

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

AM 4 and 5 of 2018

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BETWEEN: SIOSIUA TAUELANGI **AM 4 of 2018**
Appellant
AND : REX
Respondent

BETWEEN REX **AM 5 of 2018**
Appellant
AND FONUA TAUELANGI
Respondent

BEFORE LORD CHIEF JUSTICE PAULSEN

Hearing : 6 April 2018.
Date of Ruling : 9 April 2018.

Counsel : Mr. 'A Kefu SC for the Crown
Mr. S Tu'utafaiva for Siosiu Taelangi and Fonua Taelangi

RULING ON APPEALS AGAINST SENTENCE

[1] Siosiu Taelangi (Siosiu) and Fonua Taelangi (Fonua) are brothers. On 20 September 2017 they attacked Fatai Lavaka. On 12 March 2018 they pleaded guilty and were convicted of offences in relation to that attack in the Magistrate's Court and sentenced by Principal Magistrate Mafi.

rec'd 10/04/18
HC

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[2] Siosuia was convicted of common assault under section 112 Criminal Justice Act. He was sentenced to 12 months imprisonment with the final six months suspended. Siosuia appeals against his sentence.

[3] Fonua was convicted of serious bodily harm under section 107 Criminal Justice Act and sentenced to 6 months imprisonment fully suspended on the condition that he performs 40 hours community work. The Crown appeals against his sentence.

The facts

[4] The relevant facts can be stated shortly.

[5] Siosuia is the elder of the brothers. The victim had an altercation with a friend of Siosuia at the Vai Ko Puna Pool. Siosuia and Fonua learned of this and drove to a tyre repair shop at Pea where the victim worked.

[6] Siosuia quarrelled with the victim and started the attack. He punched the victim in the face including when the victim was on the ground.

[7] Fonua got an iron rod from the workshop and also a rock. He hit the victim with the rock causing injuries to his head, face and hands.

[8] The attack was stopped when third parties intervened. When arrested Siosuia and Fonua cooperated with the Police.

[9] Siosuia has a history of criminal offending including offences of violence and dishonesty for which sentences of imprisonment have been imposed. Before this offending he was last convicted of bodily harm in 2011 and sentenced to 3 years 6 months imprisonment with the last six months suspended.

[10] Fonua has a conviction for assault in 2007 and was fined \$50. It does not appear he has any other convictions.

Siosuia's sentence and appeal

[11] Before the Magistrate Mr. Tu'utafaiva accepted that a term of imprisonment was inevitable but that it should be suspended on condition that Siosuia do community work.

[12] He argued that there were a number of mitigating factors, namely that Siosuia and the victim had reconciled, compensation had been paid to the victim (money and yams) and that Siosuia was a Minister and despite a criminal history he had returned to the Church.

[13] The Magistrate's sentencing comments were brief. He said that he had taken into account all of the mitigating factors but that Siosuia had initiated the assault and had an appalling record. He sentenced Siosuia to one year's imprisonment with the final six months suspended.

[14] Mr. Tu'utafaiva advanced three principal grounds of appeal. First, that the Magistrate imposed the maximum sentence upon Siosuia for the offence of common assault when this could not be regarded as the most serious offending of its kind. Secondly, that the Magistrate failed to take account of the mitigating factors. Thirdly, that there was an unjustified inconsistency between the sentences imposed upon Siosuia and Fonua.

[15] In his written arguments Mr. Kefu submitted that there was no error in the Magistrate's sentencing but in oral argument was prepared to concede that the imposition of the maximum sentence as a starting point may have been an error. Nevertheless, he submitted that the end result whereby Siosuia will serve 6 months imprisonment was within the range of the sentences available to the Magistrate.

- [16] I consider that there is force in Mr. Tu'utafaiva's submission that the Magistrate fell into error in a number of respects. He should not have taken the maximum sentence available for the offence as a starting point because Mr. Tu'utafaiva is correct that this was not the most serious offending of its type. It would have been more serious if, for example, Siosuia had used a weapon. The Magistrate also fell into error as he clearly failed to give any credit at all for the mitigating factors (despite saying he had done so) and the guilty plea.
- [17] I accept Mr. Tu'utafaiva's submission that the Magistrate was required to achieve consistency between the sentences imposed upon Siosuia and Fonua taking account, of course, of relevant differentiating factors. The principle is that similar offenders who commit similar offences in similar circumstances should receive similar sentencing outcomes.
- [18] The Principal Magistrate's reasons were brief and do not disclose a methodical approach to sentencing. Sentencing for criminal offending should not be unpredictable. The errors that he made could largely be avoided if the proper method is applied and full reasons are given and recorded in writing. It is generally recognised that the approach that the Court should take is a three step exercise. First it must determine the appropriate starting point for sentencing purposes, secondly it must adjust that for aggravating and mitigating factors relevant to the offender and thirdly it must consider what discount is appropriate to reflect a guilty plea.
- [19] Looking at the matter afresh, as I have said the Magistrate should not have taken as his starting point the maximum sentence for the charge of common assault. That said, the offending was serious being premeditated, unprovoked, involving two assailants attacking the victim

on the ground and in the case of Siosiuia he inflicted blows to the head of the victim with his fists. In those circumstances the starting point should not have been far from the maximum. I would have taken 10 months imprisonment as a starting point.

[20] The Magistrate should then have had regard to aggravating and mitigating factors relevant to Siosiuia. The main aggravating feature is that Siosiuia has a bad history of criminal offending. Mitigating factors include his co-operation with the Police, that he apologised and made peace with the victim and that he has paid compensation to the offender. Balancing the aggravating and mitigating factors I would allow 2 months as a discount and further 2 months discount for his guilty plea. On this basis I arrive at a sentence of 6 months imprisonment.

[21] That leaves the issue of whether the Magistrate should have suspended any portion of the sentence. In this too he fell into error. I can see no justification for suspending any part of the sentence based on the principles in *Mo'unga v R* [1998] Tonga LR 154. Furthermore, the Court of Appeal in *Mo'unga* noted that a suspended sentence is intended to have a deterrent effect and that 'if the offender is incapable of responding to a deterrent, it should not be imposed'. Siosiuia has had suspended sentences imposed in the past and continues to reoffend.

[22] I therefore consider that a sentence of six months imprisonment was the proper sentence.

Fonua's sentence and appeal

[23] Before Magistrate Mafi Mr. Tu'utafaiva again submitted that a suspended sentence of imprisonment with community work was appropriate. He referred in mitigation that Fonua and the victim had reconciled, that

compensation had been paid to the victim (money and yams) and that Fonua was remorseful.

- [24] Principal Magistrate Mafi acknowledged the mitigating factors and that it had been Siosuia and not Fonua who had started the attack. The Magistrate noted that an apology and compensation had been given to the victim which had been 'gladly accepted'. He imposed a sentence of 6 months imprisonment fully suspended upon the performance of 40 hours community work.
- [25] Mr. Kefu acknowledged that on a Crown appeal against sentence the Court should take a conservative approach and if the Court is satisfied that the sentence under appeal should be increased it should be at the lower end of the appropriate sentencing range (*R v Guttenbeil* [2015] Tonga LR 88).
- [26] Mr. Kefu submitted that the Magistrate fell in to error in failing to give sufficient weight to the aggravating features of Fonua's offending particularly the serious circumstances of the offending and Fonua's previous criminal conviction. The aggravating features were that injury was caused to the victims (lacerations and bruising), that the attack was premeditated, unprovoked and was by two people as well as the use of weapons by Fonua. Mr. Kefu also submitted that the sentence should not have been fully suspended.
- [27] For his part Mr. Tu'utafaiva argued that the Magistrate's decision was correct and referred me to *R v Motu'apuaka* [2016] Tonga LR 520 where Cato J had held that a sentence of 9 months imprisonment for an assault with a weapon was adequate although at the lower end of the scale. In that case Cato J did not interfere with the Magistrate's decision to fully suspend the sentence but did impose conditions including that the

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accused perform 40 hours community work. Cato J noted in relation to the Magistrate's decision:

Normally, I would require some brief reason to be recorded why the sentence should be suspended in whole or in part.

- [28] The Magistrate's reasons are not adequate and do not explain how he arrived at his decision. He also provided no reasons for fully suspending the sentence. This is all unsatisfactory but that said I consider the end result was broadly correct.
- [29] I consider that the starting point for sentencing purposes should have been 12 months imprisonment. That is higher than the starting point in Siosuia's case to reflect the fact that Fonua was charged with a more serious offence, chose to intervene in the attack after it had begun, deliberately sought out and used weapons and would, no doubt, have caused the majority of the injuries to the victim through their use. From this I would have allowed Fonua 3 month's credit for the mitigating factors advanced by Mr. Tu'utafaiva and for the fact that he has only one conviction for what appears to be a minor offence over 11 years ago. I would have allowed him a further 3 months discount for his guilty plea arriving at a sentence of 6 months imprisonment.
- [30] As far the suspension of his sentence is concerned, I cannot argue (and nor does the Crown) that the sentence should not have been suspended in part. Whilst there is a strong argument that a partial suspension would have been more appropriate I note that the suspension was coupled with a punitive condition, is consistent with *Motu'apuaka* and that Fonua has already completed his community work. In the circumstances I am not prepared to interfere with the Magistrate's decision to fully suspend the

sentence, albeit I have reservations about it and will repeat Cato J's concern that reasons for doing so should always be given.

The question of consistency

[31] Finally I need to step back and consider whether the conclusions I have reached in regard to the sentences to be imposed on Siosuia and Fonua are broadly consistent. I consider they are. In the end result both have received a sentence of 6 months imprisonment for their part in the attack. Whilst Fonua's conduct was arguably more serious he benefited from his good record. The suspension of Fonua's sentence is justified because of both his good record and because there is reason to hope that in his case it will act as a deterrent.

Result

[32] Siosuia's appeal in AM4 of 2018 is allowed to the extent that the sentence should read:

- (a) The appellant is convicted and sentenced to 6 months imprisonment for common assault contrary to section 112(a) Criminal Justice Act. The appellant is to be given credit for any time served following conviction in the Magistrate's Court.

[33] The Crown appeal in AM5 of 2018 is dismissed.



NUKU'ALOFA 9 April 2018

A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen
LORD CHIEF JUSTICE