

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NO: S.380/93

BETWEEN: THE POLICE

Informant

A N D: TALOAFULU IOASA FAAMATUAINA,  
of Lufilufi

93-11-11 SC

Defendant

Counsel: Mr Edwards for Prosecution  
Mr Enari for Defendant

Dates of Hearing: 9, 10 & 11 November 1993

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SUMMING UP OF SAPOLU, CJ

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Ladies and gentlemen assessors, it is now my duty to sum up to you in this case.

The accused Taloafulu Ioasa Faamatuaina is charged that at Lufilufi on the 27th day of June 1993, he by an unlawful act namely, shooting with a gun, caused the death of the deceased, Ieremia Tuaina, thereby committing the crime of murder.

I must begin by explaining three(3) very important matters to you. The first relates to my function as the Judge and your function as Assessors. It is my function to direct you as to the law that is applicable in this case and I must ask you to accept completely as authoritative what I tell is the law in this case because that is my function as the Judge. But the decision on the facts of the case is for you as Assessors and for you alone. If therefore I appear to indicate any view on any question of fact which is

not in agreement with your own view, then you must disregard my view because questions of fact are for you alone to decide. You must bear that in mind especially when you come to have your deliberation.

The second matter is that you must come to your verdict solely on the evidence put before you in this Court. If you have read or heard anything about this case before you took your places as Assessors, please dismiss it from your minds for the accused must be judged solely on the evidence that has been adduced in this Court. You must consider all the evidence and in weighing it I ask you to have in mind what counsel have said to you in their addresses; and on this you must reach your verdict in accordance with the directions that I give you regarding the law. It is also for you to assess the witnesses' evidence, their demeanour and to judge their reliability and their credibility. You will decide which witness you believe or disbelieve as you think fit and what part of the evidence you accept and what part you reject. You may also draw inferences from the evidence that you accept but those inferences must be logical and reasonable deductions and not mere speculation. In considering all these matters you will apply your collective common sense and experience of human nature as ordinary men and women of good standing in our community. In arriving at your verdict, I ask you to put aside any feeling of prejudice or sympathy one way or the other which you may have towards any of the persons involved in this case.

The third matter of great importance is that the onus of proof in this case is on the prosecution which brings the charge. There is no onus on the accused at any stage to prove his innocence. He does not have to give evidence but he has elected to do so. The law is that the prosecution must prove the charge beyond reasonable doubt before you can bring in a verdict of guilty of the charge. Reasonable doubt does not mean any vague or fanciful doubt or a mere suspicion. It means a proper doubt founded upon a proper

consideration of all the relevant evidence. If you are satisfied that the prosecution has proved the charge beyond reasonable doubt; it is your duty in accordance with your oaths to find the accused guilty of the charge. If you are not satisfied that the prosecution has proved the charge beyond reasonable doubt, it is equally your duty in accordance with your oaths to acquit the accused of the charge. I will explain to you in the course of this summing up an alternative verdict you may reach based on the offence of manslaughter.

The charge in this case is one of murder which consists of three (3) elements the prosecution must prove beyond reasonable doubt:-

- (1) The first element is that the accused must have committed an unlawful act, namely discharging a firearm at the deceased;
- (2) Secondly, that it was that unlawful act which caused the death of the deceased;
- (3) Thirdly, that the accused had the requisite intent.

The intent for murder in this case may be one of two kinds. It may be the intent to kill; OR it may be the intent to cause bodily injury known to the accused to be likely to cause death but he was reckless whether death ensued or not.

Now you have heard all the evidence in this case and I do not propose to canvas all of that evidence. It appears that there are two parts to this incident - What took place between the accused and the deceased at the accused's house on the western side of Lufilufi and what happened later between the two of them in front of Faamatuainu Tala Mailei's shop on the eastern side of Lufilufi. Given the conflicting accounts given by the witnesses as to what happened in these two parts of this incident, it is for

you to decide which witness to believe or disbelieve and which part or parts of their evidence you accept or reject.

As to the first part of this incident, we have the evidence of Malama, the deceased's wife, Teofilo Vau from Falefa, the accused, and Segia, the wife of the accused. According to Malama, she had gone with Ioka to apologise to the accused because of an incident that had occurred between Ioka and the accused's children and soon after Ioka left, the deceased who appeared to be in an overdrunk condition arrived and asked the accused as to why he had chased Ioka. Now the deceased was a nephew of the accused as his mother is the accused's sister. When the accused asked the deceased to leave but the deceased continued to question the accused about the reason why he chased Ioka, the accused then went and obtained his gun. That made the deceased run away and Malama followed him. According to Malama the accused followed them with the gun and when the deceased reached Tanielu's place he turned off the road and went towards Tanielu's place. The accused appeared to Malama to have stopped and returned to his house. Malama also denies that the deceased swore at the accused.

According to the witness Teofilo Vau, who was present at the accused's house, when the deceased came to the accused's house, he had a bottle in his hand. The deceased called out to the accused as to why he had chased and also uttered swear words. When told by the accused to leave his property, the deceased did not do so. The accused then went into the house and obtained a gun so he intervened and restrained the accused but the deceased again called out swear words. It appears the deceased then left the accused's property and Teofilo went on to Saluafata.

According to the accused the deceased came to his place twice. The first time the deceased called out to him as to why he had assaulted Ioka

and to come out of his house. He told the deceased three times to go home as Malama will explain matters to him when he was again sober and that he was becoming too cheeky but the deceased refused to go. He called out that the accused should be assaulted and killed. So the accused says he then obtained his gun to scare away the deceased but he had no intention of inflicting any injury on him. Teofilo and Segia then restrained him and the deceased and Malama left. Shortly afterwards the deceased reappeared holding a bottle and a stone and called out, the accused should be killed. So the accused again obtained his gun and followed the deceased who had gone away with Malama. At Magele's house the deceased turned off the road and the accused returned to his house but when he remembered that the deceased was heading in the direction of his house where his children were, he turned back and went to his children.

• According to Segia, the first time the deceased came to the accused and asked what he had done to Ioka, the accused told him to go home as he was drunk. Malama then chased the deceased away. But shortly afterwards the deceased returned holding a bottle and stones and called out swear words to the accused. The accused then obtained his gun and when Segia and Teofilo <sup>he</sup> tried to restrain him/punched them away and went towards the deceased who was still calling out swear words.

As I have said it is for you to decide which of those accounts you believe or disbelieve, or accept or reject.

Between the first and second part of this incident, the deceased came to the house of Utua'i Mau and asked Utua'i Mau and Magele Poai if they had a gun but was told by those two men they had no gun. The accused also came by Utua'i Poai's house and he was seen carrying a gun. That brings us to the second part of this incident which occurred in front of Faamatuainu Tala Mailei's shop.

The witness Avasa Leaso, who is a school teacher and who appears to be a mature woman and had a clear view of what happened, she was with the deceased on the road in front of Faamatuainu Tala Mailei's shop when the accused appeared out of the bushes near the shop holding a gun in one hand. She moved forward towards where the accused was coming from and at that time the deceased moved and stood behind her. The gun then went off and the bullet went past a short distance from her head going upwards. The accused was apparently very close to Avasa at that time. Shortly afterwards the deceased then came from behind Avasa and jumped towards the gun and tried to hold onto the gun. At that time the gun went off again and the deceased and the accused continued to struggle for the gun. Avasa turned away at that time and screamed. Several witnesses have testified that when they came to the scene, they found the deceased and the accused struggling with the gun. It appears that the deceased then ended up on the ground with a gunshot wound to the left side of his stomach. The deceased was taken to the Lufilufi Hospital the same evening where the nurse Aitupe Soonalafo found an injury to the same side of his stomach and he passed away the same night at the Lufilufi Hospital.

Dr Faleniu Asaua who performed the post mortem on the deceased's body testified that he found a wound slightly to the left side of the deceased's abdomen which was consistent with a wound caused by a firearm. In his opinion the cause of the deceased's death was from excessive blood loss from that abdominal wound.

Now the accused, according to the evidence of Senior Sergeant Saolele, admitted to the Police that he shot the deceased. The accused says that when he was on the steps of his house next to Faamatuainu Tala Mailei's shop the deceased called out to him from the road. He replied you'll see what will happen and went towards the deceased. He discharged the gun upwards thinking that the deceased will run away but he did not. The deceased who

was standing behind Avasa then pushed Avasa towards the accused until he reached the gun and then he and the accused struggled with the gun. The accused says that the deceased then pushed him down and as he was falling down the gun went off. They then continued to struggle with the gun while he was kneeling on the ground and when the gun was removed from them he then punched the deceased and the deceased fell down.

Now as to the first element of the charge, namely whether the accused committed an unlawful act upon the deceased, I direct you that voluntarily discharging a firearm at a person is an unlawful act. But for an act to be unlawful for the purpose of homicide it must be a voluntary act. A voluntary act means an act willed by the doer of the act. The doer must be in control of the act that he committed. If the doer did not will the act and or not in control of the act that he committed, then his act is not voluntary but involuntary and therefore is not unlawful. To illustrate what this means if you hit a person on the road with a head tackle you may be guilty of assault because your act is voluntary in the sense that you willed your act of head tackling and you were in control of that act. But if all of a sudden someone gives you a strong push so that your head hits someone on the road you may not be guilty of assault because your act was not voluntary but involuntary in the sense that you did not will or have control over your act. Likewise if someone jumps from the Prime Minister's Department and lands on a child at the carpark in front of this courtroom and kills that child, that person may be guilty of manslaughter because his act of jumping down from the Prime Minister's Department was a voluntary act. That is, he willed his act of jumping and was in control of that act. But if someone is pushed over the railings in front of the Prime Minister's Department and he fell over and landed on a child at the carpark of the Minister of Justice just outside and killed that child, then that person may not be guilty of manslaughter because

his act was not voluntary in the sense I have described.

In this case Avasa says that the deceased jumped forward and struggled with the accused for the gun. The gun then went off the second time. She did not see how the gun went off or who fired the gun. The only evidence that goes to show who fired the gun is the uncontradicted evidence of Senior Sergeant Saolele who testified that the accused admitted to him that he fired the gun. But the accused did not explained to Senior Sergeant Saolele how he shot the deceased. It was when the accused testified before this Court that he explained how the fatal shot that killed the deceased was discharged. He says that the deceased pushed Avasa forward towards him and when the deceased reached the gun they then struggled for the gun. The accused says that the deceased then pushed him and as he was falling down the gun went off.

Now it is for the prosecution to prove beyond reasonable doubt that the shooting of the deceased by the accused as he admitted to Senior Sergeant Saolele was a voluntary act and therefore unlawful. If you find that the discharge of the fatal gunshot was not voluntary but involuntary, or if you have a reasonable doubt whether the discharge of the fatal gunshot was voluntary or involuntary, then the prosecution has not proved the first element of the charge and the accused must therefore be acquitted. You need not go further to consider the other two elements of the charge or any of the defences raised. But if you are satisfied beyond reasonable doubt that the accused willed the discharge of the gun and that he was in control of the discharge of the firearm then his act of discharging the firearm was voluntary and the prosecution has proved the first element of the charge. You should then proceed further to consider the second element of the charge.

As to the second element of the charge, there is the evidence of Dr Faleniu Asaua that the wound he found on the left side of the deceased's abdomen was consistent with a wound caused by a firearm and it was that wound which caused the excessive loss of blood which resulted in the death



of the deceased. The defence also does not dispute that it was the gunshot discharged by the accused which caused the death of the deceased. So you may also conclude that the prosecution has proved the second element of the charge.

As to the third element of the charge, the evidence is that when the accused discharged the first gunshot, he did aim the gun at the deceased but discharged the gun upwards. When the second gunshot went off, the evidence of Avasa and the accused show that the accused and the deceased were struggling with the gun. Even though the accused admitted to Senior Sergeant Saolele that he shot the deceased, it appears that the accused did not take careful aim of the gun at the deceased when the fatal gunshot went off. There is also no mention in the evidence that the accused at any time in front of Faamatuainu Tala Mailei's shop aimed the gun directly at the deceased and pulled the trigger. If you are satisfied on the evidence that at the time the second gun shot went off, the accused had the intent to kill or the intent to cause bodily injury to the deceased but was reckless whether death ensued or not, then the prosecution has also proved the third element of the charge. If you are not satisfied that the prosecution has proved the third element of the charge beyond reasonable doubt, but you are satisfied that the prosecution has proved only the first and second elements, then your proper verdict should be one of manslaughter.

Turning now to the defence of provocation, murder will be reduced to manslaughter if the accused at the time he caused the death of the deceased was acting under provocation from the deceased. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death. The test to be applied is that of the effect of the provocation on a reasonable Samoan, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led a reasonable Samoan to act as he did. In applying the test, it is of particular importance

to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool and to take into account the instrument with which the homicide was effected, for the retort, in the heat of passion induced by provocation, by a simple blow; is a very different thing from making use of a deadly instrument like a firearm dagger. In short, the mode of retaliation must bear a reasonable relationship to the provocation if the offence of murder is to be reduced to manslaughter.

In this case it is important to decide first which evidence you believe as to what happened at the house of the accused on the western side of Lufilufi. If you accept the evidence given by the defence witnesses or the prosecution witness Teofilo Vau, then it is for you to decide whether a reasonable Samoan in the circumstances of the accused given the provocative behaviour and abusive words of the deceased would have lost his self control and acted the way as the accused acted. You must also decide whether the accused did in fact lose his self control. If you find that the accused did lose his self control and that a reasonable Samoan in those same circumstances would also have lost his self control and acted the way as the accused did, then provocation has been made out and your proper verdict is one of manslaughter. If on the other hand you believe the evidence of Malama as to what happened between the accused and the deceased at the house of the accused, then again you ask yourselves whether a reasonable Samoan in the circumstances of the accused would have lost his self control and acted the way the accused did. In this connection you must bear in mind that the mode of retaliation by the accused must bear a reasonable proportion to the provocation by the deceased because if Malama's evidence is true then the only conduct of the deceased that might have annoyed and upset the accused was the questioning of the accused as to why he had chased Ioka. If after consideration of those matters you find that the accused did not act under provocation as already explained then the defence of provocation cannot succeed.

The defence has also raised the defence of self defence. I find that there is no sufficient evidential basis for this defence. The defence of self defence is therefore withdrawn from the Assessors.

\* Ladies and gentlemen Assessors, you may now retire to consider your verdict and the Court will stand adjourned until you are ready to deliver your verdict.

*T F M Spath*  
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CHIEF JUSTICE