IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 19107

IN THE MATTER of the Criminal Procedure Act 1972, Section 108

A N D

IN THE MATTER of an application for a retrial by LESA FARANI POSALA of Apia, Samoan

Counsel: L.R. Vaai for applicant
K. Latu for respondent

Hearing: 5th July 1994

Judgment: 12th July 1994

JUDGMENT OF SAPOLU, CJ

The applicant in this case was jointly charged with one Ioane Soosemea with causing grievous bodily harm. He was also individually charged with assault. Both charges were tried before this Court and found proved beyond reasonable doubt against the applicant. His co-accused Ioane Soosemea was acquitted of the grievous bodily harm charge. The applicant has now applied under section 108 of the Criminal Procedure Act 1972 for a retrial in respect of both charges. As to the charge of grievous bodily harm, the ground in support of the application is that fresh evidence has come to light since the trial which proves that the applicant is not guilty of that charge. In respect of the assault charge the applicant says he was not aware of that charge.

Before dealing with the grounds in support of the application for a retrial, the Court will make a few comments on section 108 of the Criminal Procedure Act 1972 which is the provision under which the present application is made. In the first place, section 108 of our Act is based on section 75 of the Summary Proceedings Act 1957 (NZ) but it must be noted that since 1972 the New Zealand provision has been the subject of certain amendments which are not reflected in our Act and are not relevant for the purposes of the present application. I only make mention of this point here so that while New Zealand authorities on section 75 of the Summary Proceedings Act 1957 (NZ) are highly persuasive authorities to the interpretation and application of section 108 of our Criminal Procedure Act 1972, it must be borne in mind with caution that the New Zealand Act has been the subject of amendments since our Act was enacted in 1972. It also appears from section 108 of our Act that an application for a retrial must be made to the Judge who presided at the trial where the applicant was convicted unless that Judge had died or ceased to hold office then the application will have to be made to another Judge. Such application will have to be made within 14 days after conviction and stating the grounds of the application. I will put aside the question whether the applicant has been convicted or not as counsel did not raise the point and the applicant seems to proceed on the basis that there has been a conviction. The final matter regarding section 108 of our Act is that there is no expressed limitation on the grounds on which a retrial may be sought and the Court has a discretion which is to be exercised judicially in deciding whether to grant or refuse a retrial. And if a retrial is granted whether it is to be a complete or limited retrial.

Now that brings me back to the grounds of this application for a retrial. Dealing with the first ground of the application, namely,

fresh evidence which has come to light since the first trial, it must be said at once that simply because a fresh evidence is new, in the sense that it was not adduced at the trial, and that it would not have been reasonably available at the trial, are not sufficient reasons to justify the granting of a retrial. The fresh evidence must also be credible. If credible, it must also, when considered together with other evidence, lead to a reasonable doubt as to the guilt of the applicant. I refer in this connexion to a line of "fresh evidence" cases : R v Mareo (No. 2) [1946] NZLR 297, R v Calendar [1947] 290, Re Occonor [1953] NZLR 584, R v Barr (Alistair) [1973] 2 NZLR 95, R v Dick [1973] 2 NZLR 669 and R v Baker [1976] 1 NZLR 419. I must, however, point out that these authorities relate to the reception of fresh evidence and the use which may be made of such fresh evidence in an appeal against conviction to the New Zealand Court of Appeal for the purpose of granting a new trial. However, it is my respectful view that what is said in those authorities about fresh evidence having to be credible or leading to a reasonable doubt as to the guilt of a defendant, also apply to an application for a retrial under section 108 of our Act. There is the comment in **Maxwell's Summary Proceedings and Police Court Practice, p.110** in relation to section 75 of the Summary Proceedings Act 1957 (NZ) which says :

> "The rules of the Court of Criminal Appeal relating to the "granting of a new trial are more appropriate to the granting "of a rehearing of an information for a summary offence".

The fresh evidence that the applicant says he was not aware of at the time of the trial but which has come to light since the trial is the evidence his co-accused, Ioane Soosemea. In his affidavits, Ioane Soosemea says that on the night of the incident from which the charges have arisen, he heard the applicant calling out "who stoned the house" and when he came to the

front of the house, he saw the applicant in a white shirt proceeding down the road. So he ran after the applicant and when he came to the applicant he fell down and when he got up again the applicant had gone on. So he followed and found the applicant standing under a mango tree with a whole group of people near the road. He also saw women and a girl Elsie surrounding a boy near the road and so he asked that boy if it was him who stoned the house and the boy replied yes. Ioane says he then punched the boy on the jaw causing him to fall down. The girl Elsie then held his head and said, "Please Ioane he's my brother". So Ioane walked away. But as he was still angry, Ioane says he turned back to the boy as no one was paying attention to him and he punched the boy again and he saw that his punch really affected the boy. At that time he saw the applicant on the road being led away by Ieti and so he followed them home.

Now Ioane Soosemea lives with the applicant in the same house at Lalovaea and is a relative of the applicant. He also says in his affidavits that when his solicitor asked him during the trial as to what had happened he replied he knew nothing. He also says that prior to the trial in May this year, he met one Taylor Leota who said to him that he is a brother of the victim, Faitala Leota. Taylor Leota then, according to Ioane, told him that his family had agreed to put the blame on the applicant. Ioane also says that during the trial a woman whom he thinks is named Tofi, came to him one afternoon as he was sitting outside the Courthouse and said to him not to worry as everything will be on the applicant's head. Then about one or two days after the trial, as he was sitting outside his family's house, Ioane says he saw Filivaa a boy of the victim's family. So he whistled to him and went over and told Filivaa whether he understood that it was him (Ioane) who assaulted his brother. Filivaa replied it was too late as his

family has decided to put the blame on the applicant. Ioane then says in his affidavit that about five days after the trial, he met the victim on the road and he asked the victim whether he knew that it was him (Ioane) who assaulted the victim. Ioane also says that he was never interviewed by his previous counsel in his office prior to the trial. He was only interviewed by his previous counsel about two days after the trial when he was asked to relate what the witness Tofi had said to him outside the Courthouse.

To support the fresh evidence now given by Ioane Soosemea, the applicant gave evidence himself and also called other witnesses. Essentially what the applicant says is the fresh evidence from Ioane Soosemea which the applicant has adduced in the present application for a retrial. The witnesses Onofiamaalii Falaniko and the applicant's wife both testified that Ioane told them the same story about his involvement in this incident as Ioane has now related to the Court. In cross-examination of Onofiamaalii Falaniko by counsel for the respondent, that witness admitted he did see the assault committed by the applicant but then he changed his evidence in re-examination. The witnesses Lusa Taiulu and Tito Latu were also called by the applicant to testify that one afternoon during the trial while they were sitting outside the Courthouse with Ioane Soosemea, a woman with brown hair came and said to Ioane not to worry as everything has been blamed on the applicant. Lusa Taiulu also says that woman has long hair.

Now the evidence for the applicant is strongly denied by the witnesses for the respondent. According to Elsie Esera whose evidence was accepted by the Court at the trial, all she said to Ioane on the night of this incident was "Do you have any brains". She did not mention Ioane's name as she did

not know his name at that time. This witness also says that on Sunday morning, 14 May this year, she was at Lynn Netzler's store at Motootua to do shopping when Ioane called out to her to come over and talk with him. Ioane then said to her about her family trying to put the blame on the applicant even though the applicant did not assault the victim. Elsie says she walked away from Ioane as she did not want to hear anything from him again. Then again on Thursday evening, 26 May this year, Elsie says she was on her home from school when Ioane called out again to her infront of their house. But Elsie replied she did not want to talk to him again and she continued on walking to her home.

The victim also gave evidence. In his affidavit he says that about a week after the trial as he was on his way home with another boy, Ioane whistled to them from infront of the applicant's house and told them to wait. Ioane then came out of the house and asked him whether he knew who assaulted him and he replied yes. Ioane then accused the victim of not telling the truth and said that it was him (Ioane) who banged Elsie's head against the power pole and pulled him away from Elsie and eventually assaulted him. The witness Tofi Esera who was also called for the respondent denies that she ever talked to Ioane Soosemea outside of the Courthouse nor tell him not to worry as everything will be on the applicant's head. Tofi also says she had no desire to talk to Ioane because of his involvement in the assault on the victim. The Court also noticed when this witness was giving evidence that she has black hair and not brown hair and her hair is also short and not long. The witness Filivaa for the respondent also denies that he said to Ioane you are late as our family has decided to put the blame on the applicant. What Filivaa says is that about a week after the trial as he was walking past the applicant's house, Ioane whistled to him

to stop. Ioane then said to Filivaa that it was him (Ioane) who assaulted the victim. And when Filivaa replied he was trying to cover up for the applicant, Ioane insisted that it was him (Ioane) and not the applicant who assaulted the victim. Filivaa also says that on Thursday, 12 May this year he met Ioane outside of the Courthouse and when he asked Ioane about the Court proceedings, Ioane replied that he does not know why he was involved as he did not assault the victim. Filivaa also says that Ioane told him that the only reason why he admitted to the Police that he assaulted the victim was because he did not want the applicant to be involved in the Court proceedings as he is a Member of Parliament. Since meeting Ioane at the Courthouse, Filivaa says he has met with Ioane again twice and Ioane said to him if the applicant goes to prison there will be no one to look after their family and Ioane was also concerned about the applicant's membership in Parliament. The witness Taylor Leota who was also called by the respondent denies that he ever told Ioane Soosemea not to worry that his family had agreed to put the blame on the applicant. He also says he knows that Ioane had approached other members of his family shortly after the trial and told them it was him (Ioane) and not the applicant who assaulted the victim.

I must say that after due consideration of the fresh evidence now given by Ioane Soosemea, there is no doubt in my mind that if the purpose of this evidence is to exonerate the applicant and place the whole assault on Ioane Soosemea, then the evidence is so incredible that it must be false. There was an abundance of credible evidence at the trial by eye witnesses including Elsie, Tofi and the victim that it was the applicant who assaulted and caused grievous bodily harm to the victim's chin. This is not a case where there was no direct evidence from believable eye witnesses. There were eye

witnesses as well as the victim whose evidence were heard and accepted by the Court. There was also the evidence from witnesses who came onto the scene after the assault on the victim by the applicant had started and the Court did not accept that those witnesses who arrived later on the scene were telling the Court all that they observed. It also appears incredible to the Court that since July 1993 when this incident took place Ioane Soosemea kept all this story to himself until May this year without telling the applicant or his wife about it even though they live in the same house and Ioane Soosemea was being jointly charged with the applicant with causing grievous bodily harm. The evidence by Ioane Soosemea, especially those parts where he says that members of the victim's family had told him not to worry as their family had decided to put the blame on the applicant, are all denied by those members of the victim's family. There is also the evidence of attempts by Ioane Soosemea to convince certain members of the victim's family that it was him and not the applicant who assaulted the victim. This evidence is not really denied by Ioane Soosemea. In fact I find Ioane Soosemea's actions soon after the trial when he went around telling members of the victim's family that it was him and not the applicant who assaulted the victim as consistent with what the witness Filivaa told the Court that Ioane Soosemea told him he was concerned about the applicant going to prison as well as his membership in Parliament. I was also not impressed with Ioane Soosemea in the witness stand. It must also be noted that there is nothing in the fresh evidence which Ioane Soosemea proposes to give that categorically denies the applicant's involvement in the two assaults which gave rise to the charges, and as related by eye witnesses like Elsie, Lisi, Tofi and the victim at the trial. In all I reject the fresh evidence now proposed by Ioane Soosemea as unbelievable and incredible. I also find that it has not been demonstrated that any

miscarriage of justice occurred in the first trial because of the absence of the fresh evidence Ioane Soosemea now proposes to give. The first ground of the application is therefore dismissed.

There is still no doubt in mind that it was the applicant who caused grievous bodily harm to the victim Faitala Leota. Ioane Soosemea was only acquitted of the charge of grievous bodily harm because there was doubt whether he was a party to the assault by the applicant on the victim resulting in grievous bodily harm. It appears from evidence accepted at the trial that Ioane Soosemea came onto the scene while the victim was lying unconscious on the road and the applicant had left the victim. Otherwise if Ioane Soosemea was assaulting the victim at the same time that the applicant was also assaulting the victim, then that would have been a joint assault and both Ioane Soosemea and the applicant would have been liable for the consequences. The reason is that they would be acting together and therefore aiding and abetting one another in inflicting grievous bodily harm on the victim.

Coming now to the second ground of the application, it is important to ask whether what happened here has resulted in a miscarriage of justice. After all not every defect or irregularity will result in a retrial. A defect or irregularity must, in the circumstances of the case, be shown to have resulted in a miscarriage of justice : see generally **Maxwell Summary Proceedings and Police Court Practice, p.110.** What happened here is that when the applicant was arraigned for pleading, his then counsel in accordance with normal practice where a defendant is represented by counsel, advised the Court that the charges be taken as read and the applicant's plea was one of not guilty to the charges. The two charges in this case were grievous bodily harm and assault. The applicant says he was never informed by his then

counsel at any time about the assault charge. It was only during the trial when his counsel made submissions towards the end of the trial that he realised that there may be another charge against him and it was after the trial that his counsel confirmed that there was an assault charge.

Now the applicant was represented at his trial by an experienced criminal lawyer. No doubt counsel, who was aware of the grievous bodily harm and the assault charges, had both charges in mind when conducting the defence for the applicant. Counsel had also entered a not guilty plea to both charges. When the applicant gave evidence at his trial, he denied assaulting "the girl". He said he was merely trying to arrest her. This is the girl the applicant was charged with having assaulted. The applicant also said at his trial that when he pulled at this girl he thought it was the victim and when he realised that it was a girl and not the victim he released her. The evidence by this girl which the Court accepted at the trial was that the applicant held her hair and pushed her head against an electric power pole.

So essentially the applicant at his trial denied assaulting the girl as he was merely trying to arrest her whereas the girl said the applicant pushed her head against an electric power pole. Whether or not the applicant knew of the assault charge, it is quite clear that he did deny that assault in his evidence and his counsel had also entered a not guilty plea to that assault charge. It just so happened that on the relevant evidence at the trial the Court accepted the girl's evidence as opposed to the applicant's evidence. So there was really no miscarriage of justice. I do not believe that the applicant's evidence on this part of the case would have been any different, if say, he had known of the assault charge. If it had appeared that as a result of the applicant not knowing the assault charge a miscarriage of justice had

occurred, this Court will have no hesitation in granting a retrial in respect of the assault charge. But there has been no miscarriage of justice. The second ground of the application is therefore also dismissed.

I would also add in conclusion that where counsel asks the Court to take the charges against a defendant as read and then enter a not guilty plea, counsel must, as his duty requires, inform the client as to the charges especially if there appears to be any doubt on the matter.

In all then, the aplication for a retrial is dismissed.

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CHIEF JUSTICE