not to be seen again at where the accused was nightwatchman at Mulinuu.

According to the victim, the accused called to him and he walked towards

the accused while the accused was also walking to him. When they were about two yards from each other, the accused pressed the mouth of his gun against the victim's lower jaw and the gun went off twice. The victim was injured. In his caution statement given to the police investigating officer, corporal Neemia Auva, on 10 December 1995, the accused says that he pushed the mouth of his gun against the victim's mouth while one of his index fingers was on the trigger and the gun went off causing the accused to fall. He then struck the victim with the gun. All this apparently took place outside of the area the accused was employed to look after as a nightwatchman.

In his oral testimony, the victim says that he had no intention of shooting the victim and he never aimed the gun at the victim. What happened was that he was struggling with the victim for the gun when the gun accidentally went off. This is in conflict with what the victim told the police investigating officer in his caution statement. I have considered the evidence and I have decided to accept the evidence given by the victim and not the accused's evidence as to how the victim sustained gunshot injuries. I was more impressed with the victim's evidence and his demeanour as opposed to the evidence and the demeanour of the accused whose oral testimony is in conflict with what he told the police in his caution statement. I also reject the evidence of the defence witness Minute Fiti who testified that when he arrived on the scene he found the accused and the victim struggling for the gun and the gun went off. This witness's demeanour did not impress me at all and he appeared uncertain and hesitant about his answers to questions put to him by counsel. His oral testimony was even at variance in material respects with what he told the police in his police statement which was put to him in cross-examination.

In view of the evidence that the Court has decided to accept, the defence of accident raised on behalf of the accused is rejected." I do not accept that the accused and the victim were wrestling for the accused's gun thus causing the gun to be discharged accidentally and injured the victim in the lower jaw.

There is some dispute as to whether the gun was discharged once or twice at the victim's jaw. In view of the medical evidence and the nature of the victim's injuries as described to the Court, I will accept that the victim was hit only once with a bullet from the accused's gun.

The medical evidence shows that the victim suffered a comminuted fracture to his jaw. A surgical operation was performed to remove pellets from his jaw but up to now there is still a pellet lodged on the left side of his face. He was admitted to the National Hospital for several months and up to now he eats only liquid food such as saimin soup.

In all then, I am of the clear view that the accused wilfully and without lawful justification discharged the gun which caused serious bodily injuries to the victim. The prosecution has therefore proved the grievous bodily harm charge beyond reasonable doubt. In view of that finding, it is not necessary to proceed further to consider the alternative charge of causing actual bodily harm.

*TFM Sapahe*  
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CHIEF JUSTICE