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#1

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

AM 16 of 2021
 (CR 148 of 2021)

BETWEEN:

POLICE

Appellant

-v-

MELEKIOLA TU'IPULOTU

Respondent

RULING

BEFORE: ACTING LORD CHIEF JUSTICE AFEAKI
 Appearances: Mr T. 'Aho for the Appellant
 Mr V. Mo'ale for the Respondent
 Date of hearing: 19 November 2021
 Ruling: 16 December 2021

Introduction

1. This was an appeal brought by the Appellant against a judgment ruling of the Principal Magistrate Mafi dated 11 August 2021.
2. In terms of the sentencing appeal, the respondent pleaded guilty to one count of serious bodily harm, contrary to s 107 (1) (2) (c) (4) (a) (b) of the *Criminal Offences Act*. The summons served on the accused (now the respondent), recorded that he “*willfully and without lawful justification use the machete to strike the right hand of the complainant, causing him injury.*”

Background

3. On or about 26 April 2021, at approximately 11pm, the complainant, a 16-year-old male, entered the respondent’s home despite having already previously been informed not to enter the house at night time. The respondent warned the complainant to leave, but he did not. As a result, the respondent says he attempted to hit the complainant’s shoulder with the flat side of a helepelu (machete). The complainant guarded his shoulder with his right hand, which was injured when the helepelu struck him.
4. The Medical Report from the Hospital Medical Officer who inspected and treated the complainant at 0015 hours on 27 April 2021 was not produced to the Magistrate Court for consideration in sentencing.
5. The respondent pleaded guilty to the serious bodily harm charge and his matter was adjourned for sentencing on 11 August 2021 before Principal Magistrate

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Mafi.

6. On 11 August 2021, he was sentenced to six months' imprisonment. The sentence was fully suspended for a period of 12 months, on the condition that the respondent:
 - a) is not to commit any offences punishable by imprisonment; and
 - b) continue good service for the town and the church.

Notice of Appeal

7. On 20 September 2021, the Police filed a notice of appeal asking the Supreme Court to quash the sentence and that the respondent be re-sentenced in the Supreme Court.

Appellant's submissions

8. The appellant outlined one ground of appeal that:

"The respondent was being sentenced for causing bodily harm when he struck a 16-year-old boy with a machete causing injury, and the learned magistrate erred in law and in principle when he fully suspended the respondents sentence resulting in a net sentence that was manifestly inadequate and inappropriate."
9. The appellant submits that the appeal should be allowed for the following reasons:
 - a) The reasons of the principal magistrate with a particular emphasis on his sentencing comments demonstrate that he acted upon a wrong principle resulting in him imposing a sentence that was inadequate and appropriate; and
 - b) The sentence is inconsistent with other sentences for the same type of offending in the Supreme Court.
10. The Court of Appeal in the case of *R v Misinale* AC 13/99 (unreported 23 July 1999) observed that:

"... for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that a sentence imposed as inadequate or inappropriate. For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge heard and that he or she must have acted upon a wrong principal, wrongly assessed

a relevant circumstance, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with the sentences the court is imposed for like offending. In such a situation the appellate court is left with no alternative but to impose a more severe or a different sentence."

11. Crown counsel quoted Learned Principal Magistrate Mafi's sentencing notes and decision thus:

"[19] The defendant did not provide any explanation for the intention of the defendant. There was no explanation to the bodily harm. Intention is the most important factor in criminal cases.

[20] There was one thing that was not raised by either party (sic) but the defendant brought it up in chambers, these events occurred in the defendant's residence. Efforts were made to chase the victim away, but he wouldn't leave which lead to whipping him so he would leave the defendants residence.

[21] What I have gathered from that circumstances, (sic) that there was no intention to cause bodily harm. He was whipped so he can leave, that led to an accidental harm. If it was intended to hit with the bladed (sic) to cause bodily harm, it is possible that it is intended for bodily harm or murder, but no such intention showed.

[22] One point to consider is that this occurred at the defendant's residence. He had made multiple attempts to chase but the victim would not leave. Everyone has the right to chase other people out of their allotment."

12. Crown counsel further submitted with some resonance that:

"if the alleged trespass by the complainant was of concern to the respondent, the respondent should have called the police, or at least the complainant's parents. By grabbing a machete and using it on the complainant, the respondent was in effect demonstrating self-help and taking retribution."

13. However, in this regard despite having some legal rights in his own home, the respondent resorted to using a lethal weapon to remove the complainant and in fact struck him with it. Whilst I respect, to a degree his reasoning, the Learned Magistrate erred in condoning the level and nature of the respondent's violent action in response to the youth's presence. It is worth adding that in trespass cases, only reasonable force may be used to evict trespassers. Reasonable force in the context of a 16-year-old do not necessarily automatically include using a machete.
14. Another aspect of the case to be weighed is that the complainant was inside the respondent's house at 11 PM without being invited in and he had previously been warned against coming into the house at night time.

15. Crown counsel submitted that the Learned Magistrate erred in assessing this aspect in his sentencing and that therefore the sentence was inadequate. The Court has a duty to, through the due process of law, protect our citizenry from violence and to provide a deterrent factor for retributive self-help violence to be prohibited in our communities. There are other exceptions in the law where violence may be justifiable, for example in cases of self-defence of oneself or another person who may be in jeopardy of being killed. Even there, the force used in self-defence must be reasonable and proportionate to the perceived as actual threat to life. The circumstances of this case do not reach that threshold.

Discussion

16. There appear to be some problems with the Learned Magistrate's reasoning which I asked counsel for submissions on.
17. The matter of *mens rea* or intention within the context of a violent criminal attack such as what the respondent has been convicted of, is that the Court has to decide on all the circumstances and evidence before it, whether or not there was justification for the use of violence. This is particularly so when the violence is carried out with a lethal weapon.
18. The evidence establishes quite clearly that the respondent struck the youth with the helepelu (machete). There is nothing in the evidence to show that he did not intend to strike him. Undeniably, he admitted to the charge of striking the complainant.
19. The Learned Magistrate's consideration of and comments about the respondent not 'using the sharp edge of the machete' to strike the complainant are distinctions which thankfully have not led to a grievous bodily harm or worse charge being laid against him.
20. From the Learned Magistrate's assessment, the damage done was less because he found that the respondent used the "flat side" of the machete. But that is not all the court should consider in this case. The Court is also bound to consider, in the totality of the circumstances, whether or not the serious bodily harm offence the respondent pleaded guilty to, resulted in a sentence which was appropriate and adequate for that offence.
21. With respect to intention, nothing in the appeal documents now before the Court indicates that the respondent did not intend to strike the youth. At [22] the Learned Magistrate mentioned his finding in assessing the respondent's intention and action, that:

"He [the complainant] was whipped so he could leave, that led to an accidental harm."

22. However, by admitting the charge against him, the established fact is that the respondent did intend to strike the complainant even if only to remove or chase him from his home. The logical inference to be drawn from the facts is that the striking of the complainant with the machete was intentional, not accidental.
23. The Magistrate Court's record received in the Appeal Booklet received, states that the Learned Magistrate considered the fact that these events occurred at the respondent's residence. The complainant is his neighbour and is a blood relation. It was mentioned that efforts were made to chase the victim away, but that he would not leave and therefore, the respondent took a helepelu and struck him so that he would leave his premises.
24. In respect of the Learned Magistrate's comment that "*everyone has the right to chase other people off their allotment*" that is accepted as a corollary of legal ownership and occupation of land and one's home. However, that is not a license for a grown man to lose his temper, surrender to a dark side of his nature, take the law into his own hands and strike a youth with a machete.
25. Resorting to the use of a machete for any type of dispute resolution is unacceptable. However, this must not be limited and indeed extends to violence against any member of the public, related, neighbors, strangers or otherwise.
26. Part of the role of the Court in sentencing is as the Court of Appeal held in *Misinale* to appropriately, if necessary, impose a punitive penalty on those convicted of violent offences.
27. It is also a role in sentencing, to provide the community with clear examples of what is and what is not acceptable in respect of violence against youths or any person, and especially violence with lethal weapons.
28. The respondent's conduct was irresponsible and caused a serious wound to the youth. I am only relieved that the complainant was not very badly injured or worse. The consequences of using a machete when a person is enraged always comes with the real risk that serious or grievous bodily harm can occur, or worse.
29. In the circumstances and light of the later received medical evidence discussed further below, I find that Mr Tu'ipulotu was reckless as to whether or not he might seriously injure the complainant when he struck him with the machete.

Further information provided by the parties

30. Following receipt of this appeal, on 5 October 2021 His Honour Whitten LCJ directed counsel for the parties to provide, if they so wished, legal submissions and any affidavit evidence upon which they sought to rely on. Both legal counsel helpfully provided legal submissions and the respondent filed his affidavit in

support.

31. The respondent attested that the complainant is related to him through his parents and that he resides next door. Further, the respondent is employed by the complainant's parents in their business.
32. The respondent's affidavit included references of him having "persistently" warned the complainant against coming into his home: "*at night time because the old lady and her daughter and the children were not felling safe and comfortable when he enters at night time, especially bedtime.*" I find that this evidence is relevant to the weighting of the respondent's reaction, not in terms of justifying his use of violence *per se*, but of the context of the events occurring late at night and prior warnings to stay out of the home, which he says were given to the complainant.
33. I understand that at the lower court the Learned Magistrate took into consideration that reconciliation had taken place with the family and rightfully considered the importance of '*ata kai o e famili*', or the collective wellbeing of the family in respect of everyone being able to get along with their life as relations. Somewhat obliquely the respondent's affidavit also mentions that the complainant is now married, but how that impacts upon the considerations in sentencing was not and is not clear to me.

Reference Letters

34. At hearing on 19 November, I heard from Counsel that two reference letters had been provided in support of the respondent but which were not included in the information received for consideration in this appeal. I sought copies of those from Counsel, who in turn sought the originals from the Magistrate's Court file and filed them by consent.
35. The reference letters for the respondent from Rev. Monsignor Lutoviko Finau of Ma'ufanga Roman Catholic Parish and Town Officer 'Alotaisi Takau of Kolofo'ou were considered by the Magistrates Court and were relevant in my consideration of the character of the respondent and his standing in the community. I have taken them into consideration.

Medical report

36. On 19 November 2021, I directed counsel to provide medical evidence, if any, of the wounds suffered by the complainant that was provided by the Police to the Learned Magistrate.
37. I was advised that no medical evidence was provided to His Honour because the respondent had already pleaded guilty to the serious bodily harm charge and

that at the time, that appeared to be enough to rely upon.

38. However, I took the view that in considering all factors in sentencing, it would be most helpful to receive contemporaneous medical evidence to understand how serious the harm was and from that point, work out how the appropriate sentence could be arrived at for this respondent, in respect of this particular offending, and in terms of finding a level of parity with other serious bodily harm convictions and sentencings involving the use of a machete.
39. Crown Counsel for the appellant had the hand-written and signed Ministry of Health Medical Report (the “Report”) which he submitted to me. I read it and handed it to respondent counsel, who also read it. I asked counsel to make a copy of it, have it transcribed, filed and served by 26 November 2021, because I wished to consider it in respect of the facts relevant to sentencing. The parties consented to it being filed for consideration in this appeal.
40. The Report is relevant and I can comment that it would have been useful to the Learned Magistrate to have had it for consideration on 11 August when he was considering relevant factors for passing the sentence now under appeal. Had His Honour seen the Report, I believe it would well likely have influenced his decision.
41. Contrary to comments and findings in the Magistrate Court’s sentencing indicating that the harm was not serious and the “flat side” of the machete was used, the Report shows that apparently the edge of the blade inflicted a significant cut and a reasonable conclusion can be drawn that the flat side of the machete did not cause a cut requiring stitching to control the bleeding from the wound.
42. When the complainant arrived at the hospital on 27 April 2021, he was examined and treated. The Doctor found and reported as follows:

“Examination & Findings: Blood soaked clothes on body

(L) Mastoid [sic.] swelling, bruise and tender

(L) Posterior neck abrasion line

Swollen abrasion 1cm central forehead

(R) wrist 2 x 1 cm bleeding

(Right) laceration (deep) Had to control bleeding by suturing wound

Opinion: Full blood count - Normal

X Ray (R) wrist: No obvious [sic.] fracture or Dislocation seen

All soft tissue injury

(R) wrist deep laceration

(R) wrist laceration required suturing for control of bleeding
Discharge home with arm sling [sic.] for traction [sic.] and oral Antibiotic &
pain relief to take regularly at home”

Below is a sketch by the Medical Officer Taumalolo from the Report:



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| Family Name | Ysnafa | Date: | |
| Address | Houmalikas | Type of | |
|  | | Exami | |
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(sketch from the Report)

43. For the purpose of sentencing and considering this evidence which was not provided in the Magistrates Court, firstly I find that the evidence in the Report does not show that the respondent smacked the complainant with the flat side

of the machete, but that he had struck and cut the complainant with the sharp edge of the machete. The complainant had been cut with the machete on his right wrist, with enough force to make a cut 2 cm long and 1 cm deep. It had to be sutured (stitched closed) to control the bleeding and placed in traction (via a sling), which contrasts with the sentencing comments indicating that it was only a minor injury. I consider it a serious harm in line with the charge laid and for which a guilty plea was properly entered.

44. It is incumbent upon the Court to provide clarity that the law does not condone violence with lethal weapons whatsoever.

Authorities considered

45. In *R v Kautai and Tavake* (CR 102/2015 and 103/2015), in relation to retribution and 'self-help', His Honour Cato J made clear that:

"[18] Self-help and retributive action of this kind, as I have said involving violence, vigilante action and the use of firearms is denounced, is incompatible with civilized conduct. No citizen has the right, no matter what he conceives, may be the seriousness of crimes committed against him to take the law into his own hands and punish others without due process and trial. Generally, arrest is the responsibility of the police who must bring suspected offenders promptly before the Court for the purpose of their guilt or innocence being determined and punished. Punishment exempted where appropriate."

46. In terms of the *Misinale* Court of Appeal decision which also emphasised the point that sentences must be consistent for similar types of offending, counsel for the appellant raised authorities about the tariff in respect of machete cases and other violent offences having a starting point of 3 ½ to 4 years' imprisonment.
47. Recently, in *R v Finau* [2020] TOSC8, his Honour Lord Chief Justice Whitten imposed a starting point of 3 ½ years' imprisonment on a man for causing serious bodily harm with a machete on his brother.
48. In *Fifita v R* [2000] Tonga LR289 the Court of Appeal at [118] expressed that:
- "The purpose of a sentence imposed on an offender are to punish so far as is just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law abiding members of the community."*
49. Following those clear principles provided by the Court of Appeal, the Court finds that in this particular case, as in all cases involving violence and people using lethal weapons, the deterrence of criminal behaviour by members of the

community is a high priority. A message needs to be sent to the community that using lethal weapons on youths or on any person is unacceptable and should not be tolerated.

50. Furthermore, the rehabilitation of the offender is an important aspect within some measurable sentencing context and this will be reflected in the sentence to be handed down.

51. It is the Court's view that continuing to do the work he already performs for his church does not provide any rehabilitative incentive to the respondent. The vindication of society's standards which must be encouraged to abhor violence, particularly against children or youths, is to be pursued by the Courts in the administration of justice. Very importantly, the protection of law-abiding members of the community must be paramount in the administration of justice in our society.

52. In *Hu'ahulu v Police* [1994] Tonga LR 93, Chief Justice Ward said:

"... the fundamental point is that anyone who commits an offence of violence against another person runs a serious risk of immediate imprisonment. That will apply even to a first-time offender. The likelihood of going to prison becomes a virtual certainty if a weapon of any type is used."

53. It is acknowledged that the respondent in this appeal is a first-time offender, which is commendable and significant. However, his guilty plea to serious bodily harm arises from a decision he made on how to behave in a difficult situation and because of his actions, he has subjected himself to risk of prison time.

54. The use of machetes in assaults in Tonga constitutes a special category of aggravation. In *R v Finau* [2020] TOSC, the Court observed:

"In Siokatame Tupou [2019] TOCA 8, the defendant was sentenced to an effective term of 6 years' imprisonment with the last 2 years suspended after pleading guilty to attacking two men with a machete causing grievous bodily harm to one of them and serious injury to the other. Alcohol had been involved leading to an argument and a fight between the defendant and one of the victims. The victim apologized and the defendant accepted the apology. However, he then went to his home, obtained a machete, and returned to the place where the victims and others were still drinking. He then carried out a sustained attack on the first victim, attempting to strike him on five occasions with the machete and then once more after he fell. The defendant then chased the other victim and hit him repeatedly about the head with the machete after he fell. When he got up and tried to run away, the defendant chased him, caught him and continued hitting him with the machete. The attack only

stopped when the defendant's younger brother took the machete away from him. The less serious injuries, constituting the serious bodily harm charge, included multiple lacerations to that victim's left arm, forearm and hand, which all healed with no long term complications.

In his sentencing remarks, Cato J observed that a machete is an inherently dangerous weapon, particularly in the hands of a drunken offender. The Court of Appeal agreed and noted, relevantly, that the starting point of four years for the serious bodily harm charge was within range for this offending given the use of a weapon, the seriousness of the injuries inflicted and the sustained nature of the attack. In also declining to interfere with the period of suspension, the Court of Appeal stated:

'... Offenders inflicting serious injury with a weapon must ordinarily expect to serve a term of imprisonment. That is particularly so given the prevalence and availability of machetes.'

55. Moreover, in the case of *Semisi Pulu*, Lord Chief Justice Whitten made reference to the case of *Siokatame Tupou*, supra at [18], where the Court of Appeal declined the period of suspension "as it considered that the factors identified in *Mo'unga v R* [1998] Tonga LR 154 had been reflected in the discounts allowed by the Judge in fixing the length of the sentence and in the partial suspension ordered." The Court warned that:

"... Offenders inflicting serious injury with a weapon must ordinarily expect to serve a term of imprisonment ..."

Recklessness

56. In respect of the respondent's action in using the helepelu to strike the complainant, his recklessness as to whether or not he would cause serious harm is apparent.
57. *Halsbury's Laws of England* helpfully set out that:

"Recklessness on the part of the accused is sufficient mens rea for certain statutory offences and for the common law crime of manslaughter, and for these purposes a person is reckless if he has done an act which in fact involves an obvious and serious risk of causing injury or damage and either (1) he fails to give any thought to the possibility of there being any such risk; or (2) having recognised that there is some risk involved, he nonetheless goes on to take it.

[see *Halsbury's Laws of England*, 4th Ed, Vol 11 (1), para 14 at p 24 and see also useful references in *R v Lawrence* [1982] AC 510 at 527, 73 CR App Rep 1 at 12, HL; *R v Caldwell* [1982] AC 341 at 354, 73 CR App Rep 13 at 20, HL per

Lord Diplock]

58. I find that the respondent in taking up the helepelu and using it was reckless as to whether or not he would risk causing injury to the complainant. Anyone taking up and swinging a machete at another person must know that there is a serious and obvious risk of causing injury with it. If in fact injury is inflicted there must be consequences.

Discussion

59. Considering the circumstances described within the materials brought before the court in this appeal, the issues and reasons for the decisions of the Learned Magistrate having been taken into account, the Court finds that he erred in his decision making in the following ways:
- (a) considering the factor of the respondent's 'intention' to strike without sufficient evidence of the same, other than his guilty plea to the charge of serious wounding;
 - (b) over-emphasising the point that in his view, which he appears to have been told by the respondent or his counsel, but which is not clear from the record from the court, that the flat side of the machete was used and not the sharp side, meaning the respondent did not intend to cause serious bodily harm;
 - (c) not receiving, seeking, nor considering medical evidence of the impacts of the wounds upon the complainant and also as a consequence not being able to consider whether or not the respondent was reckless as to causing harm;
 - (d) considering that the striking of the complainant with the machete was in some way accidental in the course of the respondent chasing him away;
 - (e) gave credence to the respondent's account that because the complainant, a youth known and related to him, was on his property and not welcome there, he was lawfully allowed to remove him, and by inference although the particular words were not used presumably by use of reasonable force, but in the event was in fact serious and potentially lethal force; and
 - (f) the Magistrate therefore erred in accepting that in those circumstances the respondent's use of a lethal weapon was either reasonable or justified.
60. In respect of the Court of Appeal's guiding principles sentencing set down in *Fifita*, the Learned Magistrate erred in:
- (a) not providing a punitive component in terms which are just and fitting in the circumstances;

- (b) not providing a sentencing process for the rehabilitation of the respondent;
 - (c) not providing the vindication of society's standards, which rejects violence with weapons and encourages responsible behaviour by adults;
 - (d) not providing a sufficient deterrence from criminal behaviour to the respondent or others; and
 - (e) not ensuring that the safety of our communities from violence, especially to our children and youth is paramount and that sentencing should reflect that.
61. Notwithstanding the information provided before me and the well-formed and presented legal submissions from both counsel for the appellant and respondent, I do not consider that sentencing purposes of protection of the community, denunciation of violence using weapons, punishment and rehabilitation can in the present case, be effectively achieved only by full suspension.
62. Therefore, I am prepared to offer the respondent the opportunity and incentive for reintegration in the community by suspension of a longer term of imprisonment I impose and ordering him to serve community service as rehabilitation within punitive context not requiring jail this time.
63. I am confident that the respondent, the complainant and their family will be able to reflect on the learnings from this event and as the Court was assured, work within the reconciliation they have achieved so as to preserve and enhance their family relationships.
64. As discussed and pointed out numerous times by this Court and the Court of Appeal, I hope that this decision sends a message to our people not to take up a helepelu and use violence to make their points. Self-control is a necessary duty we must all demonstrate as responsible citizens in leading our families and communities.

Result

65. For the reasons given above, the Magistrates Court's sentence is quashed and the Respondent is sentenced to 12 months' imprisonment.
66. The sentence will be suspended for a period of 2 years on the condition that during that suspension period, the Respondent is:
- (a) not to commit any offence punishable by imprisonment; and
 - (b) to attend the probation office within 48 hours; and

- (c) to complete 60 hours' community service, as directed by his Probation Officer.

NUKU'ALOFA
16 December 2021



A handwritten signature in blue ink, appearing to read "B. Afeaki".

Tu'inukutavake Barron Afeaki
ACTING LORD CHIEF JUSTICE