

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NOS: S.294 & 295/96

BETWEEN: THE POLICE

Informant

A. N. D: IVANA FALE GASOLO of Vailuutai

Defendant

Counsel: P Tanielu for prosecution
T K Enari for accused

Hearing: 21 January 1997 & 21 February 1997

Judgment: 26 February 1997

JUDGMENT OF SAPOLU, CJ

The accused is charged under section 79 of the Crimes Ordinance 1961 with two charges of causing grievous bodily harm.

The first of these two charges is that at Vailuutai on 29 November 1995, the accused wilfully and without lawful justification caused grievous bodily harm to Panapa Leitu, a male of Vailuutai. Panapa Leitu is also known by the name Kivi. The second charge is that at Vailuutai on 29 November 1995, the accused wilfully and without lawful justification caused grievous bodily harm to Aukuso Alama (Aukuso) a male of Vailuutai.

On Wednesday, 29 November 1995, Kivi, Aukuso and Alesi came from Vailuutai

to sell their sacks of dried copra at Vaitete. When they returned to Vailuutai they found their copra drier had been burnt by someone. So they blocked with stones a track which passed through their land and used by the village. It appears that Kivi, Aukuso and Alesi were also drinking alcohol at that time. About mid-afternoon the accused and boys of his family came by and Aukuso told them that the track was prohibited. There followed an exchange of words between the accused, Aukuso and Kivi. As the accused and his relatives continued seaward on their way, the accused pulled out his pistol and discharged it twice in the air. The accused and his relatives then went and played volleyball at the place of the accused's relative Fale Gasolo. It appears that after the volleyball game, a quarrel took place in the vicinity of where the volleyball game was played between Alesi, the relative of Kivi and Aukuso, and the boys who were relatives of the accused. Fale Gasolo stopped the quarrel and took Alesi inland to his family.

When Fale Gasolo and Alesi came to the track blockage where Kivi and Aukuso were consuming alcohol, Kivi and Aukuso assaulted Fale who ran back to where the accused and his relatives were. Kivi and Aukuso pursued him, throwing stones at him. There are somewhat different versions as to what precisely happened when Kivi, Aukuso and Fale came to where the accused and the other boys of his family were. I find the evidence of Kivi as to what happened rather confusing. The accused in his caution statement which was made on 4 December 1995 to the police investigating officer, corporal Aneteru Tago, says :

"Then Fale ran to where we were, followed from behind by Kivi, Aukuso and Alesi who were throwing stones at him. I observed Lauano trying to stop those boys, but he was not able to stop them. When Fale arrived, he held me and tried to lead me seaward, but Kivi came through and punched me.

"I saw that it was going to be trouble, I therefore pulled out my pistol and fired it several times "(faapapa)" at Kivi. I did not count the number of bullets that I fired at Kivi. After that and when Kivi had fallen down, Aukuso whom Lauano had tried to stop came. So I fired other bullets at Aukuso and injured him. I know that I fired all the bullets in my pistol at those boys".

In his oral testimony, the accused says that Kivi and Aukuso were chasing Fale throwing stones at him. Alesi who was some distance behind from Kivi and Aukuso was carrying a bush knife. The accused says that when Fale reached him he put his hands around him but Kivi then came and punched him with a stone he was holding in his hand. He felt that trouble was about to happen and he fired his pistol three times at Kivi and Kivi stopped. He also saw Aukuso with a stone in hand approaching, so he fired his pistol at Aukuso.

The evidence given by the witness Fale is to the effect that he was struggling with the accused and was holding the accused's pistol when the pistol went off. I must say that I was not at all impressed with this witness and his demeanour. He was hesitant and often was not forthcoming with his answers. I do not believe the evidence of this witness which suggests that the accused's pistol went off accidentally while he was struggling with the accused. It is also too good to be true that the pistol was discharged accidentally as Fale tries to suggest, because all the shots found their mark as both Kivi and Aukuso sustained several gunshot wounds. The accused's own evidence shows that the pistol did not go off accidentally when he shot Aukuso.

The injuries sustained by Kivi and Aukuso were no doubt serious as the medical evidence shows. In his medical reports, Dr Lealiifano Iopu Tanielu who examined both Kivi and Aukuso, states that Kivi sustained three gunshot wounds

on the chest and one on the left shoulder. All those wounds were associated with Kivi coughing up blood. An X-ray carried out on Kivi revealed aggravated lung contusions. As for Aukuso, Dr Tanielu says in his report that he found a gunshot wound at the right shoulder area and an X-Ray showed a bullet lodged above and behind the spine at the shoulder area. There was also another wound on the right side of the lower jaw bone and that wound entered the victim's mouth and split his tongue into almost equal halves. As already stated these were undoubtedly serious injuries.

Now the defence raised for the accused is one of self-defence, namely, the defence of Fale by the accused. I do not accept this defence as I am of the view that the accused did not shoot at Kivi several times in order to defend Fale but because he was provoked by Kivi who punched him. The evidence shows that the accused was not doing anything to defend Fale when he observed Fale being chased by Kivi and Aukuso who were also throwing stones at Fale. Alesi was some distance behind Kivi and Aukuso. Up to the point in time that Fale put his hands around the accused, the accused was still doing nothing against Kivi who was following Fale. It was only when Kivi punched the accused that the accused reacted and pulled out his pistol and shot Kivi three times. In his caution statement the accused says that Fale held him and tried to lead him seaward but Kivi arrived and punched him so he pulled out his pistol and fired it at Kivi. In his oral testimony the accused also says that it was when Kivi punched him that he shot Kivi three times. In my view that evidence demonstrates that the accused shot at Kivi in retaliation to the provocation from Kivi rather than in defence of Fale. I am also of the view that the accused was not acting in defence of himself when he shot at Kivi but was acting out of anger because Kivi

had punched him. There is also no evidence of a sustained attack by Kivi on the accused. I have also observed both the accused and Kivi and the accused is physically taller than Kivi. He was also 23 years old at the time of this incident while Kivi was 20 years of age.

In relation to Aukuso, the accused says when Kivi fell down after being shot he saw Aukuso holding a stone coming towards him. He therefore shot Aukuso. As the evidence, particularly the medical evidence, suggests, the accused must have shot Aukuso twice. And there is no evidence that the accused shot Aukuso in order to defend or protect Fale. According to the accused, Aukuso was approaching when he shot him. The evidence also shows that instead of the accused trying to retreat or take some other avoiding action, he immediately shot Aukuso twice when he saw him coming. In my view the accused was in effect counter-attacking rather than taking defensive action to protect himself.

The defence of self-defence which has been raised on behalf of the accused cannot succeed. I conclude that the accused was acting wilfully and without lawful justification when he shot at both Kivi and Aukuso causing them seriously bodily harm.

The two charges of causing grievous bodily harm have been proved beyond reasonable doubt.

As for the remaining charge, that the accused presented a loaded firearm at Aukuso Alama without lawful, proper and sufficient purpose, the evidence did not really address this charge like two other charges under the Arms Ordinance

1960 which have been dismissed. The present charge is also dismissed.

T. F. M. Sapala
.....
CHIEF JUSTICE