

**IN THE SUPREME COURT OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY**

AM 13 of 2015

Scan & file

*Recd 7/8/15.
07/08/15*

BETWEEN: TAANI NONU FOLAU - Appellant

AND: THE POLICE - Respondent

BEFORE THE HON. JUSTICE CATO

APPEAL AGAINST SENTENCE

- [1] The appellant appealed against a sentence imposed upon him by Magistrate Soakimi on the 6th May 2015.
- [2] The appellant had pleaded guilty to one count of assault under the Criminal Offences Act, and one count of domestic violence on his daughter. Both convictions carry a maximum sentence of one year imprisonment.
- [3] It appears the appellant also had a history of assault on his defacto wife and the same daughter. The Magistrate was informed that on the 13th May 2014, he was sentenced to imprisonment for three months to be suspended for one year on CR 373 /2014 for an assault on his daughter. He was also informed that on the same day the appellant had been sentenced to six months imprisonment suspended for one year on summons 374/2014, an assault on his defacto wife. The Magistrate was informed he had violated his probation in committing this offence. The Magistrate was informed by the

daughter that she had been punched in the face and her face was swelled, as she put it. The Magistrate noted the previous assault, and his sentence was;

"I order as follows; In case 374/14 where you were sentenced on 13th May 2014 to imprisonment for six months which was to be suspended for one year and because you have violated your probation you are to be sentenced to six months imprisonment of six months to be served concurrently with the former sentence imposed. "

[4] It appears that the Learned Magistrate in his sentence reactivated the former suspended sentence of 6 months on CR 374/2014 as in my view he was entitled to do under s 24 (3)(c) of the Criminal Offences Act. The offending in the most recent assault had been committed on 16th September 2014 well within the period of suspension which for both offences under CR 373 and CR 374 had been imposed on the 13th May 2014, and therefore expired on or about the 13th May 2015. Having done this, the Magistrate, who could well have imposed an additional or cumulative sentence upon the reactivated sentence of six months, did not do so but ordered the sentences of six months which he appears to have imposed on each new offence, to be served concurrently with the reactivated sentence.

[5] The appellant contended that the Magistrate did not take into account any of his personal circumstances being that he was the sole earner for his family which included his defacto partner, and their two infant children. The record does not show that the Magistrate made any inquiry of the appellant as to his personal circumstances. The appellant did however, volunteer to the Magistrate that he had assaulted his elder daughter after she had at the plantation assaulted his younger child. The appellant claimed that he should not have been sentenced to a term of

imprisonment and in his appeal grounds it was asserted that a fine should have been imposed.

[6] The file and record was rather spartan as is the case often of cases on appeal from the Magistrates Court. Mr Aho, who appeared for the Crown, advised me also that there was a further matter against the appellant CR 375/2014 another case of assault for which the appellant had been placed on probation on the 13th May 2014. The record is unclear as to who this assault was perpetrated upon, but it is clear that the three assaults were perpetrated on different days between the 17th April 2014 and the 25th April 2014.

[7] I heard both counsel and indicated that it was my view that although the Magistrate's reasons were brief and not entirely clear, I had formed the view that as a repeat offender the appellant merited a term of imprisonment. The Magistrate appeared to reactivate the suspended sentence of 6 months imprisonment for the assault which he was entitled to do. In my view, taking into account that this was the second occasion he had assaulted his daughter, it was well within the sentencing discretion of the Magistrate to also impose a sentence of six months for the most recent offending. As I have said no part of this was made cumulative to the reactivated sentence, as I interpret his sentence; and the appellant is perhaps fortunate that this was not the case.

[8] I have said on more than one occasion, that in the case of an unrepresented defendant, a Magistrate must take care and make inquiry about the defendant's personal circumstances before sentencing the defendant. Likewise, he should give clear reasons for any sentence that is imposed. In cases where imprisonment is contemplated, a probation report should be

requested. A Magistrate should not forget either that, in some cases, a sentence of community work may be preferable to a period of imprisonment, in which case a probation report should be requested to ensure that the defendant is an appropriate candidate for such a sentence, and can be adequately placed.

[9] However, I do not consider in this case, taking into account the appellant's history of assault on his partner and his elder daughter that the subjective factors referred to by the appellant were such that this court should interfere with sentence. The complainant was punched in the face hard enough to make it swell, and this kind of domestic violence by a person with a history of assault requires a firm response from the Courts.

[10] It may be that the assault in question of his daughter on this occasion may not have necessitated a sentence of imprisonment had the defendant been a first offender; but taking into account his history, I do not consider that the sentence could have been said to be either manifestly excessive or inappropriate. Parliament in Tonga has recently introduced domestic violence legislation to emphasise that domestic abuse will not be tolerated and the Court must be responsive to this sentiment. That is not to say, however, that principles of sentencing should be abandoned altogether because a case involves domestic violence as I have pointed out in Fukofuka v Police AM 7 of 2012. There, the defendant was imprisoned for a short period for an assault on his wife. It was not a particularly serious assault, in a situation where the parties had separated and there had been an argument over the children. The husband had no previous convictions and had been sentenced to 12 months imprisonment with 9 months suspended. No probation report had been requested. The Magistrate had placed, in my view, too great an emphasis on this being domestic violence before imposing

sentence. The defendant was a first offender, aged 31 and had shared responsibility for the children. There was nothing in the sentencing judgment about the personal circumstances of the defendant. The Crown did not oppose the sentence being varied by me to a bond of two years, probation with the appellant attending a Salvation Army for an anger management and a drugs and alcohol awareness course. This case also is a reminder that merely because a case involves domestic violence does not mean that a defendant must be exposed to a greater penalty than might otherwise be the case. Every case must be considered in relation to its circumstances. However, as I have said here, the appellant is a repeat offender and had been treated in the past with leniency with suspended sentences for previous assaults on his wife and the same daughter. He has re-offended regardless of the previous sentences imposed upon him.

[11] To clarify the Magistrate's sentence for the record, the suspended sentence of 6 months imprisonment imposed on CR 374/2014 is reactivated. (This will incorporate also the suspended sentence on CR 373/2014 and breach of probation on Cr 375/2014 (which Mr Aho informed was the sentence imposed for that assault)). On both new offences, the assault and domestic violence the defendant is sentenced to 6 months imprisonment to be served concurrently with each other and with the 6 months reactivated sentence on CR 374/2014. The overall effect is that he is sentenced to 6 months imprisonment.

[12] I also record that although I had indicated that I was likely to dismiss his appeal on the date it was heard being the 3rd August, 2015, the appellant's bail was continued on reporting terms, so that he could attend to his mother who is very ill in intensive care until judgment today.

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NUKU'ALOFA: 7 AUGUST 2015

