

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

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AM 7 of 2016


11/08/16.

BETWEEN: REX - Appellant

AND: SONTANE MA'AKE MOTU'APUAKA - Respondent

BEFORE THE HON. JUSTICE CATO

JUDGMENT UPHOLDING CROWN APPEAL AGAINST SENTENCE

- [1] The Appellant appeals against the manifest inadequacy of the sentence imposed on the Respondent by Senior Magistrate Mafi at the Magistrate's Court in Fasi on the 5th or 6th of November, 2015, on a charge of causing serious bodily harm contrary to sections 107(1) (2) and (4) of the Criminal Offences Act as amended in 1912. The maximum sentence is 5 years imprisonment.
- [2] He had been arraigned before me and pleaded not guilty to this charge on the 26th June 2014 and had elected trial by Judge alone. By consent, the case had been remitted to Senior Magistrate Mafi in his enhanced jurisdiction for trial. Mr Aho said that there had been a considerable delay in the trial of the matter.
- [3] On the 22nd October 2015, the Respondent was re-arraigned and pleaded guilty before Senior Magistrate Mafi. He was then for some reason remanded to the Psychiatric ward of Viola

rec'd 11/08/16


Hospital and sentencing was adjourned to the 29th October, 2015.

- [4] Mr Aho informed me that his sentencing submissions contained a summary of the facts contained within an earlier memorandum, he had submitted to the Court and a list of the criminal convictions of the Respondent. A bench warrant had been issued for the arrest of the Respondent because he had escaped from the Psychiatric ward.
- [5] He appeared after arrest on the 3rd November, 2015 and was remanded in police custody until sentence on the 6th November, 2015.
- [6] He was sentenced to 9 months imprisonment which was fully suspended for two years.
- [7] The record of the proceedings which I received from the

Magistrate's Court, is brief. It reads;

Criminal case number 36 /2014 Police v Sontane Motu'apuaka
assault

Ct read the indictment. Accused pleads guilty

I am guilty your worship. I harmed the other person because he attacked me with a knife and he punched and attacked me with a rock. Therefore your Honour I am guilty and I have three children. I apologise for what had happened. I feel the utmost remorse. I ask for your leniency and mercy.

Ct You were previously convicted for assault and that has become a habit of yours. However, because it was the victim who attacked you and because of your children, I hereby

sentence you to 9 months imprisonment with two years suspension.

- [8] On the 11th November, 2015, the Appellant filed a Notice of Appeal with the Magistrate's Court. It was not, however, until the 16th June 2016 that the Appeal case reached this Court. That is an unacceptable delay and no reason has been given for this delay. Delays of this kind can prejudice justice.
- [9] There does not appear to be any agreed summary of facts either with the file. It seems it was a late plea of guilty and Mr Aho said that the Crown facts which the Magistrate had before him were contained within a memorandum of an intended Crown opening that had been filed with the Magistrates Court in or about the 9th June 2015. He said that he had presented these facts again for the Magistrate for sentence on the 29th October, 2015, when he appeared. He did not appear on the actual sentence he said on the 6th November, 2015 because he was overseas. I was concerned that there was a very significant disparity between the statement of facts presented by Mr Aho and the Magistrates' version as reported on sentence. This moved me to inquire of Mr Aho whether this Court had received the correct file and he assured me it had, so I proceeded to hear the appeal.
- [10] The Crown's case was that the victim had been drinking kava at the Crown Hall on or about the 20th February 2014 at Ha'alo. The Respondent had joined the party at around 3am on 21st February 2014. Whilst drinking kava, the victim began to joke about the accused. This angered the Respondent and so he stood up, walked outside the town hall and challenged the victim to come outside and fight him. The victim walked outside to chase after the accused and then the accused threw a knife at the victim. The knife penetrated into the victim's left shoulder, leaving a superficial laceration on the left shoulder. The Respondent had admitted to the offending.

[11] It is of concern to me that there is no agreed facts on the file, and also it is concerning, in a case of this seriousness, involving the use of a knife to cause injury, that no probation report was called for and no report requested either from the Psychiatric ward before sentencing despite his attendance there. The reasoning given in the report as recorded is brief in the extreme and of little assistance to this Court. I also add that the Court file as delivered up to this Court contained little information.

[12] Of concern also is that there is no reference by the Magistrate to the list of convictions that had I am told been furnished to the Court by Mr Aho. These indicate that between 2000-2008 the Respondent has been before the Court 7 times on offences involving, theft, housebreaking, unlawful assembly and riot. He had been sentenced to terms of imprisonment, probation and some sentences have been suspended. It is deserving of note, however, that he does not seem to have offended for several years before the present offending in 2014, and has not violently offended. I take this into account on this Appeal.

[13] Despite the very unsatisfactory nature of the sentencing process, I feel able to dispose of this Appeal. Because it is a Crown appeal, I approach the matter allowing the Respondent a measure of leniency. I consider that the Magistrate was correct to impose a sentence of imprisonment for this offending. The use of a weapon to inflict injury will almost always attract the potential for a sentence of imprisonment, the length of it being dependant on the seriousness of the injury inflicted, and what if any mitigating factors are present.

[14] The summary of facts as presented by Mr Aho however, as I have said, bears no resemblance to the provocation mentioned by the Respondent in his short account to the Magistrate before sentence. On Mr Aho's version of events, there is little, if any,

provocation prior to the use of the knife by the Respondent. That is why it is necessary for a Sentencing Officer to proceed in cases where there is a guilty plea on an agreed set of facts. If there is no agreement, then there has to be a trial on the facts to determine a proper basis for sentence. The Agreed facts should then be sent together with other documents to this Court when an appeal against sentence or, as here, a Crown Appeal against sentence is filed. In this case, it seems the Magistrate proceeded on the basis of an attack by the victim which as I have said is not born out in the facts Mr Aho says were presented to the Court. The Magistrate also referred to a previous conviction for assault but there no record of that in the summary of convictions either.

[15] I consider that the sentence of nine months is an adequate sentence although at the lower level for the use of a weapon, and takes into account the late guilty plea, and the fact that there was apparently no serious injury to the victim. Before sentencing in cases like this the sentencing judge should discuss with the Police prosecutor or the Crown prosecutor the nature of the injuries and in what state the victim is at the date of sentencing, if that is possible.

[16] I also do not, in this case, interfere with the fact that Senior Magistrate Mafi suspended the sentence, because the record of convictions evidenced a lapse of offending between 2008 and the present offending of about 6 years and, contrary to the observation of the Magistrate, it seems he had not been involved in any offence involving violence. Normally, I would require some brief reason to be recorded why a sentence should be suspended in whole or in part. There were no reasons given here aside from the fact the accused had a family on his own assertion which was not born out by confirmation from any probation report, and some provocation. There was no reference to any of the Mounga principles which govern suspension of sentences in Tonga.

[17] However, I consider the sentence is manifestly deficient in one respect. The suspension should have been accompanied by a punitive condition to emphasise to the Respondent the seriousness of using a knife as a weapon. Mr Aho is correct when he submits his use of knife was here at best highly reckless as it was highly dangerous. The Respondent was very fortunate that the injuries were apparently not serious. In my view, the sentence imposed should be varied to reflect a punitive and deterrent element. I vary the sentence to require the Respondent as a condition of his suspension to perform 40 hours community work under the direction of probation with the recommendation that this be cleaning the Vuna Road. I have imposed the minimum hours because this is a Crown appeal.

[18] Finally, I stress that appeals should be processed and sent to the Court much more expeditiously than occurred here, so that appeals can be disposed of quickly and regularly.

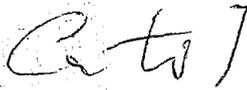
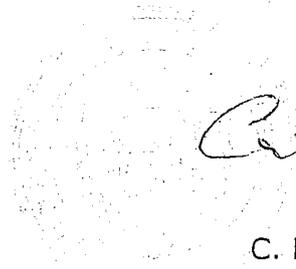
[19] I allow the Appeal to the extent that the sentence should read;

- i. The Respondent is convicted and sentenced to 9 months imprisonment for causing serious harm contrary to section 107(1) (2) and (4) of the Criminal offences Act.
- ii. That sentence is fully suspended on the following conditions;
- iii. The Respondent is not to commit any offences punishable by imprisonment for two years;
- iv. He is to carry out 40 hours community work under the direction of probation with a recommendation that this be cleaning the Vuna Road.

The period of suspension operates from the date of his sentence namely the 6th November 2015.

[20] He is warned that a failure to carry out either of these conditions may result in his being recalled to serve the term of imprisonment.

[21] The Respondent is to report to Probation with a copy of this Judgment or Court order no later than 4pm on Monday 8th August, 2016 so that arrangements can be made with Probation for him to perform his community work forthwith. Mr Aho should also communicate with Probation by that date.

C. B. Cato

J U D G E

DATED: 5 AUGUST 2016