

months imprisonment for causing bodily harm concurrent also with the robbery.

[3] The circumstances of that offending, it also involving a lengthy jury trial, was that the accused and another had planned a robbery of the victims, a husband and wife, who owned a restaurant in Nuku'alofa. A third person, an accomplice, who was also charged and had pleaded guilty before me, before Mr Vaka's trial, had been involved in passing text messages to Mr Vaka concerning the departure of the victims from their restaurant in the late evening of the 4th February 2016 to their residence, which was not a very long drive. Mr Vaka and his confederate, who had also pleaded guilty before trial lay in wait for the couple. As the female victim got out of the car to open the gate she was assaulted by a punch to her head and her bag and other items were stolen. Her husband, who was driving the car, was hit by one of the accused (probably Vaka's co-accused), with a rock sustaining injuries to his head. The robbers tried to make off in the vehicle but could not start it. They then ran away but later owing to some prompt police work, Mr Vaka was located that evening and arrested. A subsequent search of his person revealed the phone with the incriminating text messages on it.

[4] That was not Mr Vaka's first offence for robbery. On the 2nd December 2009, he had been convicted of robbery and common assault and sentenced to two years imprisonment suspended for three years on conditions that he attend a life skills program, drug awareness, pay compensation and perform 120 hours community service. That offence arose shortly after Mr Vaka returned to Tonga from the United States, he says voluntarily. In a letter written to the Court before his first sentencing before me he spoke of being taken to the United States by his natural mother and being educated there to High School level. He spoke also of getting into bad company. Here, it seems he fell in with

bad company shortly after returning and was involved in serious offending. He was treated leniently on that occasion.

[5] The present offending, of which there were two incidents, arose on the 28th November 2015. The first robbery involved an elderly couple Mr and Mrs Swift who lived in rented accommodation near the Vuna road not far from the NZ High Commission. At about 10am Mr Vaka and Mr Toki were drinking with others before the group of youths moved further towards Popua. At or around the area of Mr and Mrs Swift's residence, Mr Vaka and Mr Toki were seen to leave the group and move across the road towards the Swift residence. They arranged with the other men to meet up further along the coast. Mr Toki was seen to be carrying a crow bar. They then broke into the Swift residence late in the evening, the back door being jemmied, in all probability with the crow bar. Mrs Swift encountered the first intruder and was knocked unconscious. There was evidence, which I accept, that Mr Toki had admitted assaulting her to one of the youths called by the Crown to give evidence. Mr Swift woke up and went out of his room to encounter the second intruder who I find also on the evidence that I heard was Mr Vaka. He hit Mr Swift with a laptop about the head and rendered him unconscious, also. There was another short skirmish as Mr Swift attempted to fight back and Mrs Swift received another blow as the robbers left and as she had tried to get up. Money, passports and items of jewelry amounting Mrs Swift said to about \$5000 were taken by the robbers.

[6] Not content with their evening's robbery of the Swifts, Mr Vaka and Mr Toki went to join the others on the beach area towards Popua. There, I find again on the evidence that Mr Vaka, who was I consider the ring leader and in a very angry mood, confronted the occupiers of a motor vehicle that was parked up in the beach area. Mr Vaka approached one of the occupants,

both being in the car, for a cigarette. Neither smoked. Mr Vaka then used some kind of object to break a window of the car, either a crow bar or a machete. Mr Toki and a third party who was given an indemnity against prosecution also broke windows. In what must have been a terrifying and quite unexpected incident, I find that Mr Vaka threatened violence to the female occupant and was restrained from doing so. Vaka and Toki then got into the car and stole items it would seem amounts of money that belonged to the occupants, the evidence suggesting that about a thousand dollars went missing. The occupants left the vehicle and were not harmed during the incident, but the vehicle belonging to a hire company was damaged. Mr Vaka and Mr Toki later made off to their residences and were later located and arrested by the police.

- [7] The Juries, in both cases involving Mr Vaka returned verdicts in a reasonably short time period. In my view, the evidence against him in both cases was cogent. In this case, they rejected both Mr Toki and Mrs Vaka's evidence they had not been involved in robbery. Mr Vaka admitted damaging a window but said that was because the male occupant had pulled a gun on him, which the male occupant had denied.
- [8] Although, in none of these incidents did the robbers seem to acquire a very large amount of money or property, I consider for the purpose of sentencing that what is of more concern is the callous and ruthless way the prisoners acted. The Swifts were both seriously assaulted although fortunately neither suffered permanent injury. Mrs Swift has given a victim impact report in which it is plain that there has been some adverse effect upon her namely difficulty sleeping and concern about security.
- [9] This was a home invasion which Mr Toki and Mr Vaka had planned, and after forced entry they had proceeded to ruthlessly

attack their victims who were elderly persons and in a rather brutal and cowardly way, had assaulted them before making off it seems with Mrs Swift's handbag containing personal items, some money and jewelry.

[10] The second robbery must, as I have said, been a terrifying experience for the occupants of the car. It was ruthlessly executed principally by Mr Vaka who was the ring leader. He was, as I said, extremely angry and excited as he intimidated the occupiers. My observation of Mr Vaka over a lengthy period in two trials is that he is not unintelligent, and quite able to conduct himself in a restrained and civilized manner, but as this offending demonstrates, he assumes an altogether different personality when engaged in criminal enterprise. In that regard, it seems he has a Jekyll and Hyde personality, and that is what makes him unpredictable and a dangerous presence in Society unless he takes stock of his life and takes steps to control his antisocial behavior.

[11] I was given a number of cases by the prosecution to consider some of which I have been involved with as the Sentencing Judge. I do not find the case involving Mr and Mrs Swift as serious as Ngaue and Tupou Cr 24-27/2015 where two men viciously beat a Chinese market gardener as he commenced his work, then decamped in his car, which was later found burnt out. The victim, who had been driven away unconscious also in the car, had been dumped in a remote area and rather miraculously found his way back to a road where he received assistance to get to hospital. In that case, I considered a starting point was appropriate for the robbery of 8 and half years. I allowed mitigation of 9 months to each man resulting in sentences of seven years and 9 months imprisonment. I declined to suspend any part of their sentences.

[12] In the case of Mr and Mrs Swift, the injuries sustained were not as serious and nor was the violence it seems as sustained, before the men left. However, it was a premeditated home invasion in which both victims were assaulted. Courts have an obligation to protect persons from being the victims of criminal acts in their own homes. People are entitled to expect that they will be safe from predatory conduct at home. I view the callous, ruthless nature of the offending and the fact this was a premeditated home invasion where the purpose was robbery to merit a starting point of 7 and half years. Deterrence of this kind of activity and the protection of society are the principal sentencing considerations in cases of this kind.

[13] As to Mr Vaka, he is now aged 28. He declined to participate in a probation interview, but I have had some access to his background from a letter he wrote the Court prior to his earlier sentence. He has had a difficult upbringing; it seems being removed from Tonga by his natural mother to live in the United States at a young age. There; he must have progressed reasonably well at school because he indicated he could have studied at University, but he commenced to get into the wrong company. There is nothing before me to suggest that he was deported but chose in 2009 to voluntarily return. He said that he had tried to gain employment as a diver and in whale watching but engaged in a robbery shortly after his return. There was a gap after 2009 before he commenced reoffending with the Swift robbery in November 2015 and the robbery and damage to the car on the beach. He subsequently became involved in another robbery of the Korean couple in February 2016 for which he has been sentenced.

[14] I consider that there is very little if anything that can be said on Mr Vaka's behalf in mitigation. Leniency was afforded to him in 2009, yet plainly, he chose to reoffend in 2015. He did not

advance anything I could regard as mitigation when given the opportunity in Court on his sentencing. I sentence him on the count of robbery of Mr and Mrs Swift to 6 years and 9 months imprisonment.

[15] On the count of serious housebreaking, this being a planned home invasion to at least burgle the premises, I sentence him to three years imprisonment concurrent with count one.

[16] On the charge of robbery of the occupants of the car, I take the view that this is less serious, however, it merits a starting point of four years imprisonment. On this count of robbery, I sentence him to three years imprisonment and I take the view as I have said that he was the ringleader in this offending. It was a terrifying incident and I consider an appropriate sentence for him on this offending is three years imprisonment. I did not detect any mitigating factors. He was fortunate that somebody had the presence of mind to stop him from assaulting the female occupant whom he had threatened.

[17] In relation to the charge of serious damage to a thing being a motor vehicle, I sentence him to 9 months imprisonment concurrent with the sentence imposed for robbery count 2.

[18] In relation to common assault on Mrs Swift, I sentence him to 9 months imprisonment concurrent with the robbery sentence on count one.

[19] In relation to the common assault charge on Mr Swift, I sentence him also to 9 months imprisonment concurrent on the robbery charge count one.

[20] I have considered the issue of whether the robberies that took place on the same evening, 28th November 2015, should be

accumulated and I see no reason why they should not be because they were separate serious incidents of offending involving violence and or threats of violence, theft and destruction of property. This offending will also be accumulated upon the offending for which I sentenced Mr Vaka to 6 years relating to the February 2016 robbery (CR 93/2016). Mr Vaka has now been convicted of 4 robberies in the last seven years. Further, he has been engaged in three robberies, two planned and serious within about four months of each other. He has it seems little regard for the wellbeing of others. If I were to simply accumulate the offending, the overall sentence would be 15 years and nine months. Applying the totality principle, I do not intend to impose a sentence which is that long. I intend to impose a cumulative sentence which includes 5 years for the offending on count one and one year for the offending on count 2 to be served cumulatively upon each other and both served cumulatively on the 6 year sentence I have already imposed on Cr 93/2016. That means the overall sentence that is imposed is 12 years imprisonment backdated to the time on remand in custody for the CR 93/2016 offending. He is still a comparatively young man and has the prospect if he chooses to live a decent life. That is up to him. The alternative is that he is likely to spend many more years in prison. In not imposing a longer institutional period, I bear his age in mind. However, his offending is such that a lengthy overall period of imprisonment is required to reflect the totality and seriousness of it. I do not consider that any part of his sentence should be suspended. There is nothing that I can see which would suggest at present that he is a reasonable prospect of rehabilitation. He declines it seems still to admit any responsibility for any of his offending; nor has he been co-operative. He is a demonstrated recidivist.

[21] As for Mr Toki, he is in a different position. He is 18, and has convictions only for theft in 2015 for which he was sentenced on

the first to probation, and a second to one months imprisonment. He has had little education and comes from a large family where fishing is the source of income. He like many young Tonga offenders that come before the courts has I suspect associates who have little to do in their spare time but drink with their peers and engage in criminal offending to gain easy money. As he will now find out, money earned in this way has serious consequences.

[22] He also had nothing to say for himself in mitigation. Aside from his age, there is little that can be advanced on his behalf. He is a young man of limited ability as compared with Mr Vaka who is not only much older and more worldly, but demonstrates that he a person of some intelligence. Having said that Mr Toki had the crow bar and he assaulted Mrs Swift, which was a ruthless and cowardly act. Fortunately for him, she did not suffer any serious injury but it could have been far worse. I am prepared to grant him some mitigation because of his age and the fact this is the first time he has been involved in violence. I sentence him to five years imprisonment on count one of robbery.

[23] On count 3, serious housebreaking, I sentence him to two and half years imprisonment, concurrent with count one.

[24] On count 2, robbery of the occupants of the motor vehicle, in which I consider that he played a lesser role than Mr Vaka, 2 years imprisonment.

[25] On count 3 causing damage to the motor vehicle, he is also convicted and sentenced to 6 months imprisonment concurrent with count 2.

[26] On count 4, the assault on Mrs Swift, he is also sentenced to 9 months imprisonment to be served concurrently with count 1

[27] On count 5, the assault on Mr Swift, he is sentenced to 9 months imprisonment concurrent with count 1.

[28] In his case, I consider also that the sentences should at least in part be served cumulatively. I consider that one year only of the robbery on count two should be served together with the sentence of five years imprisonment on count one making an overall sentence of 6 years backdated to the date he was remanded in custody on this offending.

[29] In his case, there is also little to satisfy Mounga principles justifying suspension of any part of the sentence. However, that said, he is only 18 and may gain from a partial suspension which is subject to conditions involving rehabilitative courses and supervision. No such opportunity was given to him on his earlier sentence, unlike Mr Vaka. I accordingly suspend the final 18 months of his sentence on the following conditions;

- a. He is not to commit any offences punishable by imprisonment for the period of suspension;
- b. He is placed on probation for the period of his suspension;
- c. He is to live where directed by his probation officer;
- d. He is to undergo the following courses under the direction of his probation officer;
 - i. A course of anger management
 - ii. A course on alcohol and drug abuse
 - iii. A life skills course.

e. He is not to drink alcohol during the period of his suspension.

[30] He is warned that a failure to abide by any of these conditions may result in his being ordered to serve the balance of his term of imprisonment.

[31] Both men are convicted on all counts and sentenced in accordance with the sentences imposed herein.

DATED: 4 MAY 2017



Cato
C. B. Cato
JUDGE