

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAS. 571/93, 572/93  
S. 93/94BETWEEN: POLICEInformantA N D: LESA FARANI POSALA of Lalovaea  
and IOANE SOOSEMEA of Lalovaea  
and SaleaumuaDefendantsCounsel: K. Latu for Prosecution  
T.K. Enari for DefenceHearing: 10th, 11th & 12th May 1994Decision: 13th May 1994

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DECISION OF SAPOLU, CJ

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The two accused in this case are jointly charged with having wilfully and without lawful justification caused grievous bodily harm to Faitala Leota at Lalovaea on Saturday night, 31 July 1993. The accused Lesa Farani Posala (hereinafter referred to as "Lesa") is also charged with assaulting Elsie Esera at the same place at the same time. The other accused, Ioane Soosemea, will hereinafter be referred to as "Ioane" and Faitala Leota will hereinafter be referred to as "the victim".

Lesa is 44 years of age, Ioane is 28 years of age and the victim is 13 years of age. According to the evidence by the victim, he was walking along with his brother Tu'i Esera to buy something from a shop at Lalovaea

when dogs barked and attacked them in front of Lesa's house. They threw gravel at the dogs. Lesa's house was hit on the wall and a piece of gravel also went inside the house. The victim and his brother then continued on their way when shortly thereafter they heard someone whistling to them. It was Lesa. He was running towards the victim and his brother. The victim says when Lesa reached him and his brother he asked them who threw at the dogs and the victim replied it was him. Lesa then punched the victim but missed and the victim ran away. Lesa followed after the victim and called out to some boys to give chase and catch the victim and bring the victim to him. When the victim came to the main road he continued to run in the easterly direction to Malifa. He soon met his aunties Elsie and Tofi and his cousin Lisi who were returning home from choir practice at Aai-o-Niue.

The victim then told Elsie that he was being chased by a man to be assaulted and he was scared of being assaulted by that man. Shortly afterwards Lesa appeared. Despite attempts by Elsie to pacify and appease him, Lesa assaulted the victim. The victim says he was holding on to Elsie from behind. Lesa then held the victim's head and that of Elsie and pushed their heads against the electric power pole. That separated the victim from Elsie and Lesa then punched the victim on the chin causing the victim to faint and fall down unconscious on a hibiscus hedge. The victim says it was a strong punch and as he was down he felt kicks from Lesa.

The victim was later taken to the hospital the same night where he was admitted for two weeks. According to the victim two of his teeth fell off and he also sustained fractures to his jaw as a result of the assault by Lesa. His teeth were wired by a dentist and he had that wiring on for five to six months.

That is the evidence by the victim.

Now the witnesses Elsie Esera, Tofi Esera and Lisi Esera called by the prosecution all testify that on the night of this incident, they were attending a choir practice at the Aai-o-Niue. At the end of the choir practice at about 9.00pm they returned home to Lalovaea. As they were walking along the footpath of the main road at Lalovaea, they saw the victim running in front of Sefo Pua's store towards them.

According to Elsie, she saw the victim being chased by three other boys. The victim then rushed to her as if to seek protection and said he wanted to live as a man was chasing him. Elsie then asked the boys who were giving chase to the victim as to what had happened and they replied they were told by a man to catch the victim. Shortly afterwards Lesa appeared on the scene. He rushed over to the victim who was behind Elsie holding on to her back and left hand and tried to grab him. He then punched the victim twice but both punches missed. At this time the victim was saying please, please, please. Lesa then held Elsie's head, pulled her, and pushed her head against the nearby electric power pole. That caused Elsie to separate from the victim who was still holding on to her. Lesa then punched the victim again, while the victim was still saying please, causing the victim to fall on the hibiscus hedge. Lesa then stood up the victim and punched him again and the victim fell down again. Lesa again punched the victim after he fell down and then kicked the victim on the ground five times. Elsie says the three punches by Lesa that connected as well as the kicks all hit the victim on the chin. Ioane then appeared on the scene and delivered a punch to the victim and Elsie said to Ioane "whether he had any brain". Elsie also says that while Lesa was delivering kicks to the victim, the

witness Sefo Pua and another man came and tried to stop Lesa but Lesa could not be stopped. So those two men stood by and told Lesa several times that's enough. She also says that when Sefo Pua and the other man arrived, Lesa had already delivered about two kicks to the victim. Her evidence is also that where this incident took place although it was dark, was not too dark as the light of Sefo Pua's store nearby was on and likewise were the street lights on the opposite side of the main road.

According to the witness Tofi Esera, when they met Lesa on the road, she asked Lesa what was it for please. However Lesa did not reply but simply reached for Elsie's hair and pushed her head against the electric power pole causing the victim who was holding on to Elsie from behind to be free. Lesa then punched the victim on the jaw with his right hand causing the victim to fall down near the hibiscus hedge. Lesa with both hands then punched the victim twice on the chest and also delivered kicks to the victim on the ground. Tofi does not know where of the victim did the kicks land or how many kicks were actually delivered. She says that Lesa stopped assaulting the victim when he was willing to stop. After Lesa had assaulted the victim Ioane appeared and delivered a kick to the victim.

Tofi also says that she is not sure whether Sefo was present while Lesa was kicking the victim on the ground as many people had crowded on to the scene by that time and encircled Lesa and the victim. She also says that at one time she called to Lesa, please you are a Member of Parliament but Lesa replied why mention the Member of Parliament.

Tofi and other people took the victim to the hospital that night. There was blood coming from the victim's mouth and he was unable to talk.

The witness Lisi says that when she, Elsie and Tofi first met the victim on the night of this incident in front of Sefo Pua's store, he appeared to be looking for protection and he was calling out that he wanted to live. When Lesa arrived, Elsie had already had her hands around the victim. Lisi says that Lesa was punching the victim while the victim was hanging on to Elsie saying please, please, please. Lesa then pulled Elsie and the victim and collided their heads against the nearby electric power pole causing the victim to be separated from Elsie. Lesa then punched the victim and the victim fell down. He punched the victim again. He punched the victim more than once. These punches landed on the victim's right jaw. According to Lisi, Lesa then kicked the victim lying on the hibiscus hedge more than once. Many people came by and watched Lesa assaulting the victim but no one tried to stop Lesa. Someone, however, said to Lesa that he is a Member of Parliament. Then Ioane arrived and delivered more than one punch to the victim while on the ground. Lisi and other people then took the victim to the hospital. At that time there was blood on the victim's face. Lisi also says that where this incident took place was not too dark as the light of Sefo Pua's store nearby was on.

The evidence by the next witness Rasela Sami called by the prosecution did not impress me as reliable, so I place no reliance on her evidence. She says that she saw Lesa punching and kicking a young boy and then stood on the boy's mouth and throat. But there are sufficient inconsistencies between her evidence in chief and her evidence in cross-examination to satisfy me that it is unsafe to accept her evidence. I was also not impressed by her demeanour.

The next prosecution witness Tu'i Esera, the brother of the victim, gave evidence similar to that of the victim as to what happened when they

arrived in front of Lesa's house and were attacked by dogs and he and the victim threw gravel at the dogs. He says Lesa came out of his house and asked who was throwing at the dogs and when the victim replied it was him, Lesa punched the victim twice. The victim then ran away and Lesa gave chase. Tu'i then says that when he arrived at the scene of this incident, he saw his brother being punched twice by Ioane and then Lesa punched the victim on the mouth and the victim fell down. Lesa then kicked the victim on the chest. However, in cross-examination Tu'i says that when he arrived on the scene, Lesa was assaulting the victim and then Ioane came in and punched the victim on the mouth. Ioane then left the scene with Lesa. I have reservations about the correctness of this witness's observations given the inconsistency in his description of the sequence of events of this incident in examination in chief and in cross-examination.

The next prosecution witness Sefo Pua says that on the night in question he was talking with his friend Ieti Jennings in front of his store at Lalovaea when he heard someone called his name. When he arrived at where this incident was taking place he was shocked when a boy fell down right beside him. He seemed to have seen someone bending down and punched the boy who fell down but he did not see who it was. So he left the incident in case he got hurt himself. At that time he saw his friend Ieti Jennings with his hands around Lesa leading Lesa away. Sefo also says he is well acquainted with Lesa. When asked by the Court about Ioane, Sefo says Ioane only punched the boy once and then left with Lesa.

I must say that I was not impressed with the demeanour of this witness. I do not believe he is telling the whole truth. He seems to be saying that when the boy was punched right next to him by an unknown person and fell down

Lesa was being led away by Ieti. He then says that Ioane punched the victim once and then left with Lesa. If that is true then either someone other than Lesa or Ioane punched the boy who fell down or Sefo is trying to insinuate or imply that it was Ioane who punched the victim. I disbelieve the expressed evidence by this witness as well as the insinuation and implication he is trying to put forward. I think this witness is not telling the whole truth about what he observed.

According to the witness Ieti Jennings he is well acquainted with Lesa as he visits Lesa's place whenever he comes to Samoa from New Zealand. On the night of this incident, he was talking with his friend Sefo Pua at the latter's shop at Lalovaea when he was shocked by the voice of a woman screaming "please Farani". He ran to where the voice came from and saw a boy fallen on one side of a hibiscus hedge about a foot high. At that time Lesa was on the other side of the hibiscus hedge. Lesa then stepped over the hibiscus hedge as this boy was still lying down and Ieti says he then grabbed Lesa and said to him it is me, Ieti. The boy was then stood up and he appeared alright. He was led away by some women and shortly afterwards Ieti says he heard the sound of a person falling down and he saw someone actually falling down. A car arrived and illuminated with its lights a boy lying on the road with blood coming from his right jaw. So Ieti then told the people who were crowding near the boy to take him to the hospital.

Ieti also says that when the boy was led away from the hibiscus hedge, Lesa said to him that someone stoned his house while matais were present and Lesa's children were almost hit by a stone. Lesa at that time appeared concerned for his children and the matais in his house. Ieti then led Lesa away and at that time a woman was calling out obscene words to Lesa while the boy was still lying on the road.

As with the witness Sefo Pua, I do not believe that Ieti Jennings is telling the whole truth about what he observed at this incident. It appears clear to me that these two witnesses in their evidence are trying to imply that it was not Lesa who inflicted injuries on the victim. The implication is rejected.

The Police investigating officer, Sergeant Lautolo Misi, was also called to give evidence. He says that when he interviewed Lesa at the Apia CIB on 1 August 1993, Lesa denied that he assaulted the victim. He told Sergeant Lautolo that he gave chase to the person who threw stones at his house as he wanted to confirm the identity of the stone thrower and to ask him as to why he had stoned Lesa's house. When he caught up with the boy who threw stones at his house Lesa said a woman tried to remove the boy from him. Lesa was able to put his hands around this boy but the boy fell onto a hibiscus hedge and Lesa fell onto the boy while trying to fall away from the boy. Lesa also told Sergeant Lautolo that there was time when the boy fell down but he did not know why he fell down. Sergeant Lautolo also says that when interviewing Lesa he noticed that Lesa's right hand was not in a "good condition" and his right toes were swollen. When questioned about the swelling on his right toes, Lesa replied that it might have come about because of the previous night's incident but was uncertain about it. Lesa denied that he ever kicked the victim.

Sergeant Lautolo also interviewed Ioane and Ioane stated that he punched the victim only once as he was misbehaving towards Lesa and the victim fell down. When confronted by the Police Sergeant with this admission from Ioane, Lesa asked to put the whole blame on Ioane's neck.



The prosecution also called Dr Manutai Ualesi, the dental practitioner who examined the victim on 31 July 1993. His evidence was that he found a "comminuted fracture" of the victim's lower jaw on the right side and the front left part of the jaw. Now a "comminuted fracture" of a bone means the bone is splintered or broken into many small pieces. The doctor says that the surrounding tissues were pierced and the muscles were also affected. In the doctor's opinion such a fracture as he found on the victim's jaw could only have been caused by hitting the jaw with a stone or striking the jaw with a stick or from five or several hard punches as one punch would be inadequate to cause such a fracture. He also says that the force which caused the fracture on the right side of the jaw could have also caused the fracture on the left front part of the jaw. He then says that the comminuted fracture in this case was a serious injury. He also says there have been more serious cases of fractured jaws than this one.

By way of treatment, interdental and intermaxillary fixation were done to ensure the realignment of the broken bones and thus restore the normal functions of the upper and lower teeth when the mouth is closed (occlusal functions of the mouth). As I understand the doctor's evidence this means the victim's mouth and teeth were wired and locked. The victim was also placed on a fluid diet for at least five weeks to ensure proper healing of the fractured portions of his mouth. The doctor says that in cases of broken jaws the patient would be on fluid diet for three to six weeks. In this case it was at least five weeks. So it appears this fracture is in the upper level of the period allowed for a patient with a fractured jaw to be on fluid diet.

Apart from the splintered fracture, the victim also had lacerations on the gingiva which is the gum lining the mouth and the base of the teeth

and there was profuse bleeding from both sites of the splintered fracture. The victim was also in real pain on the night he was brought into the hospital.

Now that is the evidence for the prosecution.

For the defence, Lesa gave evidence but not Ioane. According to Lesa, on the night of this incident he had just started watching television in the sitting room of his house at Lalovaea with other matais when the dogs started barking in front of his house. He saw two boys standing outside about to swing at the dogs. A stone then struck the wall of his house and another stone came into the house and just missed the head of a school girl who was doing her homework by one and half feet. He then came out to see who were the boys who had thrown the stones as he wanted to identify them and bring them before the Court. Lesa says at that time he was not angry but sad, and frightened. He called out who threw the stones but the stone thrower ran and stood at the bridge. So he followed him with bare feet. Then suddenly Ioane tripped in front of him. Lesa kept on following the stone thrower and then told some boys to catch the fleeing stone thrower. He wanted to catch the culprit, bring him to his house and then called the Police. Then these boys told Lesa that the boy he was chasing was coming with his mother and relatives. Lesa then met the victim and his relatives in front of Sefo Pua's store and Lesa wanted to say something to the victim but a girl intervened and asked Lesa as to why he wanted to do something to the victim. Lesa then tried to reach the victim and he pulled the girl, but the girl and the victim also pulled him. So they pulled around at one another. Lesa says when he pulled at the girl he thought it was the victim but then he realised that it was the girl so he let go of the girl and the victim fell down while Lesa

fell on to the hibiscus hedge. According to Lesa it was then that he met with Ieti who told him not to waste his parliamentarianship over this incident. He told Ieti that he wanted to take the victim to the Police as he had thrown stones at his house while matais and his children were present. He was then led away by Ieti and Lusa and at that moment he heard someone fell down. A woman also uttered obscene words to Lesa while he was being led away. Lesa also confirms that at one time during this incident a woman called out "please Farani".

In cross-examination, Lesa says that he did not assault the girl that he pulled but was merely trying to arrest her. He also fell over the victim since he was pushed from behind.

The witness Muliava Tuiloma called by the defence says that when he came to the scene of this incident, he saw a person lying down on the foot-path near the hibiscus hedge. At that time Lesa was standing under a mango tree with two other boys.

The next defence witness Lusa Tanielu says she saw a boy lying near an electric power pole and Lesa was not there as he was standing inside the hibiscus hedge talking to another man. She then pulled Lesa and led him away and as Lesa was being led away, a woman uttered swear words to Lesa. I was far from impressed with the demeanour of this witness in the stand that her evidence with utmost suspect.

The evidence by the witnesses Ioane Tanielu and Ulu Tito are also to the same effect as the evidence of the witness Lusa Tanielu. Ioane Tanielu says he was walking along the road to go and visit a patient at the hospital

when he saw a commotion at the scene of this incident. When he came closer he saw people under the electric power pole and a boy lying down. At that time Lesa was talking to another man inside the hibiscus hedge. I do not accept this witness's evidence as it is very suspicious. Given the time this incident occurred which was after 9.00pm and the fact that Ioane Tanielu was walking to the hospital, it is somewhat strange from Ioane to be visiting a patient at the hospital close to 10.00pm at night which is well after visiting hours permitted at the hospital.

Ulu Tito's evidence is that he also saw a person lying down near the electric power pole. He did not recognise who that person was and he also did not see Lesa at that time. The evidence by the witness Onofia Falaniko is that when he came to the scene, he only saw Lesa being pushed by a woman.

The evidence of Dr Toga Potoi was that he examined Lesa's right hand and fingers on 4 August 1993 and found an old scar on the knuckle joint of the middle finger of his right hand alleged by Lesa to have been caused from an old injury. Dr Potoi says that finger is usually extended and it would require some strength to enable Lesa to hold his right fist. It is possible for Lesa to deliver a punch with his fist but it will be difficult to do so due to the deformity in the tissues and muscles connected to his middle finger. An X-ray was done on Lesa's finger and no abnormality was shown. But Dr Potoi says there is no X-ray equipment available locally for the X-ray of tissues and muscles.

Now I will not refer to evidence of Tusa Posiulai as that evidence does not related to the incident in this case. It relates only to the formal apology made to the victim's family. There is no evidence whether Lesa was aware of that formal apology or agreed to it.

I have considered all these evidence and I have decided that Lesa did in fact assault the victim by punching him several times on the jaw and then kicking the victim on the jaw several times while on the ground. This is clear from the evidence of Elsie, Tofi and Lisi who were all on the scene from start to end. Even though there are some differences in their observations of what happened, I do not find that unusual in a case of this kind with so many people present on the scene and also in view of the particular circumstances of this case. All three witnesses agree that Lesa delivered several punches to the victim and then again kicked the victim on the ground several times. The evidence of the victim himself is that Lesa punched him and he fainted and fell down unconscious. The evidence by Lesa himself and other witnesses that as Lesa was being led from this incident a woman called out obscene words to Lesa would also tend to support the conclusion I have reached that it was Lesa who assaulted and inflicted the injuries on the victim. I cannot see any other more sensible explanation on the evidence than that. For why should a woman be uttering obscene words at Lesa. The evidence by Lesa and Ieti that a woman also called out "please Farani" also tend to confirm the same conclusion. Likewise the evidence by Sergeant Lautolo that when he interviewed Lesa the day after this incident Lesa's right toes were swollen and Lesa's explanation was that the swelling could have been caused from the previous night's incident. It was also observed by Sergeant Lautolo that Lesa's right fingers and wrist were not in a "good condition".

It is also clear to me from the evidence of Elsie which I accept that Ioane only came in and punched the victim once while lying down after Lesa had assaulted the victim. It appears to me from the totality of the evidence that Ioane's involvement in this case was minimal and that it was after Lesa had assaulted the victim that Ioane punched the victim on the ground. The

dentist's evidence was also quite definite that one punch could not have caused the splintered fracture of the victim's jaw. Five or several hard punches would have been required to cause that fracture. Given the minimal involvement of Ioane after the victim had been assaulted by Lesa, I am satisfied that Ioane did not cause the splintered fracture.

Other witnesses like Sefo Pua, Ieti Jennings, Muliava Tuiloma, Lusa Tanielu, Ioane Tanielu and Ulu Tito tried to suggest that another person caused the victim's injuries since when he fell down or lying down, Lesa was some distance away. I disbelieve the evidence of those witnesses and the suggestion they tried to make. In any event, not one of those witnesses was present at the start of this incident and none of them was able to contradict the evidence of Elsie, Tofi, Lisi and the victim as to what happened at the start of this incident and the actions by Lesa against the victim and Elsie. In fact none of these witnesses ever expressly stated that Lesa did not at any time assault the victim.

I also disbelieve Lesa's evidence as to what happened in this case. I do not accept that he did not punch and kick the victim. His evidence on the whole is incredible. There is no doubt in my mind that he assaulted the victim resulting in the splintered fracture and other injuries sustained by the victim. Lesa's actions were undoubtedly deliberate and intentional. To persist in such a serious attack on a young boy lying down almost at the feet of his aunties and cousin was heartless and merciless. It must have caused great emotional pain and distress to the victim's aunties and cousin to see one of their own young ones being battered around with punches and kicks by Lesa but they could not do a thing to help.

I also accept Elsie's evidence that she was assaulted by Lesa when he pulled her and pushed her head against the electric power pole. I reject Lesa's evidence that he was merely trying to arrest her.

As to the injuries sustained by the victim, I also accept that the splintered fractures to the jaw at two parts were really serious injuries. It is for the Court as the trier of fact to decide whether the victim's injuries were really serious. I am in no doubt that the splintered fractures as explained by Dr Manutai, the fact that the victim was admitted to the hospital for two weeks, the locking and wiring of his mouth and teeth, his being placed on fluid diet for at least five weeks, and the profuse bleeding from the gum all go to show that this was not a minor fracture but a really serious one. The doctor himself said the splintered fracture in this case was serious. Mr Enari argues that the doctor did not expressly say that the victim's injuries were really serious but serious. While that may be so, the doctor also did not say that these injuries were not really serious. Being a serious injury and being a really serious injury are closely related and the distinction between the two must really be one of degree and is a question of fact in each case. On the evidence here I am satisfied as the trier of fact in this case that the victim's splintered fractures were really serious injuries and therefore grievous bodily harm. There is also no lawful justification for Lesa's actions in this case.

In all I am satisfied that the charge of grievous bodily harm against Lesa has been proved beyond reasonable doubt. But the evidence falls short of proving that Ioane aided and abetted Lesa in causing grievous bodily or that he was a party in any other manner since he only came in shortly after Lesa had stopped assaulting the victim. The charge against Ioane is therefore dismissed. I am not satisfied on the required standard of proof that Ioane was acting jointly or in concert with Lesa at the time the latter inflicted the really serious injuries on the victim so as to warrant a finding of guilty against Ioane.

I am also satisfied that the charge against Lesa for assaulting Elsie Esera has been proved beyond reasonable doubt.

The case against Lesa is adjourned to 30th May at 8.30am in the morning for a probation report and sentencing.

*T. F. M. S. J. J.*  
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CHIEF JUSTICE