

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

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CR 102 & 103 of 2015

BETWEEN:

REX

-Prosecution

AND:

1. TU'A TAVAKE

2. SOSEFO LANGI KAUTAI

- Defendants

BEFORE THE HON. JUSTICE CATO

Mr. 'Aho for the Crown

Mr. Tu'utafaiva for Mr Tavake and Mr Kautai

SENTENCE

1. The prisoners were tried on several charges arising out of an incident at Lavengatonga Tongatapu on the 29th May 2015. They were tried before a Judge and Jury with the trial lasting nine days between the 23rd January 2017 and the 3rd February, 2017.

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2. At the conclusion of the trial, Mr Tavake was found guilty of one count of common assault and one count of unlawful imprisonment. Another count of unlawful imprisonment and two counts of serious bodily harm were withdrawn from the Jury as I ruled that no prima facie case had been established at the conclusion of the Crown case.
3. Mr Kautai was found guilty of all the counts he faced on the indictment consisting of common assault (maximum sentence 12 months imprisonment), 2 counts of unlawful imprisonment, (maximum sentence a fine not exceeding \$5000.00 and in default thereof to imprisonment for any period not exceeding one year) and 2 counts of serious bodily harm (maximum sentence being 5 years imprisonment).
4. The incident, or series of them, occurred on the 29th March 2015 in the area of Lavengatonga, which is a village on the eastern side of Tongatapu where the accused Mr Kautai owned and operated allotments of crops used for tapa bark. This appeared to be a reasonably substantial undertaking.
5. The victims, Fine Lasike and his uncle, the second victim known as Nofomuli Lasike, were related to Mr Kautai by his

marriage. Both, from time to time, had worked for Mr Kautai. I accept, for some time that, Mr Kautai had noticed that tapa bark and items from his residence were being stolen and he had become increasingly frustrated by his inability to find the offenders. He instructed his employee, Mr Tavake, who had accommodation with his wife in a hut at an allotment belonging to Mr Kautai, to remain in Mr Kautai's residence on the 29 March, 2015 to apprehend any trespassers. Mr Kautai would be away and his wife was also absent at work.

6. It seems that Fine had approached the house, he said in evidence, for legitimate reasons a couple of days before the incident and may have been seen by a neighbour who reported the incident some days later. As a consequence after this incident, a complaint against Fine was filed to which he had pleaded guilty before this trial. It was not until the 29th March, 2015 which was prior to the resolution of the complaint, however, that this matter came to a head.
7. Fine, who said in evidence, that he was having trouble sleeping and did not want to go to work, decided that he would go to Mr Kautai's residence and sleep there, apparently because he did not want to incur his mother's wrath if he did not go to work. He entered the house by

opening a window, the residence being secured by Mr Kautai before he left. He was apprehended by Mr Tavake inside the house. Mr Tavake is of solid build, and a much bigger man than Fine. Fine was knocked to the ground by Mr Tavake who repeatedly punched him and effectively restrained him until Mr Kautai returned. Fine maintained that he was innocent of any wrongdoing at trial and testified that, on both occasions, he had gone to the residence for legitimate reasons and was not a thief.

8. Mr Kautai considered otherwise and, on his return, obviously very concerned and surprised to find Fine concluded that he was responsible for his losses and beat him with an iron wood branch several times. Fine asked him to stop but he persisted. Fine was later taken by Mr Kautai to the allotment from where bark had been stolen. Fine, who was very frightened, admitted his involvement and said that his uncle Nofumuli had also been involved. This must have further enraged Mr Kautai because Fine received another beating with a stick on his return from that area to the hut where Mr Tavaki lived with his wife.

9. By this stage, Fine had been in the custody of Tavake and then Mr Kautai since the early morning, and the arrival of the two at the hut occurred in mid to late afternoon. Tavake

was ordered by Mr Kautai to detain Fine and did so until Mr Kautai returned over a hour later with Nofomuli whom he had located and had driven him back to the hut, having falsely pretended that the two would go pig hunting.

10. Upon bringing Nofumuli, an older man and an uncle to Fine, back to the hut, Mr Kautai took a .22 rifle from the rear of the motor vehicle and confronted Fine and Nofumuli inside the hut. Nofumuli was accused also of taking bark which he denied. As a consequence, Mr Kautai shot Fine in the hand and then it seems Nofumuli close to his knee. He later drove both men home where his wife applied some treatment to Fine and then took them to the hospital. They did not wish to stay and asked to be taken home which Mr Kautai did. At home, the police were contacted and they arrived taking both men to hospital for treatment.

11. I was informed that both victims spent some time in hospital. It seems, however, that both have recovered without any permanent injury fortunately for the victims and Mr Kautai, who otherwise would be facing sentence on more serious charges. I consider that the assaults Fine received from Mr Kautai were severe, and were sustained over a protracted period. For Fine the ordeal lasted from the morning to his detention in the late afternoon and ended

with his shooting. This must have been a terrifying experience, as it would have been also for Nofumuli.

12. In so far as Mr Kautai was concerned, the jury rejected his defence that he had acceded to Fine' request not to take him to the police but to do with him as he pleased. The Jury rejected his claim that Fine consented to the beatings he received. In so far as Mr Tavake was concerned, the Jury rejected his defence that the force he used to detain Fine, at the house, was reasonable and constituted lawful excuse as a valid power of citizen's arrest at common law.

13. I make no finding as to whether Fine and his uncle were involved in theft. Whether they were responsible is irrelevant. Mr Tavake and Mr Kautai had no right to take the law into their hands and administer punishment to Fine or Nofumuli. Mr Kautai, in my view, although I accept he became enraged at finding Fine in his house, acted foolishly in not involving the police and instead, exacting retribution himself. No civilized society can tolerate oppressive, vigilante, conduct such as Mr Kautai chose to engage in towards Fine and Nofumuli that day. The sentence I impose must reflect the seriousness of his actions and act as a deterrent to others who chose to take the law into their own hands and exact punishment for perceived wrongdoing.

14. I will sentence Mr Tavake first because he plainly had a lesser role. He would, in my view as I directed the Jury, have been entitled to use reasonable force to restrain Fine until Mr Kautai or the police arrived, but, as the jury concluded, his actions went beyond this. He is a first offender, is married with one young child and is said to be remorseful. I consider a sentence of community work of 60 hours adequately reflects his role as punishment for his initial assault on Fine. He did not use a weapon and on the arrival of Mr Kautai, he took no further part in violence.
15. In so far as unlawful imprisonment is concerned, he was acting under instructions from Mr Kautai who was his employer to detain Fine at the hut where he lived with his wife and, although he did, at one point inform Fine he could not leave, he did not act violently towards him. He has no savings I am told and has not the means to pay a fine.
16. I convict him of common assault and order him to carry out 60 hours community work with the recommendation it be served cleaning the Vuna Road and in default two months imprisonment. He is unable to pay a fine so I convict and discharge him on the charge of wrongful imprisonment.

17. Mr Kautai represents a much more difficult sentencing exercise. He is aged 59, is married with 6 children and is a first offender. In his case, I have read a large number of reports including several from church leaders of various denominations, including Cardinal Mafi, praising his character and the charitable and other work he has performed for many years for his community, including giving employment to others. I accept that he is a well regarded, hardworking member of his community, that he has a good family background and returned to live in Tonga after residing in New Zealand. I will acknowledge these references of community support by affording Mr Kautai as much credit as I am able, by way of mitigation, but the fact remains that his actions were, although I am satisfied out of character, sufficiently serious to require a severe response.

18. Self help and retributive action of this kind as I have said involving violence, vigilante action and the use of firearms is denounced as 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 courts for the purpose of their guilt or innocence

being determined and punishment exacted, where appropriate.

19. I consider that the beating of Fine was callous, cruel and rather sadistic. As to count one, common assault, this involved the beating in the house and at the allotment, where sticks were used. I accept Fine had difficulty walking at one stage and asked Mr Kautai to stop. I consider a starting point is 10 months imprisonment. However, taking into account his age, the fact he is a first offender, that he has expressed some remorse for his actions (although this has not been accepted), that he took Fine to hospital for treatment and taking into account also, the expression of community support, I convict and sentence him to imprisonment for 6 months. This sentence is concurrent with the term I impose on count 4, serious harm.

20. I now move to count 4, the charge of serious harm on Fine. I agree with Mr Aho that using a gun to intimidate and then shoot Fine in the hand was very serious. Mr Tu'utafaiva argued that I should not accumulate the sentence imposed for common assault upon this offending, and, whilst I consider there could be no objection to my doing so since they were quite distinct applications of force, I propose to take into account the assaults and later

shooting in the case of Fine as one overall transaction and in order to reflect the totality of the violence I impose a starting point of 4 and half years. The use of the rifle standing on its own, in my view, would justify a starting point of about four years.

21. In mitigation, I note the fact he has been a person of good character for many years, is a first offender, the expression of community support and his limited apology, (this not being accepted, however, by either of the complainants). Any apology offered, I view, as belated in any event, because for a long period since the incident and at trial, he had denied and defended these charges strenuously exposing both victims to the additional ordeal of trial, and lengthy cross-examination, particularly in Fine's case. He did, however, take the victims to hospital after the shooting suggesting he realized, at that time, the seriousness of what he had done. He has also already paid into court a sum of \$3000.00 to be divided between each of the victims as compensation. In all, I allow him 18 months by way of mitigation. The sentence I impose upon him on conviction for serious harm to Fine is three years imprisonment.

22. I also order on this count that he pay \$1500.00 as compensation forthwith into court and this be paid out as soon as possible to Fine.

23. In so far as the serious harm to Nofumuli is concerned, the injury involved a gunshot very close to the knee cap. It may so easily have resulted in permanent incapacity. It was a callous and cowardly action. It must have been a terrifying experience and is worsened by the fact that he falsely pretended to Nofumuli they would go pig hunting so as to entice him into the car before taking him back to the hut where he held him at gunpoint with Fine before shooting him in the leg.

24. I adopt a starting point in relation to Nofumuli of 4 years imprisonment. I deduct 18 months for the mitigating features above. I convict him and sentence him to two and a half years imprisonment for serious bodily harm.

25. I also order that he pay Nofumuli \$1500.00 compensation which is held already in court. I order that it be paid out to Nofumuli as soon as is possible.

26. I now consider whether the sentences of serious harm should be imposed cumulatively as Mr Aho contends, or concurrently as Mr Tu'utafaiva submits. I consider that there are two discrete transactions here although the shootings occurred, almost, at the same time. The first transaction involved Fine from the assault at the home, then at the allotment, his detention, to the point where Mr Kautai returned and he is shot with Nofumuli present. The second involves the deceitful apprehension of Nofumuli, his unlawful confinement at the hut when confronted by Mr Kautai with the rifle and Nofumuli's shooting. I consider, in these circumstances, to treat the offending concurrently would diminish the overall seriousness of it. It would constitute an inadequate response to the totality of Mr Kautai's offending, involving the detention and shooting of both victims. Applying the totality principle, I consider that two years of the Nofomuli serious bodily harm sentence should be imposed consecutively on the Fine bodily harm sentence. I consider that because Mr Kautai has paid compensation to the victims justifies some reduction also when considering the question of totality. I sentence him on counts four and five to a combined sentence of five years imprisonment. This overall sentence is backdated to the date the prisoner was placed on remand in custody for his offending.

27. In relation to the two counts of unlawful imprisonment, both were serious examples. Fine was held for a considerable time whilst Mr Kautai went to look for Nofumuli, after he had been beaten extensively. That must have compounded his distress and uncertainty as to what was going to happen to him. The unlawful imprisonment of Nofumuli was also serious. He was tricked into getting into Mr Kautai's car and then intimidated at gun point before being shot.

28. The legislation is, in my view, deficient in not allowing for a sentence of imprisonment to be imposed in serious cases. I would have, had I had the power to do so, imposed sentences of imprisonment on these charges and made these concurrent with the sentences for serious bodily harm. I have not done so and, although I have mentioned these factors as being part of the circumstances leading up to both victims being shot, I have not taken these factors into account as aggravating or affecting the length of sentence I imposed on those counts. Because the prisoner has been ordered to pay compensation, and has paid the money into court, I do not consider that a fine is appropriate. On this basis, I convict and discharge the prisoner without further penalty on counts two and three.

29. Finally I come to the issue of suspension. Although, Mr Kautai could not be described as co-operative in this case having chosen to defend the case and justify his actions, I consider it is very unlikely that he will reoffend. I accept that he became very angry after being frustrated by being unable to locate the offenders for a lengthy period, when he found that Fine and then Nofumuli had been involved as he believed in stealing from him when they were family and had been his employees. He still has some years after imprisonment in which to continue the good work of which the community attests. His wife is taking over the plantations, but this will impose an additional onus upon her with her other family commitments, and I take this also into account, on the issue of suspension. He is a first offender. Up until this point, now aged 59, he has been of good character and this, I consider, enhances the likelihood he will not commit any further crimes. I take into account the testimonials provided and order that the final two years of his combined sentence of five years be suspended on the following conditions;

- a. he is not to commit any offences punishable by imprisonment for a period of two years;
- b. he is placed on probation for one year; and

c. he is ordered during this period to undergo a course on anger management at the direction of probation.

Should he fail to abide by these conditions he is warned that he may be recalled to serve the balance of his sentence of imprisonment.

30. For clarification, the sentences I impose upon Mr Kautai are;

Count 1, (common assault), he is convicted and sentenced to six months imprisonment to be served concurrently with count 4

Count 2, (unlawful imprisonment), he is convicted and discharged.

Count 3 (unlawful imprisonment) he is convicted and discharged.

Count 4 serious bodily harm (Fine), he is convicted and sentenced to three years imprisonment.

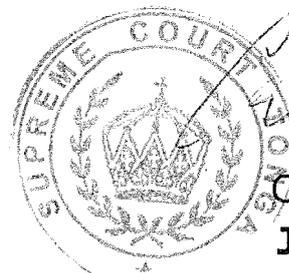
Count 5 serious bodily harm (Nofomuli), he is convicted and sentenced to two and half years imprisonment.

Two years of the sentence imposed on count 5 is to be cumulative upon the sentence imposed in count 4. The overall sentence of 5 years imprisonment is backdated to the date the prisoner remanded in custody.

The final two years of the combined sentence of five years are suspended on the following conditions;

- i. He is not to commit any offences punishable by imprisonment for a period of two years;
- ii. He is placed on probation for one year, and
- iii. ordered during this period to undergo a course on anger management at the direction of probation.

Dated: 28th March 2017



**C. B. Cato
JUDGE**