

**R v Kailea & Kailea**

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Supreme Court, Nuku'alofa  
Ward CJ  
Criminal Case No.96-100/1991

10 - 14 & 18 August, 1992

*Criminal law - bodily harm and assault - provocation - self defence*

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The two accused brothers attended a kava club organised by one of the complainants. Another man was ejected and a scuffle resulted with two complainants being injured, the first complainant being struck on his back with a cane knife.

Both accused were convicted of certain offences of causing harm and assault the decisions being made on factual matters and the case is reported only in relation to claims of extreme provocation and/or self defence made on behalf of one accused in relation to the use of the cane knife.

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HELD:

1. A provocation defence under s.89 Criminal Offences Act was not, and could not, be available as a matter of law.
2. Self-defence was not available as a defence in circumstances where an attack is made on a fleeing man, even although he had initially been the aggressor. The prosecution had proved beyond reasonable doubt that this was not self defence.

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Counsel for Crown : Mr Williams  
Counsel for Accused : Mr Veikoso

### Judgment

In the evening of 24th May 1991 Foliaki Teisina organised a kava club in the Wesleyan Church Hall at Vaini. The two accused, Peni and Siupeli Kailea, who are brothers, joined Foliaki's group. They had been drinking beer and home brew and were drunk as was at least one other man in the group Hopoate. Foliaki objected to their presence and eventually ejected Hopoate. A scuffle erupted which left Foliaki and another man from the club, Lotini Violeti, injured. Peni is charged with alternative counts of bodily harm contrary to sect.107 and assault contrary to sect.112 in relation to each man. Some time later, Siupeli struck Foliaki on the back with a cane knife and similarly charged with alternative charges under sections 107 & 112. (The judge then considered the facts in detail and went on as follows):

Siupeli gave evidence and admitted causing the cut with a cane knife. On his own account of the incident, he did not strike Foliaki during his fight with Peni but pursued him some 15 metres as he fled before he was able to strike his back with the knife. Initially it was suggested by defence counsel that a defence of extreme provocation under section 89 applied but he now concedes such a defence does not cover these offences. The extreme provocation referred to was an attack on Siupeli's brother by Siasosi with the cane knife and I shall return to consider that allegation later.

It was also suggested this attack by Siupeli was self defence because Siasosi had struck him with the knife also. Clearly such a defence cannot help this accused. He had punched Siasosi so he dropped the knife and ran away. By the time Siupeli had the knife, the man who attacked him had already fled. In order to strike Foliaki it was necessary to pursue him too. Self defence cannot apply to an attack on a fleeing man even if he had initially been the aggressor. The prosecution has proved beyond any doubt this was not self defence and the second accused is convicted on count 5. I do not consider count 6.

There were many matters of dispute in relation to this second incident and, although they do not affect the verdict, they may go to sentence and it is convenient to resolve the main points now. I have already stated that I feel Foliaki was more aggressive than he admits to the Court. In the kava hall it was suggested by the accused and Hopoate that Foliaki threatened to beat Siupeli up. I am satisfied on the evidence as a whole that may have been the case and I am satisfied that Foliaki's objection to the presence of three drunken men resulted in him acting in an aggressive and provocative manner. His insistence that Siupeli should pay before he drank kava when the evidence suggests no one else had yet paid was likely to cause a reaction as was the manner in which he took the bowls of kava poured by Hopoate for Siupeli.

The two accused and some of their witnesses told the Court that, when Foliaki returned from his house, he was challenging Siupeli to a fight. I accept both the accused and some of their witnesses had taken drink and bear that in mind when considering their evidence but I feel the evidence suggests Foliaki probably did challenge in that way.

The knife is also an important part of the evidence in this case. The defence claim it was introduced into the fight by Foliaki's brother, Siasosi. That was mentioned in their interviews with the police yet no evidence has been called by the prosecution to establish the ownership of the knife or from where it appeared in the fight. When Foliaki was asked to look at the knife during his evidence he gave very guarded replies about it. Siasosi is, according to witnesses, available but has not been called to deal with the allegations of his involvement. In the circumstances, the defence have proved on balance that the knife

was introduced by Siasoi.

The defendants admit that first Peni and then both of them accepted Foliaki's challenge but then Siasoi used the knife to inflict a serious wound on Peni. I accept such a blow occurred at that time and effectively prevented Peni being involved any further in the incident. One prosecution witness, Siteisi who was in the house to which Foliaki eventually fled, said Peni was still around at that time. I found her evidence confused and unconvincing and it was given in a flippant way. I reject it. Foliaki also described Peni still being involved then. I do not believe him.

100 The prosecution has proved the offence of assault causing bodily harm by Siupeli on Foliaki beyond any doubt but, on all other aspects of the incident, I prefer the defence account in that I accept, on balance, that it is correct.