IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 5 of 2022
(CR 224 of 2020)

BETWEEN:

SAMINSONI TU'I'ONETOA Applicant

-v-

REX Respondent

Application for leave to appeal out of time against sentence

RULING

BEFORE: PRESIDENT WHITTEN QC LCJ
To: Mr 'A. Pouvalu for the Applicant
The Attorney General for the Respondent
Application: 26 April 2022 (filed in Vava'u on 29 October 2021)
Ruling: 11 May 2022

Introduction

1. This is the second application by Mr Tu'i'onetoa for leave to appeal against his sentence by Niu J on 13 August 2021: *R v Tu'i'onetoa* [2021] TOSC 130.

2. In AC 26 of 2021, Mr Tu'i'onetoa's first application was refused on 23 November 2021 following his failure to file an amended application as directed.

Application for extension of time within which to apply for leave to appeal

3. In his affidavit in support of this application for leave to appeal out of time, sworn 13 April 2022, Mr Tu'i'onetoa deposed that the reason for the failure to file an amended application for leave to appeal was due to his counsel, Mr Pouvalu, being hospitalized on 7 November 2021 until 1 January 2022. Thereafter, the disruptions to communications resulting from the volcanic eruption and tsunami on 15 January 2022 and subsequent lockdowns due to the Covid-19 pandemic within Tonga, have further delayed his ability to file the present application.

4. The basic principle in deciding an application for leave to appeal out of time is that it is entirely in the discretion of the Court, which discretion must be exercised

judicially: *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1.[1] An extension of time will not be granted as a matter of course; the court will require substantial reasons to be advanced before such an extension will be granted: *Latu v Rex* [2011] TOCA 19.[2]

5. I am satisfied that the applicant's sworn explanations are substantial and reasonable: *AJ & E Ltd v FC Nichols (Wholesales) Ltd*;[3] *Latu v Rex*;[4] *Tupa v R.* [2021] TOCA 8. No prejudice to the Respondent is identified. The interests of justice warrant an extension of time: *Police v Tauki'uvea.*[5]

6. Accordingly, and subject to the assessment below as to the prospects of the appeal succeeding if leave is granted, pursuant to section 20 of *Court of Appeal Act* and order 10 rule 1 of the *Court of Appeal Rules*, an extension of time within which to apply for leave to appeal against sentence is granted.

7. I turn now to the application for leave to appeal.

Application for leave to appeal against sentence pursuant to s.16(3) of the Act

8. Following his conviction at trial, Niu J sentenced the applicant to 4 ½ years imprisonment for grievous bodily harm and 3 months imprisonment for common assault, to be served concurrently, and with the last 18 months of the head sentence suspended for two years and conditions.

9. For a grant of leave to appeal, the applicant must demonstrate that the proposed grounds of appeal, or any of them, have reasonable prospects (or a 'real chance') of success: *Laimani v R* [2021] TOCA 9. Further, the prospects of success of the appeal may be discounted as a factor to be assessed by the Court "unless those prospects are obvious": *Lavulavu v R* [2021] TOSC 111.[6]

10. Provided the sentencing Court has applied the relevant sentencing considerations to the circumstances of the offending and the offender, an appellate Court will not intervene unless the final sentence clearly indicates that something has gone wrong. That is usually because it is simply outside the available range: *Rex v Tau'alupe* [2018] TOCA 3 at [14].

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[1] Citing *Bank of Tonga v 'Alatini & Muti* [1990] Tonga LR 153 (CA).
[2] Citing *Rigby* (17 Cr. App. R11); *Lesser* (27 Cr. App. R 69) and *R v Hawkins* [1997] 1 Cr. App. R 234, 239 C-D.
[3] [2006] TOCA 1.
[4] [2011] TOCA 19.
[5] [2020] TOSC 49; AM 8 of 2020 (17 July 2020)
[6] Citing *R v Giordano* (1982) 31 SASR 241 at 243.

11. The application for leave is based on the following grounds.

A. "The starting point was too high'

12. The applicant contends that the starting point set by the sentencing judge of five years imprisonment was too high. He compares his case to the decision in *Vi* [2017] Tonga LR 361 where the same starting point was reduced by six months on account of provocation by the victim. Here, the applicant says that one of the victim's family provoked the applicant and his family members involved, in what became the latest altercation in an ongoing family feud, to "come and have a fist fight". Therefore, the applicant says that the starting point in his case should have been the same as in *Vi*, namely, 4 ½ years.

13. In Vi, the prisoner was drunk, unruly and aggressive. He got into a fight with another officer, who got the upper hand and forced the prisoner to the ground and placed his foot on him. Another officer, the victim, came to assist and kicked the prisoner several times to the head over seven to eight minutes before police arrived. The prisoner was taken away by police. Later the same day, after he had been released, the prisoner returned to the station with two iron rods which he used to hit the victim on the back of his head as he lay in bed. Then, after the victim turned to face the prisoner, he hit the victim again causing a frontal bone fracture with a fractured fragment lodging within the frontal sinuses and haemorrhaging in the frontal sinuses. The victim was hospitalised for about 10 days and was off work for two months while he recovered.

14. Cato J found that the victim had used excessive force when kicking the prisoner to the head which was unjustified and dangerous even though the prisoner was not obviously injured nor did he lose consciousness. His Honour accepted that the actions of the other officers in restraining the prisoner and using force as they did which 'probably' included the victim kicking the prisoner was a likely trigger that motivated the prisoner to return to the station and exact revenge later that morning.

15. His Honour then referred to the following statement of the Full Court of the New Zealand Court of Appeal in *R v Taufeki* (CA 384/2004, n 17 February 2005) in relation to provocation in sentencing:

> *"... Where the offender has been provoked, that may justify a lower starting point. It is not enough simply to claim to have been in since to buy the actions*

> *of the victim or another, rather the sentencing judge will need to be satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence."*

16. In the instant case, the sentencing judge addressed this issue as follows:

> *"[22] When Lonitenisi's brother, Sione Fisi'ihoi, but commonly known as Sione Hoi, came out onto the Free Wesleyan Church field and challenged you and the Tu'i'onetoas to come and have a fist fight ("tau hoka"), you did not come out with just your fists; you all came out with metal pipes, sticks and stones instead. You were carrying a metal pipe and you used it and you hit Lotolua with it on his head. He had done nothing but to try and stop the fight. He had no weapon with him. He was not a threat to anyone. He was 65 years of age. Yet you hit him on his head without him knowing it. He fell on the road immediately, unconscious. He posed no threat to anyone whilst he so laid unconscious on the road. Yet, you stepped up to him and struck him again, twice, on the head, with the metal pipe. He was defenceless when you so hit him.*
>
> *[23] Those strokes caused a hairline fracture of the skull and 2 separate intracranial haemorrhages inside the skull and laceration of the scalp and left external canal. He was fortunate not to have died from the strokes you delivered.*
>
> *[24] I consider that you had come out with the metal pipe to do grievous harm, to anyone of the Fisi'ihois.*
>
> *[25] I therefore consider that your case is no different from those cases and that the same starting is warranted. I consider that the starting point in your case is 5 years imprisonment."*

17. The circumstances between the two cases and the nature and extent of any provocation, including by whom it was instigated in the present case, are vastly different. Here, the challenge by the victim's brother for the two groups to have a fist fight could not be regarded as a serious provocation, certainly not by the victim himself, which warranted the applicant using a metal pipe to beat the victim while he laid defenceless on the ground. The response was grossly disproportionate to the threat. It follows that the challenge to a fist fight could not be regarded as the operative cause for the violence inflicted by the applicant on the victim which followed.

18. Accordingly, on this ground, no error in the sentencing judge's approach has been identified.

B. "The starting point should have reflected the seriousness of the offence"

19. The applicant contends that the injuries caused in *Vi* 'seemed' to be more serious than the present case, and that therefore the starting point here should have been lower.

20. The applicant describes the primary injury in *Vi* as "an open fracture on the skull". That is not how the injuries were described by Cato J at paragraph [3](iii) of his sentencing remarks (referred to in paragraph 13 above).

21. In any event, both cases involved skull fractures and hemorrhages. Any differences in their degree or severity were not the subject of medical evidence referred to in either case. Nui J observed that the victim was fortunate not to have died from his injuries.

22. Again, on this ground, no error in the sentencing judge's approach has been identified.

C. "The mitigating factors in the pre-sentence report would not fully considered"

23. The applicant contends that in the presentence report, the probation officer reported that "*the accused had accepted that he had been convicted… that he had committed the offence and that he had repent [sic] for what he had done and that he had learnt his lesson*" which showed that the applicant was remorseful and, for which, he should have received a discount.

24. The sentencing judge addressed this issue as follows:

> *"[5] The officer says that in respect of these offences, you told him that it was not true that you had carried, and had hit Lotolua with a pipe, but that you accept that you have been convicted that you did do that, and that you are repentant for what you have done and that you have learnt your lesson from it.*
>
> *…*
>
> *[26] Because you have maintained to the probation officer that you did not do anything to Lotolua, I have very little regard to your claim of remorse. What you did to him was deliberate, premeditated and totally unwarranted."*

25. The failure by the applicant to acknowledge responsibility for his offending entitled the sentencing judge to place little weight on his subsequent and inconsistent assertions of remorse.

26. Again, on this ground, no error in the sentencing judge's approach has been identified.

D. "Failure to consider that the two families had made peace and ended their feud as an important mitigating factor"

27. The sentencing judge did consider this issue as follows:

> *"[27] The probation officer and your counsel have pointed out that the two families have made up and have ended the feud between them and I am glad that they have come to their senses and have ended such barbarous behavior. One can only hope that this will never happen again between them.*
>
> *[28] But that does [not] excuse or minimise the very serious offence which you have committed. If I was to make allowance for and reduce your sentence in view of the fact that your offence was committed in pursuance of the long standing feud, I would thereby be condoning what you did or part of what you did. That can never be. What you did was a criminal offence, a serious criminal offence punishable by imprisonment of up to 10 years, and it can never be mitigated by the unlawful feud that existed between your two families."*

28. To suggest that by his infliction of serious injuries on an elderly man, thereby ending (for now) the inter family feud, the applicant should have been rewarded through a discount in his sentence, is plainly inconsistent with the criminal law and patently absurd.

29. Again, on this ground, no error of principle or approach has been identified.

30. The applicant has not demonstrated an arguable case in respect of any of the complaints in his application and/or affidavit. The proposed grounds do not clearly indicate that something has 'gone wrong' with his sentence, nor do they have reasonable prospects of demonstrating that the sentence was outside the available range.

Result

31. For those reasons, the application for leave to appeal against sentence is refused.

NUKU'ALOFA
11 May 2022

SUPREME COURT TONGA

M. H. Whitten QC LCJ
PRESIDENT