

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CRIMINAL DIVISION)**

**CR NO. 34/17**

**POLICE**

**v**

**SAMUEL MORRIS**

Hearing date: 1 and 5 September 2017

Counsel: Senior Sergeant T Manavaroa for Prosecution  
Mr N George for Defendant

Judgment: 24 October 2017

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**DECISION  
OF HER WORSHIP MRS CARMEN TEMATA, JUSTICE OF THE PEACE**

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**Introduction**

[1] The trial began on 1 September 2017 to hear the evidence of two crown witnesses, Doctor Gabriel Pauu and Acting Sergeant Tereapii Tapoki who were both travelling overseas and will not be in the country on the scheduled hearing date of 5 September 2017. At the conclusion of the giving of their evidence the matter was adjourned to 5 September to complete the trial. Today is the delivery of the reserved decision.

[2] The defendant, Samuel Morris, is charged under Sec 213, Crimes Act 1969 with a single charge of assault with intent to injure on Saturday 28 January 2017.

**Background**

[3] In the early hours of 28 January 2017 an assault at On The Rocks (OTR) bar in Avarua was reported to the police. The complainant stated that she was at the downstairs part

of the OTR bar when she saw a group of people scuffling just behind the Rehab nightclub. Security officers from the Rehab and OTR bar intervened to stop it.

[4] It was alleged that as a result of intervening in the scuffle the victim, Ben Tumupu a security officer at OTR received stab wounds on the left side of his back. The defendant, Samuel Morris who denied stabbing the victim and being involved in the alleged incident was subsequently brought to the Police Station for questioning. He told the Police that he did not have a knife with him and was walking past Rehab Bar when he saw his brother being beaten up hence his involvement in the fight.

### **The Law**

[5] Crimes Act 1969, Section 2 defines "assault":

"Assault" means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he has the ability to effect his purpose

[6] Crimes Act, Section 213, Assault with intent to injure states:

Everyone is liable to imprisonment for a term not exceeding three (3) years who, with intent to injure any one, assaults any person

### **General Elements**

[7] The person named in the charge is the same person who is appearing in Court.

[8] There is a date or period of time when the offence charged is alleged to have taken place.

[9] There must be a public place where the offence was alleged to have been committed.

### **Specific Elements**

[10] The accused intended to injure another

[11] The accused used physical force on another person

[12] There was no legal excuse or reason for using physical force on the person

## **Burden and Standard of Proof**

[13] The prosecution must prove all elements beyond reasonable doubt. The prosecution needs to prove that the defendant assaulted the victim with intent to causing actual bodily harm. The harm intended must be such as to be calculated to cause discomfort, or interfere with health and enjoyment of life. To injure means to cause actual bodily harm. The prosecution does not need to prove that actual injury was sustained, however, the fact that the victim was injured will help prove that there was clear intent to injure.

[14] The matter in dispute is: Whether the accused assaulted the victim with intent to causing actual bodily harm.

### Dr Gabriel Pauu – Crown Witness

[15] Dr Pauu, the medical doctor at the Rarotonga Hospital who examined the victim, Ben Tumupu, on Saturday morning, 28 January 2017, gave evidence of the victim's condition upon being admitted to the emergency department with a complaint of being stabbed twice in the back trying to handle a brawl as a security officer.

[16] He said that the wound is not serrated therefore cannot differentiate whether it was caused by the victim backing into a sharp object or he was stabbed although the victim told him that he was stabbed.

[17] The doctor said that the wound is clean and required multiple sutures for the inner deeper tissues and to close the outer skin. Victim was sent home with oral medication.

[18] Dr Pauu's report that he prepared during his examination of the victim at the Rarotonga Hospital was presented as Exhibit 1. And the photograph showing the victim's stab wounds was presented as Exhibit 2.

### Cross-Examination – Defence Counsel

[19] Under cross-examination Defence Counsel queried the 12cm length of the wound on the victim's back where Dr Pauu explained that there is a 5cm at deepest point under the skin

therefore the 12cm length on the stab wound is not only on the outside of the skin but underneath too.

Acting Sergeant Tereapii Tapoki – Crown Witness

[20] Acting Sergeant Tereapii Tapoki in giving evidence explained her involvement in dealing with the complaint where two of the witnesses she interviewed told her that they saw the alleged assault which led to the defendant's arrest.

[21] She read out the Suspect Statement of defendant that she took from the defendant dated 29 January 2017, who also signed it confirming that he was video interviewed on Saturday, 28 January at about 3.16am at the Cook Islands Police Station. This was presented as Exhibit 3.

Cross-Examination – Defence Counsel

[22] Under cross examination, Acting Senior Sergeant said that the defendant was cautioned because he was the prime suspect however when asked if defendant was given a list of lawyers that he could make contact with to assist him, she responded that she could not remember.

[23] Acting Senior Sergeant was asked if she investigated the defendant's claim that he was hit by the stubbies to which she responded that she did not refer the matter to another police officer.

[24] She also said that she cannot recall whether the boys that were hit on the head had injuries but was told that a torch broke on Thomas Ben Marsters head and agreed that it is an offence.

[25] When asked if she came across a knife sheath during her investigations she responded no, and based on that there is no evidence that the defendant was carrying a knife.

[26] Asked if she went back to scene of the alleged incident she responded that she did not, but agreed that the area where the alleged incident happened is a dark area at night.

[27] When asked if it ever occurred to her to go and verify the ability to look down where the alleged incident took place, she responded no.

[28] Acting Senior Sergeant Tapoki said that she did not accept the defendant's claim that he did not do it and still arrested him.

Ben Tumupu – Crown Witness

[29] The victim, Ben Tumpu, gave evidence that he is employed as a security officer at OTR whose main responsibilities among others include the control of drunkards who are denied entry into the bar.

[30] He told the Court that on Friday night, 27 January 2017, he was on duty and always stationed at the front door of OTR which is the main entry on the seaside of downstairs bar.

[31] He said that a scuffle broke out in the upstairs bar and there were three boys whose names he does not know came and were stopped from entering because they were drunk.

[32] One of the boys called Peter was wearing a black t-shirt while the other two boys had black with yellow writings on maroon basketball shirts

[33] These same boys, about six-seven of them went to the fence and started to fight amongst themselves and he is not sure of the cause of the scuffle because they were all drunk.

[34] He told them to leave and go somewhere else because they had tourists coming to the bar and don't want them to see this kind of behaviour on their premises. The boys eventually left.

[35] He said that the first was a scuffle on inside the boundary of OTR and the second was actually a fight beside the Rehab bar, however, he was uncertain whether or not they were the same boys he sent away earlier.

[36] He told the Court that as he approached the boys to try and break up the fight, he saw Peter jumped and punched Daniel Mare.

[37] There were several people involved in the fight and he and his security staff were telling them to stop at the same time they were trying to protect those being attacked.

[38] After the fight he felt something warm on his back and already knew what it is which Daniel confirmed when he asked him however he did not see who inflicted the stab wounds on his back.

[39] The victim was shown the coloured photograph of his injury of stab wounds, he was shocked as it was the first time he had seen his wound before it was stitched. He expressed anger as he likened the wound to a slaughtered pig.

[40] He told the Court that such a wound can only be inflicted with a knife though a broken bottle can inflict a similar wound but not as deep.

[41] He also told the Court that he received stitches inside and outside the wound on his left upper back but did not know how many.

[42] On the night of the alleged incident he was wearing his security uniform and was presented as Exhibit 4.

[43] All he could remember is being walked to Hinano Matapo's car by Daniel Mare and Hinano taking him to the hospital in a red truck.

[44] He told the Court that he tried not to think about his injury that took two weeks to recover and hopes that it does not happen to anyone else.

#### Cross Examination – Defence Counsel

[45] Under cross examination he told the Court that the first scuffle happened downstairs in front of him involving seven people but the second scuffle which is really a fight involved some 15 to 20 people.

[46] He told the Court that he and Daniel Mare were trying to stop the fight and denied holding an empty stubby bottle against the boys fighting.

[47] He denied being involved in the fight but admitted to exchanging blows with Peter only because he attacked his colleague Daniel Mare.

[48] He also said that he did not see the defendant during the fight, therefore unable to identify the defendant in Court today.

[49] He agreed that there was insufficient light on the night of the alleged incident which would make it difficult to see details of the people down when looking from the top floor of Bar.

[50] He also agreed that as a result of this incident a meeting between the owners of the Bar and government was held to install lights and CCTV. He added that the lights are now installed which is a good thing and safer but not sure about the CCTV.

[51] In reference to the stabbing wound on his back, he disagreed with the suggestion that it could have been the result of his falling backwards onto a sharp broken glass or a sharp steel point.

#### Re-Examination – Crown

[52] Under re-examination, Ben confirmed that he was not drunk on the night of the alleged incident as drinking is not allowed on the job.

[53] The reason that he has a bottle in his hand is because when patrons leave them lying around they, the staff are expected to pick them up and put them in the bins.

[54] He confirmed that he did not see any bottles because it was dark and there were a lot of people involved in the fight.

Tongakura Tonitara – Crown Witness

[55] The Constable in giving evidence explained her involvement in this case who told the Court that on that night she was rostered as reserve staff with the task of monitoring bars.

[56] She said that while inspecting liquor licensed premises, advice came through that someone was stabbed so they went to investigate.

[57] On arrival at the OTR bar area, she spoke to the bystanders to see what happened and was told that there was a fight.

[58] Afterwards, she and Sergeant Takai received instructions to locate the defendant at his home in Matavera where Sergeant Takai spoke to the defendant's father.

[59] She conducted a video interview of the defendant at the Police Station at 3.17am that morning in the presence of Sergeant Takai and also took some notes of the interview. The transcript of the defendant's video interview was presented as Exhibit 5.

[60] The defendant was wearing a black t-shirt and grey shorts but prior to that she was told, the defendant was wearing a yellow t-shirt. Defendant told her that he had a shower and had changed his clothes before the police arrived at his home prior to being taken to the police station for questioning.

[61] The defendant confirmed that he was wearing an orange coloured t-shirt the night of the alleged incident.

[62] The defendant told her that he came to town just after midnight with his brother and that he had two cans of Woodstock and drank outside the bar but did not make it into the upstairs bar because they were refused entry.

[63] The defendant also told her that he saw the fight when they arrived and later he saw his brother involved in the fight so he went to assist him.

[64] About the stabbing incident, the defendant told her that he did not stab anyone.



Cross-Examination – Defence Counsel

[65] Defence Counsel objected to transcript presented as Exhibit 5.

[66] Under re-examination, Constable Tonitara confirmed that she did caution the defendant of his rights and that the evidence is in the transcript of the defendant's video interview.

Giovanni Marsters – Crown Witness

[67] Mr Marsters in his evidence told the Court that on the night of 27 January 2017, at about 9pm he was on the balcony at OTR bar when the fight broke out.

[68] He was informed that the fight actually started on the Wednesday night 25<sup>th</sup> January 2017 which was started by an Arorangi boy and the Morris boy, the fat one and the other one but did not witness that fight. The same Morris boys were also involved in the Friday fight.

[69] He said that he does not know the cause of the fight but stated that it could be a revenge of the Wednesday fight.

[70] He told the Court that he did not see the defendant fighting but only saw his brother.

[71] The boys involved in the fight were told to leave and they moved to the Rehab and resumed fighting between the defendant's brother and the Arorangi boy.

[72] Meanwhile, Ben came to break up the fight when another two boys started fighting, and eventually many more people were fighting.

[73] He told the Court that he saw another person wearing a yellow t-shirt who ran and stabbed Ben Tumupu's back. Ben's back was facing towards him.

[74] Earlier on he saw the person in a yellow singlet hanging around sitting on the rock on the seaside and watching but was not involved in the fight.

[75] He was on the top of the balcony stairs when the stabbing occurred about less than 30 metres away from him. He explained the sketch plan produced indicating where he was standing at the time and the path the person in the yellow singlet took to attack Ben. The sketch plan was presented as Exhibit 6.

[76] From about 3 metres from where he was looking down from the top of the balcony at the boys fighting below and could see everything happening so fast.

[77] He said that Ben was right in the middle of the fight trying to break it up but at the same time he was getting punched as well. Other security staff also came to his assistance.

[78] What caught his eye is the person in the yellow singlet running towards Ben the victim and stabbing him 3 or 4 times, then ran towards the Rehab and disappeared quickly. This person was also wearing a hat that night.

[79] When he got to Ben, he overheard people saying that, Sam Morris did it.

[80] He said that the fight started in the dark and as it progressed it came towards the light which enabled him to see the stabbing incident.

[81] He claimed to have seen something shinning as Ben was stabbed. He added that the wound inflicted on Ben's back in his opinion, was not caused by a broken bottle but by a knife.

#### Cross Examination – Defence Counsel

[82] Under cross-examination he confirmed that he overheard some people calling out the defendant's name as the person who stabbed Ben.

[83] The person he claimed to have seen was wearing a yellow sporty t-shirt but when shown the orange t-shirt that the Police recovered from the defendant's home he was adamant that the colour was yellow and not orange that he saw on that night. Furthermore, he remembered the colour of the t-shirt but did not see the person's face.

[84] When asked if he was sure what weapon he saw Ben being stabbed with he responded, that he did not but said that it was something shining.

[85] With no weapon and no glass found, he disagrees with the suggestion by the defence Counsel of the possibility that Ben may have backed into something sharp which resulted in him being wounded.

[86] When shown photographs of wounds inflicted by his security staff on the men that were fighting he was adamant that they didn't do that and that they wouldn't do such things.

#### Inano Matapo – Crown Witness

[87] Ms Matapo in her evidence told the Court that on the night of the alleged incident she was at the front gate with Ben and a group of boys were by their garage and looked kind of suspicious so Ben went over and told them to leave.

[88] She does not know who these boys are but one of them who was in the bar that night had a red singlet on. He is a regular at the bar and appears to be wearing his favourite red t-shirt hence she recognised him.

[89] The scuffle started between two people and while she and Ben were trying to break them up, other people were jumping in and having a go at each other. The fight kept increasing in numbers, so security staff Daniel and Terepai came to assist her and Ben, the victim.

[90] When asked if she recognised the people fighting she responded that she only remembered some faces but not their names.

[91] She said that she did not recognise the person who was supposed to have stabbed Ben, in other words she did not see the defendant stab Ben.

[92] She said that she saw the defendant earlier in the bar with a yellow t-shirt like a basketball one similar to the one the person in the red was wearing.

[93] She said that the bulk of the fight occurred right behind Rehab stage and there were lights shining around that area.

[94] She also said that there is a dark patch on that corner of Rehab and the only light coming from OTR provided sufficient lighting on the night of the alleged incident.

[95] She drove Ben to the hospital for treatment.

#### Cross Examination – Defence Counsel

[96] Under cross-examination, she told the Court the person in the red t-shirt was one of four boys involved in the fight but did not see the person in the yellow t-shirt at the time.

[97] She said that she does not know which fight Daniel Mare came to separate as she was not watching but actually doing what the other security staff are trying to do and that is to break up the fights that were breaking out and increasing in the numbers of people becoming involved.

[98] Referring to the meeting held between them the bar owners and the authorities to install more lights around that area plus CCTV to monitor all the activity around there she acknowledged that more lights are needed. She added the only light comes from their bar and none from the Rehab side.

[99] She maintains that there was sufficient light but agrees that lighting of the area has improved since the installation of more lights recently.

#### Daniel Mare – Crown Witness

[100] Mr Mare, Security officer at OTR, gave evidence that he was on duty on the night of the alleged incident, carrying out his normal duties such as ensuring the place is tidy, also checking IDs for underage patrons and dealing with drunk patrons.

[101] He said he was stationed upstairs that night, when an argument broke out between the defendant's brother and Terepita. He escorted them downstairs where the scuffle began there.

[102] He saw everyone rushed in and joined the fight so he went to assist other security staff to break it up as more and more people became involved.

[103] The fight was just behind Rehab when he went to assist his security colleagues Terepai and Ben. By this time he was also being attacked so he had to defend himself and threw a few punches at the boys coming at him.

[104] He said that Ben was in the centre of the fight and was about 4 metres away from him when he saw the defendant stab Ben thrice from behind with a diving knife because he has one. Defendant came from the rock and approached Ben from the right side then stabbed him.

[105] He then approached Ben and told him that he has been stabbed in the back and was wearing a black security t-shirt that night.

[106] He said that on the night of the alleged incident he saw the defendant wearing a yellow basketball t-shirt, a cap and shorts.

[107] The photograph of Ben's stab wounds was shown to the witness and presented as Exhibit 1.

[108] He said that Ben was stabbed on his right side but after he examined the photograph he confirmed that it was actually on his left side.

#### Cross-Examination – Defence Counsel

[109] Defence Counsel asked witness if the knife he referred to in his evidence is serrated and he responded that it is not.

[110] When asked about the length, handle, colour and type of the knife, he responded that it is a diving knife because he has one himself and the length is about 3 or 4 metres but corrected himself by stating that it is in centimetres and under re-examination he accepted that the knife is about 12 to 14cm in length.

[111] He was adamant that Ben was stabbed three times in the back because he was right behind him

[112] When shown the t-shirt Exhibit 7 and asked if he can recall seeing that singlet on the night, he responded no, as people were mostly wearing blue, black and red singlets but not orange. He was adamant that the defendant was wearing a yellow singlet. He could not recall the colour of the defendant's cap and trousers but clearly recalls his yellow singlet.

[113] When asked if he was using empty beer bottles on the people that were fighting because two witnesses saw him do that, he responded he did not.

Maeren-Jo Vikta – Crown Witness

[114] Ms Vikta a patron at the Bar in her evidence told the Court that while drinking at the Jungle Bar she recall from where she was seated, could see lots of boys fighting and she also confirmed seeing the defendant who was wearing a singlet and a three quarter pants however cannot recall the colour of the singlet he was wearing.

Pauline Rangi – Crown Witness

[115] Ex-Police Constable Pauline Rangi was on reserve shift on the night of the alleged incident and was at the Sinai Hall checkpoint up to midnight

[116] She said that a silver car parked in front of the Sinai Hall and she saw three boys walking from it. They were wearing red caps, orange/yellow singlets with red letterings.

[117] She said that she knows of the defendant as an offender from the police records

[118] While on the road visiting other bars, they received a call about a stabbing incident at OTR.

[119] Upon arrival there, three Police Officers spoke to bystanders while she spoke to Giovanni Marsters to inquire about the victim and was told that Hinano had taken him to the hospital.

[120] The information they received from their inquiries revealed that the defendant was involved in the alleged incident and Sergeant Takai was instructed to locate him.

[121] She told the Court that they went to the hospital to see the victim who was still being treated by Dr Pauu and were told to come back and talk to him later.

#### Cross Examination – Defence Counsel

[122] Under cross-examination Constable Rangi was shown the t-shirt and cap retrieved from the defendant, and asked if she could confirm that they are the ones defendant was wearing when she saw him at Sinai Hall her response is that they are not.

#### Sergeant Takai – Crown Witness

[123] Sergeant Takai in his evidence told the Court of his involvement in this case. He was rostered on reserve duty on the morning of 27 January 2017 when they were advised of the stabbing incident at OTR.

[124] He also spoke to Giovanni Marsters who told him about what happened to Ben.

[125] He was then instructed to locate the defendant and went to his home in Matavera and spoke to the defendant's father.

[126] He brought the defendant and his brother to the Police station for questioning and instructed Constable Tonitara to video interview the defendant.

[127] Before releasing the defendant he advised him that further investigations will need to be done.

[128] On Wednesday the following week and after obtaining a search warrant the police conducted a search of the defendant's home.

[129] Defendant was not at home at the time only his wife, so she was explained the reason for the search and that is to obtain a yellow cap, yellow/orange basketball t-shirt with red letterings, black shorts and a 15cm pocket knife.

[130] Later they asked the defendant about the clothes he wore on the night of the alleged incident and he gave them an orange singlet, grey yellow cap and green knee-length shorts which they took to the police station for processing as exhibits. He told the Police that these were the clothes he was wearing on the night of the alleged incident.

[131] Based on the information given to the police, they believed the clothes the defendant gave them during the search at his home were the same ones he was wearing on the night the alleged incident.

[132] However as to the knife, they found assorted knives in the kitchen but were unable to locate the diving knife that one witness testified that he saw the defendant stab the victim, Ben with.

[133] Search Warrant is presented as Exhibit 6; Singlet Exhibit 7; Shorts Exhibit 8; Cap Exhibit 9.

Samuel Munokoa Morris – Defendant

[134] The defendant, in his evidence told the Court that at about 11pm on 27 January 2017, he and his younger brother Matapo and cousin Thomas went to town and parked at the Sinai Hall. They walked to Tukis Shop and turned towards the beach road leading to OTR.

[135] He said they were drinking Woodstock as they walked and came to the door of the OTR but Ben would not allow them into the Bar.

[136] They walked to Hideaways and met up with friends and stayed for about half an hour and walked back to OTR just before midnight.

[137] While they were standing and drinking outside between Rehab and OTR he looked across towards Rehab and saw these boys beating up his brother and cousin.



[138] He then ran towards them and tried to pull them out but there were too many people fighting, about 20 of them.

[139] He also said that he saw OTR securities in particular Daniel Mare beating up his brother and cousin and both sustained injuries hence his involvement in trying to rescue them.

[140] Thomas sustained head injuries inflicted by Ben Tumupu and Daniel Mare. Photos of Thomas Ben Marsters injuries were presented as Exhibit D/A-E.

[141] He maintained that he did not stab Ben Tumupu, the victim, nor did he carry a knife on him on that night.

#### Cross Examination – Crown

[142] Under cross examination the defendant confirmed that he did park his car at the Sinai Hall before walking to the OTR.

[143] He disagrees that the reason they were refused entry into the Bar is because they were too drunk.

[144] He confirmed that the clothes he gave Sergeant Takai as Exhibits 6, 7, 8 and 9 are what he wore on the night of the alleged incident.

[145] He also confirmed that he had a shower and changed his clothes soon after he, his brother and cousin Thomas returned home.

#### Thomas Ben Marsters – Defence Witness

[146] Mr Marsters in giving evidence told the Court how he and his cousins the Morris boys came to town, where they parked their car, where they went to and where they finally ended up.

[147] He also confirmed that Ben denied them entry into the OTR bar, so they went to Hadies and the Rehab but returned to OTR later that evening.

[148] He saw someone jumping on him and his cousin Matapo when the defendant came to help them.

[149] He said that he saw Ben and Daniel Mare hitting them with beer bottles. Ben especially hit him with a torch which broke on his head and the next day the defendant took photos of his injuries on his phone.

[150] He told the Court they were not trying to stop the fight but rather they were beating them up.

[151] He said that the clothes recovered from the defendant are the same ones that he wore on the night of the alleged incident.

[152] He does not agree that it is the defendant that stabbed the victim, Ben.

Matapo Morris – Defence Witness

[153] Mr Morris in his evidence told the Court how he and his brother Samuel and cousin Thomas Ben Marsters came to town, where they parked their car, where they went to and where they finally ended up that night.

[154] He said that upon arrival at the Rehab a couple of boys started to fight and he and his cousin Matapo ended up getting beaten up.

[155] He rejected the accusation that his brother Samuel took a knife with him when they came to town that night.

[156] He vouched that the clothes the defendant gave to the Police from their home in Matavera are the same clothes he was wearing on the night of the alleged incident

### Closing Submissions – Crown

[157] The Crown, in closing submissions submitted, that the general elements:

- [7] The person named in the charge is the same person who is appearing in Court i.e. the defendant, Samuel Morris
- [8] The date or period of time when the offence charged is alleged to have taken place i.e. on 28/29 January 2017
- [9] The public place where the offence was alleged to have been committed i.e. at the OTR bar, Avarua

These general elements are accepted as proven.

[158] Specific Elements [10] and [11]: prosecution submitted that these are also proven therefore the defendant is guilty.

### Closing Submission – Defence Counsel

[159] The Defence Counsel in closing submissions, submits:

- 1. Must have credible witness that defendant stabbed the victim
- 2. Specific element: The assault took place; there has to be an intention to injure the victim; Injury was caused

[160] Defence also asked the following questions:

- 1. Who caused the injury and how was it caused?
- 2. The Doctor said that he is not sure whether it was a deliberate or intentional stabbing with a knife
- 3. Where is the evidence that the defendant stabbed the victim?
- 4. Defendant has no grudges against the victim
- 5. They left of their own accord
- 6. Only the people who said that they saw the defendant stab the victim and could not confirm his clothing that night
- 7. Sergeant Takai accepted the clothes that he was given by the defendant as the ones he was wearing on the night
- 8. OTR security officers are unreliable witnesses from the Crown
- 9. The victim, Ben, and security officer, Daniel Mare, perpetrated the fight rather than stop it

10. Witnesses Giovanni Marsters and Daniel Mare could not confirm the defendant's clothes he was wearing that night nor were they able to produce the knife used to stab the victim as evidence
11. Crown has not established a firm prima facie case.
12. Crown has failed to prove beyond reasonable doubt that defendant is guilty as charged.

## **Conclusions**

[161] There is no doubt an assault occurred at OTR on 28 January 2017 and the victim received injury as reported by the medical doctor who examined him at the hospital.

[162] Crown called ten witnesses whose testimonies varied from one to another, while the defence called three witnesses to give their evidence.

[163] Defence focus their line of defence on the visibility where the brawling occurred in the darkness of the night that would have a bearing on the identification of the defendant who remained unwavering that he did not injure the victim Ben and that he had no knife throughout the Police investigations.

[164] Defence also asked if there was a stabbing or did the victim fall backwards into a sharp object that injured him.

[165] The Doctor in his oral evidence said that he is not sure whether it was a deliberate or intentional stabbing with a knife. The stab wound was not serrated but clean therefore he cannot differentiate whether it was caused by the victim backing into a sharp object or he was stabbed although the victim told him that he was stabbed.

[166] Eyewitnesses, the co-owner of OTR, Giovanni Marsters and his security officer Daniel Mare claimed that they saw the defendant stab the victim however, in his oral evidence, Giovanni said that he saw someone dressed in a yellow basketball t-shirt run from the beach side into the fight, which he believed was the defendant and added that he did not see the person's face.

[167] Defence also argues that there is a collusion between the eyewitnesses the co-owner of OTR and his security officer in gathering information against the defendant.

[168] Witness Giovanni Marsters also claimed that he saw the defendant from the top of the balcony stairs of the Bar run into the fighting crowd and stabbed the victim in the back with something shining. He also stated that he could see everything from where he was standing and looking down onto the fight.

[169] The identity of the defendant as the attacker in my view, is not conclusive as witnesses testified that they were busy trying to break up the fight involving some 20 people and was not just standing around watching the fight. There would have to be bodies all over the place. But witness Daniel Mare claimed that he was right there when the defendant stabbed the victim in the back with a knife. However, Police failed to produce the knife that was used in the attack. The question is, where is the weapon and why was it not presented as evidence?

[170] At that hour of the night/morning patrons would have had many drinks throughout the night having been at the bar all night therefore are at different levels of intoxication, unsteady on their feet and demonstrating unruly behaviour.

[171] In my view, it would be difficult for anyone in such a situation to be able to clearly identify the victim's attacker given the number of people involved in the fight and also insufficient lighting too. Daniel Mare's oral evidence stated that the victim is right in the middle of the brawl.

[172] The Police taking possession of the defendant's clothes shows that they believed those are the same clothes the defendant was wearing on the night of the alleged incident although some witnesses in their evidence stated that they were not the clothes they saw him wearing that night before the stabbing incident.

[173] No forensic testing on the defendant's clothes was undertaken by the Police when they took them away from him.

[174] As a result of the search warrant on the defendant's home at Matavera the Police obtained the basketball singlet, pair of shorts and a cap which they presented to the Court as the clothes he wore on that night.

[175] Based upon that above I am unable to accept that the prosecution has proven the specific elements beyond reasonable doubt, that the defendant assaulted the victim with intent to causing actual bodily harm, therefore I find the defendant not guilty of the charge of assaulting the victim with intent to injure.



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**Carmen Temata, JP**