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

AC 31 of 2021
(CR 122 of 2021)

BETWEEN:

ATTORNEY GENERAL Applicant

-v-

PENISIMANI ANGILAU Respondent

JUDGMENT

Court: Whitten P
Randerson J
Hansen J

Appearances: Mr J. Lutui DPP with Mrs 'A. 'Aholelei for the Appellant
Mr D. Corbett for the Respondent

Hearing: 17 May 2022
Judgment: 23 May 2022

The appeal

1. On 25 August 2021, the Respondent was convicted after trial of causing serious bodily harm and wilful damage. On 22 October 2021, Niu J sentenced the Respondent to 12 months' imprisonment for the serious bodily harm and 3 months imprisonment for the wilful damage. The sentences were ordered to be served concurrently and were fully suspended for a period of 12 months on conditions.[1] The judge also declined to activate an extant suspended sentence pursuant to ss 24(3)(c) of the *Criminal Offences Act* and instead extended the original period of suspension, pursuant to subsection (e) thereof, for a further 6 months from 24 November 2020.[2]

2. On 17 December 2021, the Attorney General was granted leave, pursuant to s. 17B of the *Court of Appeal Act*, to appeal against the sentence. An order was also made staying the further execution of the sentence pending the hearing and

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[1] *R v Angilau* [2021] TOSC 168

[2] The reference in the order to '2022' was obviously a typographical error as the subject sentence in proceeding CR 103 of 2020 was imposed on 24 November 2020.

determination of the appeal.

The offending

3. On 27 March 2021, the Complainant drove his car to a petrol station at Vaini. There was an issue as to whether the Respondent was there first and whether the Complainant effectively 'pushed in' in front of the same bowser, to be served before the Respondent. The Respondent swore at the Complainant and told him to back his vehicle away because the Respondent said that he was there first. When the Complainant refused to do so, the Respondent got out of his vehicle with a length of 4 x 2 inch timber, punched a man in the front passenger seat of the Complainant's vehicle, smashed the side mirror of the Complainant's vehicle, struck the Complainant's left forearm, resulting in a fractured ulna, and then smashed the rear window of the Complainant's vehicle. The Complainant and his other passengers ran off.

4. When questioned by Police, the Respondent admitted to the offending. However, he pleaded not guilty upon arraignment. At the conclusion of the Prosecution's case at trial, the Respondent changed his plea.

The sentence

5. In his sentencing remarks, the learned judge noted that the Respondent had failed to attend the probation office, as directed, and thus no presentence report was available. The Respondent's previous convictions were listed, relevantly, as:

   (a) 14 June 2011, five counts in relation to attempted armed robbery with a firearm, resulting in a head sentence of six years imprisonment; and

   (b) 24 November 2020, for possession of 0.75 grams of methamphetamine, the Respondent was sentenced to nine months imprisonment, suspended for two years on conditions including 70 hours community service and completion of courses in drugs and alcohol awareness and life skills.[3]

6. The judge then referred to the Crown's submissions which recommended a sentence for the serious bodily harm of two years and three months imprisonment. By reason of a lack of the *Mo'unga* considerations in his favour, and given that the Respondent committed the instant offending during the period of suspension of his last sentence, the Crown submitted that there should be no suspension of the subject sentence and that the previous sentence of nine months should be activated and added to the subject sentence.

7. The judge then referred to the Respondent's submissions that his offending had

[3] *R v Angilau* [2020] TOSC 116; CR 103 of 2020 (24 November 2020).

been provoked by the Complainant 'jumping the queue' and parking in front of the pump where the Respondent had been waiting. The Respondent considered himself the 'victim' of the 'improper act' of the Complainant and his friends. Among the Respondent's personal factors, including having since 'turned to Christ', the judge noted that the Respondent had given the Complainant compensation of $500 cash and $500 worth of 'goods'.

8. The judge then turned to the issue of provocation in which he considered that the 'justice' of the case turned on the question of:

> *"... whether or not the Complainant provoked the attack and the causing of the two offences committed by the accused. The presence, or absence, of provocation would determine whether or not the sentence for the present offences be suspended and would also be relevant in considering the breach of the suspended sentence of 9 months imprisonment ordered on 24 November 2020."*

9. His Honour then compared the evidence of the Complainant and one of his passengers from the trial against statements made by the Respondent in his record of interview by police. He explained how he preferred the Respondent's account and concluded therefore that the Complainant had 'unlawfully and wrongfully provoked' the Respondent to injure the Complainant and damage his vehicle.

10. The judge considered that the provocation constituted diminution of culpability as referred to in *Mo'unga*,[4] and that, but for the provocation, the Respondent would not have committed the offences. His Honour also took into account the Respondent's apology, the Complainant's forgiveness and that the Respondent had paid for the damage he caused to the Complainant's car. He also considered that the Respondent was likely to make use of the suspension to rehabilitate himself. On those bases, the judge determined that any sentence should be fully suspended.

11. On the length of sentence for the serious bodily harm, the Prosecution below referred to the comparable sentences in *Taliai & Vea*,[5] *Pekipaki* [6] and *Palu*,[7] which indicated a range from 21 to 27 months. The judge referred to the first two and distinguished them on the basis that the victims in those cases were hit on the head with a hammer in one, and an object in the other, which posed a 'serious risk of death'. However, his Honour considered that because the blow here was only to the forearm, and 'was not even strong enough to break both the ulna and the radius', a sentence of 12 months' imprisonment was appropriate.

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[4] [1998] Tonga LR 154 at 157.
[5] CR 56/2018.
[6] CR 172/2018.
[7] CR 176/2020.

12. The judge declined to activate the previous suspended sentence in proceeding CR 103/20 because he considered that the Complainant's provocation was also a 'special circumstance' for the purpose of ss 24(3)(e). As a result, the judge extended the suspension period by six months from the date of that sentence.

Appellant's submissions

13. Before us, the Appellant submitted, in summary, that:

    (a) the judge's finding of provocation was not supported by the evidence, and that even if it was, the judge placed too much weight on what could only amount to 'moderate provocation at its highest';

    (b) the evidence of his tone and profanity towards the Complainant and his passengers, and even the female employee at the station, showed that the Respondent was very angry at the Complainant for jumping the queue. He then took out the timber and threatened to 'smash' the Complainant and others. He then lost control of his temper and smashed the car and attacked and injured the Complainant even though he knew that the occupants of the other vehicle posed no threat to him;

    (c) even though the Complainant's conduct in jumping the queue may be considered disrespectful or a breach of some unwritten moral code, the judge erred in regarding it as an "unlawful and wrongful provocation" so as to justify the retributive conduct of the Respondent which amounted to an act of 'road rage';

    (d) having regard to the test on a Crown appeal set out in *Misinale*,[8] in imposing a sentence for the serious bodily harm of only 12 months' imprisonment, the judge erred by failing to consider:

        (i) the seriousness of the offending where the timber was used as a weapon to inflict harm; and

        (ii) that the Respondent's 2011 convictions included bodily harm;

    (e) further, the sentence fell well short of the range indicated by the comparable sentences submitted, and was therefore manifestly inadequate;

    (f) on suspension, the judge erred by finding that the provocation was a factor in favour of suspension. Further, the judge failed to consider other *Mo'unga* factors against suspension such as the Respondent was not young, he did not have a clean record, he had been afforded an opportunity by his fully suspended sentence in CR 103/20 to rehabilitate, but had breached the

[8] [1999] TOCA 12

conditions of that suspension by the subject offending, and the Respondent only pleaded guilty after the close of the Prosecution case; and

(g) the judge erred in applying provocation, as he found it, as a special circumstance to justify not activating the sentence in CR 103/20. In doing so, his Honour also failed to consider that, at the mitigation hearing, the Respondent admitted that the $500 worth of 'goods' he gave the Complainant were in fact methamphetamine.[9]

14. In his oral submissions, Mr Lutui contended that:

(a) the judge's approach to the provocation issue and the relative lenience of the resulting sentence was tantamount to condoning the Respondent's conduct;

(b) the appropriate sentence for the serious bodily harm was two years' imprisonment;

(c) the sentence for the wilful damage was correct;

(d) for what occurred at the service station, the sentences should have been partially suspended;

(e) however, by reason of the Respondent's supply of methamphetamine to the Complainant:

(i) there should be no suspension of the subject sentences; and

(ii) that was a further reason to activate the sentence in CR 103/20.

Respondent's submissions

15. Mr Corbett opposed the appeal and submitted that:

(a) the judge was correct in his finding on provocation and that it also constituted special circumstances for the purposes of dealing with the breach of the sentence in CR 103/20; and

(b) in relation to the conditions of that suspended sentence, the Respondent:

(i) believed he had completed at least half the community service; and

(ii) had completed 29 hours of the Salvation Army courses.

16. Before us, and on the issue of provocation, Mr Corbett referred to evidence that one of the Complainant's passengers challenged the Respondent to a fist fight. Therefore, Mr Corbett characterised the Respondent's reaction as self-defence.

17. In reply, Mr Lutui informed us that the Respondent had completed 26 of the 70

[9] Appeal book 126.

hours of community service ordered in CR 103/20.

Consideration

18. We agree with the Appellant that the sentencing judge erred in his treatment of the provocation issue. There was no issue that even if provocation had been established, it was not a legal defence to the charges. However, we are not persuaded that, on a proper consideration of the evidence, there was any basis for finding any form of provocation sufficient to warrant full suspension of the sentences.

19. Where it is a defence, provocation is some act, or series of acts, done or words spoken which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind: *R v Whitfield* (1976) 63 Cr App R 39 at 42 (CA). That the conduct of the Complainant in jumping the queue at the petrol station did not have, and could not reasonably have had, such an effect on the Respondent is plainly reflected by his statements to police to the effect that:

    (a) it was he who got out of his car first with the timber and threatened to smash the Complainant's vehicle if he did not 'back off';

    (b) when the occupants of the other car got out, they did not attack him;

    (c) he started smashing the car and hit the Complainant 'just to warn them'; and

    (d) when the victims ran off, he shouted to them to 'come and fight'.

20. Mr Corbett's submission of self defence, which was never raised below, was based on a misconception of the evidence as recounted by the sentencing judge.[10] Relevantly, after the Respondent had already approached the Complainant's vehicle with the timber, and smashed the side mirror, the passenger told the Respondent to drop the timber and then they would have a fist fight.

21. The judge described the Complainant's conduct as unlawful. Yet, no law was identified. As Mr Lutui submitted, jumping the queue at a petrol station may be regarded as inconsiderate by social norms, but it is not unlawful in any criminal sense. It was always open to the station attendant not to serve the Complainant until he joined the queue. In any event, the Respondent's violent reaction to the perceived insult could never be condoned by a court. The judge's treatment of

[10] Paragraphs 28 to 34 of the sentencing remarks.

the issue and resulting sentence went very close to doing so.

22. We also agree that the 12-month head sentence was well below the available range. The judge's distinction between the two comparable cases he did consider as involving blows to the victims' heads did not provide a sufficient basis for such a short sentence. In his evidence,[11] the Complainant said that when the Respondent came to hit him, he 'held up his left hand to fend the blow'. That suggests a very real likelihood that the Respondent was aiming at the Complainant's head. The timber was just as much a weapon as a hammer, both capable of inflicting blunt force trauma. It is well established in Tonga that anyone who commits an offence of violence runs a serious risk of immediate imprisonment, and that the likelihood of going to prison becomes a virtual certainty when a weapon is used: *Hu'ahulu v Police* [1994] Tonga LR 93; *Siokatame Tupou v R* [2019] TOCA 8. Here, the Respondent had previous convictions for serious violence, including bodily harm, and for which he received a significant prison sentence. The judge failed to take that into account.

23. We consider the appropriate sentence for the serious bodily harm in this case to be two years' imprisonment.

24. We also agree that had the Respondent not further breached the conditions of his suspended sentence in CR 103/20 by giving the Complainant methamphetamine, some partial suspension of the index sentences might have been warranted.

25. However, for the same reasons we consider the learned judge erred on the issue of provocation, we agree that the suspended sentence in CR 103/20 should have been activated and added to the sentences for the index offending. The Complainant's conduct could not constitute special circumstances for the purpose of ss 24(3)(e). The principal reason for not activating a suspended sentence is where the subsequent offence is relatively trivial. The serious bodily harm here was not trivial. Further, that it was a different kind from the offence for which the suspended sentence was imposed is not in itself a ground for non-activation: *Rex v Vete* [2007] TOSC 43.[12]

26. Section 24(3)(c) expressly provides that the term of the suspended sentence is to be added to the sentence for the subsequent offending. That approach, however, is subject to the totality principle: *Kolo v Rex* [2006] TOCA 5.[13] Here, in order to give effect to that principle, and as credit for the community service the Respondent has completed, we reduce the sentence for the index offending to

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[11] Referred to at [28] of the sentencing remarks.

[12] Citing Archbold at 5-196. See also *Saunders* (1970) 54 Cr App R 247 and *Craine* (1981) 3 Cr App R (S) 198.

[13] Citing *Bocskei* (1970) 54 Cr. App. R. 519 at 521.

21 months imprisonment. Otherwise, in light of the Respondent's previous conviction for violence, his breach of his most recent suspended sentence and his supply of methamphetamine to the Complainant, we do not consider it appropriate to suspend any part of the resulting total period of incarceration of 30 months.

Result

27. The appeal is allowed.

28. The sentence of the Supreme Court is quashed.

29. In substitution, the Respondent is sentenced to:

    (a) 21 months imprisonment for causing serious bodily harm; and

    (b) 3 months imprisonment for wilful damage, to be served concurrently with the sentence on the head count.

30. Pursuant to ss 24(3)(c) of the *Criminal Offences Act*, the suspension of the Respondent's sentence in proceeding CR 103 of 2020, of nine months imprisonment, is rescinded and that term is to be served in addition to the sentences above.

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Whitten P

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Randerson J

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Hansen J

COURT OF APPEAL TONGA