

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

CR NO. 717/16

POLICE

v

TEREPAI TANGAPATORO NGAATA

Hearing: 28 March 2017

Counsel: Ms A Herman for Crown
Mr N George for Defendant

Judgment: 19 April 2017

RESERVED DECISION OF TAORO JP

[1] The Defendant, Terepai Tangapatoro Ngaata is appearing before Court today for a reserved decision on a charge of assault with intent to injure under Section 213 of the Crimes Act 1969 where it is alleged that on the 14th August 2016 at Avarua the Defendant, Mr Terepai Tangapatoro Ngaata did assault Mr Filipino Schmidt of Takuvaine with intent to injure. This charge carries a maximum penalty of up to 3 years imprisonment.

Representations

[2] The Defendant is represented by Counsel Mr Norman George

[3] The Crown is represented by Counsel Ms Alex Herman

Elements of the charge

[4] All general and specific elements of this charge were not disputed.

Issues

[5] The Defence has raised two issues:

That the assault by the Defendant Terepai Tangapatoro Ngaata on the victim Filippo Schmidt were:

- a) Consented by the victim.
- b) An act of self-defence

[6] Before the Defendant can be found guilty the Crown is required to prove the charge beyond reasonable doubt.

Brief account of what happened

[7] On the early morning of 14th August 2016 at about 12.15 a.m. Ms Natalia Joseph (the victim Filippo Schmidt's partner) received a call on her mobile phone that one of her partner's cousins has been beaten up at the Hidies Bar. Filippo and her partner drove to Hidies Bar to try and find out what has happened. Upon arriving at Hidies Bar, Filippo went around asking as to what has happened and who beat his cousin up. He asked a group of 4-5 boys who were behind the Energy Centre Petrol Station and they pointed towards Joshua MacDonald's vehicle who was parked on the opposite side of the road, Joshua MacDonald and his partner Maria Anthony were in the vehicle. Filippo went over to the vehicle, pulled the key out of the ignition and asked Joshua MacDonald what has happened. Joshua asked for his key back and the two started arguing. Ms Natalia Joseph went over and asked Joshua what was happening and he told her that Filippo had taken the key for his vehicle. She asked Filippo to give the key back and he was about to when the Defendant Terepai Ngaata took a blind spot punch on Filippo's face. Filippo then fell on the concrete footpath hitting his head and became unconscious, the Defendant continued to assault the

victim by stomping on his face 3-4 times. The Defendant claimed that the reason he punched the victim was because he would not give the key back and also that the victim asked him for a fight. He further claimed that he was scared of the victim due to his physical status and aggressive behaviour. The police arrived and the victim Filippo Schmidt was then taken to the hospital for treatment to the bruises around his head and facial area.

Facts

Victim Mr Filippo Schmidt

[8] About 12.15 a.m. on 14th August 2016 while at home his partner Natalia Joseph received a call on her mobile phone that one of his cousins' has been beaten up at the Hidies Bar. He and his partner went to Hidies Bar, he claimed that he was not drunk. Upon arriving at Hidies Bar he went looking for his cousin and then went around asking as to what has happened and the reason for beating his cousin up. He asked a group of boys behind the Energy Centre petrol station and they pointed at Joshua MacDonald who was sitting in his vehicle on the other side of the road. He then walked over to Joshua MacDonald's vehicle, pulled the key out of the ignition and they started arguing. All of a sudden he became unconscious. When he came around in the hospital all he could remember was pulling the key out of the ignition of Joshua's truck and Joshua asking for his key back, he could not remember being assaulted but he was in so much pain when he woke up. He claimed that he did not know the Defendant Terepai Ngaata before this time, he did not ask the boys for a fight, he did not talk to the Defendant, he did not ask the Defendant for a fight and he did not fight with the Defendant.

Ms Natalia Joseph

[9] At about 12.15 a.m. on 14th August 2016 she received a call on her mobile phone saying that one of Filippo's cousins has been beaten up at the Hidie's bar. She and Filippo went to Hidies Bar to find out what has happened. After a while upon arriving at Hidies she realized Filippo has gone so she went looking for him and saw him walking towards Joshua MacDonald's truck. She recognised Nigel and Andrew

as two of a group of boys standing behind the Energy Centre petrol station. She went over to Joshua MacDonald's truck and saw that Filippo and Joshua were arguing. She asked Joshua what has happened and he told her that Filippo has taken the key for his truck. She then asked Filippo to give the key back and Filippo was about to give the key back when the Defendant Terepai Ngaata took a blind spot punch at Filippo on the right side of his face, the punch was intense that Filippo fell and hit his head on the concrete footpath and was unconscious. Before this happened Filippo was standing about a hand distance in front of her and Joshua was standing behind her. After Filippo fell to the ground Terepai Ngaata stomped on his face about four times, the stomping was very intense. She pushed Terepai off and asked him to stop. While she went looking for the key Terepai came back and stomped on Filippo some more. She asked for help, Nigel came and helped find the key which they found under Filippo, she then gave the key to Joshua, Terepai did not help. Filippo was bleeding heavily from the back of his head. The police arrived and Filippo was unconscious but his mind was not all there. She claimed that Filippo did not say he was looking for Arorangi boys.

Ms Maria Anthony

[10] While in the truck with her partner Joshua MacDonald, Filippo Schmidt came and pulled out the key for the truck. She was sure that it was the Defendant Terepai Ngaata who punched Filippo. The punch was quite hard and Filippo fell to the ground. Terepai kicked Filippo's head about three times and these were quite hard too, she did not see Filippo get up and he was bleeding and unconscious. Natalia gave the key and they left. When questioned by Defence counsel about her signed statement when interviewed by the police "I didn't see Terepai punch Filippo" Ms Anthony told the Court that the day after the assault Terepai came to ask them not to say anything to the police about what happened, this is the reason why she said in her signed statement that "I didn't see Terepai punch Filippo". All she know of Filippo is that he is a Samoan and plays for Takuvaine but do not know him personally.

Probationary Constable Bernard Tararo

[11] Upon arriving at the scene he found the victim, Mr Filippo Schmidt crying and bruised, he separated the victim's friend from the victim and then took him to the

hospital to be checked and treated for his injuries, he was not sure what actually happened.

Acting Sergeant Tereapii Tapoki

[12] When interviewing the Defendant on Monday 15th August 2016 she did not see any injuries on him. Defendant's statement submitted as Exhibit B. She took photos of the victim on Tuesday 16th August 2016, photos submitted as Exhibit C.

Terepai Tangapatoro Ngaata

[13] He went to Hidies about 9 p.m. and drank two bottles of stubbies. Filippo Schmidt's cousin got into a scuffle with Nigel over a girlfriend, there was no fighting. On the way to Joshua and Maria's truck at about 12.30 a.m. Filippo was already at the truck, he saw Filippo pull the key from the truck. He asked Filippo to hand over the key and Filippo said no and told him that he wanted to have a fight with him. The Defendant admitted that he punched Filippo and stopped punching him when Filippo stopped returning punches, he admitted kicking Filippo. He said Natalia Joseph was nowhere near at the time. He told the Court that when he was challenged to fight by Filippo he just wanted to protect himself, he was scared of Filippo who was in an angry mood. Defendant regretted what happened and apologized to Filippo. He did not kick the victim a second time. Upon cross-examination the Defendant admitted being angry with Filippo for not giving the key back so he punched Filippo on the face and Filippo punched him back. When Filippo fell and became unconscious he got scared. Told the Court that he did not pressure Joshua MacDonald and Maria Anthony to cover up.

[14] In his signed statement the Defendant stated that when asking for Filippo for the keys Filippo told him that he want to fight before giving the keys back. He also stated that they had a fight and were throwing punches at each other. He further stated that the victim was in a bad mood and looking for trouble and wanted to fight with someone from Arorangi. When asked as to what were the main reasons he gave the victim a hiding he stated that because Filippo pulled the keys for the truck and was asking him for a fight because they were from Arorangi.

Mr Joshua MacDonald

[15] Filippo Schmidt came over to the truck and asked him if he was from Arorangi, Filippo did not ask him for a fight. Filippo took out the key of the truck and when he got out of the truck Filippo was on the ground. He didn't see what happened. Filippo's behaviour was he wanted to fight.

Issues

[16] Whether the victim Mr Filippo Schmidt did consent to the assault?

[17] Whether the assault was in self-defence?

Analysing the Facts

[18] There is no dispute that the Defendant, Terepai Tangapatoro did assault the victim Filippo Schmidt. The Defendant openly admitted that he assaulted the victim by punching him and stomping on his facial area after he fell to the ground.

[19] The issues are:

a) Whether the victim Mr Filippo Schmidt did consent to the assault?

[20] The defence of consent does not dispute that a criminal act took place; rather, it states that the conduct was permitted by the victim. Defence counsel quoted from Adams Criminal Law Student's version 4th Edition where actual consent will be a defence, based on genuine belief but mistaken". Defence is claiming that the Defendant had fear of the victim and believed that he will be assaulted"

[21] The victim Mr Filippo Schmidt told the Court that when he spoke to the group of boys he did not ask them for a fight. They did not make mention of the Defendant instead pointed to Joshua MacDonald the reason he went over to Joshua. He claimed that he did not ask for Joshua for a fight which was confirmed by Joshua in his evidence. Filippo claimed that he did not talk to the Defendant at all, did not ask him for a fight and did not fight with him.

[22] Ms Natalia Joseph, the victim's partner told the Court that her partner was a hand's distance in front of her while Joshua MacDonald was behind her when the Defendant, Terepai Ngaata took a blind shot punch at her partner, the punch was so intense that Filippo fell to the ground. There was no evidence of the Defendant being around and arguing with Filippo before the assault.

[23] Mr Joshua MacDonald told the Court that Filippo Schmidt came to their truck and pulled out the key, Filippo did not ask him for a fight although his behaviour was he wanted to fight. When he got out of the truck Filippo was on the ground, he didn't see what happened. He also made no mention of the Defendant being around and arguing with the victim before he went on the ground.

[24] The Defendant claimed that the victim Filippo Schmidt asked him for a fight when he asked for the keys back the reason he punched him, he was angry that Filippo did not give the keys back. He claimed that Joshua was in the truck while him and the victim were arguing and fighting. In his verbal evidence he told the Court that he was scared of the victim due to the victim's physical status and aggressive behaviour the reason he punched the victim.

[25] It is in my opinion that if Filippo had wanted to pick a fight it would have been with Joshua MacDonald but in his evidence Joshua MacDonald told the Court that Filippo Schmidt did not ask him for a fight, Filippo did ask if he was from Arorangi and that Filippo did look like he wanted to fight but did not ask him for a fight.

[26] The victim Filippo Schmidt claimed that he never met or spoke to the Defendant Terepai Ngaata at all that evening. None of the witnesses gave evidence of seeing the Defendant talking or being with the victim Filippo Schmidt before the assault took place. Surely if the Defendant had been arguing with the victim before the assault Joshua MacDonald would have seen or even heard them arguing because the assault took place right next to his vehicle and the Defendant did state that Joshua was there when they were arguing and fighting. Joshua however gave evidence that he did not see what happened, my understanding of this evidence is that he did not see the Defendant and the victim arguing or fighting although the Defendant admitted to punching the victim the reason he was lying on the ground.

[27] Did the victim Mr Filippo Schmidt consent to the assault?

[28] Was there genuine belief but mistaken". Defence is claiming that the Defendant had fear of the victim and believed that he will be assaulted"

[29] Based on the evidences submitted in Court, the victim Filippo Schmidt claimed that he did not know or spoke to the Defendant Terepai Ngaata before the assault. The only person he was arguing with was Joshua MacDonald over the key for the vehicle, and yes he did show aggressiveness towards Joshua MacDonald but did not ask for a fight. There was no evidence to support that Filippo showed aggressiveness towards the Defendant and asked him for a fight except that of the Defendant. The key witness Joshua MacDonald claimed that he did not see what happened before finding the victim on the ground unconscious which implied that he did not see the Defendant and the victim arguing or punching each other and yet the Defendant claimed that Joshua MacDonald was there when him and Filippo were arguing and when they were throwing punches at each other.

[30] I therefore find that the victim Filippo Schmidt did not consent to be assaulted by the Defendant Terepai Tangapatoro Ngaata.

b) Was the assault by the Defendant Mr Terepai Ngaata on the victim Mr Filippo Schmidt in self-defence?

[31] When the victim Filippo Schmidt asked a group of boys about the beating of his cousin, they pointed to Joshua MacDonald who was in his pickup truck with his partner the reason why Filippo Schmidt went over to Joshua MacDonald. They did not point to the Defendant and the Defendant was never mentioned by any witnesses as being spoken to by Filippo Schmidt.

[32] Ms Natalia Joseph told the Court that she saw the Defendant Terepai Ngaata take a blind spot punch at Filippo on the right side of Filippo's face, the punch was intense that Filippo fell and hit his head on the concrete and became unconscious. This happened when she was standing between Filippo and Joshua as she was trying to get the key of Joshua's vehicle from Filippo. She also told the Court that after Filippo fell to

the ground the Defendant stomped on Filippo's face about four times, the stomping was very intense. She pushed the Defendant off Filippo and asked him to stop and when she was looking for the key the Defendant came back and stomped on Filippo some more.

[33] In Ms Maria Anthony's evidence she told the Court that she saw the Defendant punch Filippo and after Filippo fell to the ground and did not get up, she also saw the Defendant stomp on him. There was no mention of Filippo punching the Defendant back.

[34] The Defendant however told the Court that Filippo Schmidt wanted to fight him when he asked for the key for the truck. The Defendant further stated that the reason he punched Filippo was because he was angry with Filippo for not giving back the key for Joshua MacDonald's truck, he also stated that another reason was because he was scared of Filippo.

[35] He claimed that Natalia Joseph was not with them when the alleged fight between him and Filippo Schmidt happened. He did confirm that he stomped on Filippo about 3 to 4 times which are the same number of times stated by Natalia Joseph in her evidence which implied that she must have been close by during the time of the assault to know as to how many times the Defendant Terepai Ngaata stomped on Filippo.

[36] The Defendant also claimed that Filippo did throw punches at him and yet when the Defendant was interviewed by the Police two days after the assault, the Acting Police Sergeant noticed that the Defendant did not have any injuries. If Filippo had thrown punches at the Defendant, being of bigger built than the Defendant, the Defendant would have sustained some form of injuries but there were no evidence to show that the Defendant did sustain any injuries.

[37] The photos of the injuries sustained by the victim submitted as Exhibit C, showed the seriousness of the level of injuries inflicted on the victim as a result of the assault.

Was the assault on Mr Filipino Schmidt by the Defendant Mr Terepai Tangapatoro Ngaata in self-defence?

[38] If the victim Filipino Schmidt had thrown punches at the Defendant as claimed by the Defendant, being of bigger built and in an aggressive behaviour, the Defendant would have sustained some form of injuries, maybe more serious than that of the victim. When interviewed by the Police a day after the assault, the Police Officer told the Court that he noticed that the Defendant did not have any injuries, there was also no evidence to show that the Defendant did sustain any injuries.

[39] The victim claimed that he did not know the Defendant or spoke with him before the assault. Both Natalia Joseph and Maria Anthony told the Court that it was the Defendant who took an intense blind spot punch on the victim causing him to fall to the ground, they both claimed that the Defendant stomped on the victim while he was on the ground unconscious. Mr Joshua MacDonald stated that he did not see what happened except the victim on the ground.

[40] What is of concern to the Court are the level of injuries inflicted on the victim as according to the photos of the victim's injuries, these were quite horrific, and, the continuous assault on the victim when he was unconscious.

[41] I therefore find that the assault on the victim Filipino Schmidt by the Defendant Mr Terepai Ngaata was not in self-defence.

Conclusion

[42] In conclusion I find that Crown has proven this charge beyond reasonable doubt therefore the Defendant Mr Terepai Tangapatoro Ngaata is found guilty as charged.

Tangi Taoro JP