

Scan files Upload CROWN LAW

[Signature]
01/09/12

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

CR 55 of 2017

BETWEEN: R E X - Prosecution

AND: MOALE VI - Accused

BEFORE THE HON. JUSTICE CATO

Mr 'Aho for the Prosecution

Mr Niu SC for the Prisoner

SENTENCE

[1] The prisoner, Moale Vi, pleaded guilty to one count of grievous bodily harm contrary to section 106(1),2(c) of the Criminal Offences Act in that he did, on the 22nd December 2016, at Longolongo wilfully and without lawful justification caused grievous bodily harm to Penisimani Fifita when he hit him on the head with an iron rod, thereby causing an open fracture on the right frontal part of his skull.

[2] Mr Niu SC informed the Court on his plea that the summary of facts was disputed. He indicated that his client, who was a serving fire officer at the time of the incident, alleged that the actions of fire officers at the station in Longolongo were provocative and contributed materially to his actions resulting in grievous bodily harm.

[3] I heard evidence in relation to these events which arose probably an hour before the incident resulting in grievous bodily harm to

*rec'd 01/09/12
HC*

fire officer Fifita. My conclusions from the evidence I heard in relation to this matter and the balance of the agreed facts which form the basis for my sentence today are;

- i. In the early hours of the 22nd December, 2016, the accused, an employed fire officer, who had been granted leave from his station duties to attend to cooking for an event, had consumed alcohol and arrived back at the station drunk. The evidence revealed that he had a knife of some kind which he had used to chop at a table but he did not have this in his possession at the time of the assault which followed. He was seen also to throw chairs but was not doing so at the time of the assault. Plainly, on the evidence I heard the prisoner was drunk, unruly, in a rather aggressive frame of mind and appeared to bear some kind of grievance which was not clarified, when I heard sentencing submissions, a couple of days ago.
- ii. I am satisfied, however, that the officer in charge of the station at the time, Paulo Kolo who was asleep at the time, was summonsed by another officer and he went downstairs, and had words with the prisoner who was sitting down. This led to a fight between the two in which Officer Kolo appeared to get the better of the prisoner forcing him to the ground and placing his foot on him. The complainant, Officer Fifita, then came down to assist and the evidence reveals that he kicked the prisoner several times in the head as the prisoner was guarding his head. This occurred over a period of 7 to 8 minutes before police arrived. The prisoner was then taken away by police and charged with disorderly behaviour. No evidence of injury was seen by a police officer who came to the scene nor any of the fire officers involved. Nor I

find on the evidence was the prisoner, at any time, rendered unconscious.

- iii. The evidence revealed that, after the prisoner was taken away, Officer Fifita returned to his bed at the station. About an hour later, the prisoner returned to the station this time with two iron rods one of which he used to hit officer Fifita on the back of the head as he lay on his bed, and then, after he had turned to face him, he hit him again causing a frontal bone fracture with a fractured fragment lodging within the frontal sinuses and haemorrhage in the front sinuses.
- iv. Officer Fifita was in hospital about ten days and was off work for two months whilst he recovered. I adjourned this sentence so that Mr Aho could give me an up to date report on the health of officer Fifita.
- v. After the assault, the prisoner had chased after Officer Fifita who was able to run from the station and was seen bleeding from the head. The prisoner had threatened to tear him apart. Officer Fifita was admitted to hospital.
- vi. The facts reveal that the prisoner who was arrested soon after the incident was co-operative on his arrest.

[4] On these facts, I conclude that the prisoner was drunk and unruly at the station. I accept and it was confirmed by Officer Paulo Kolo in his evidence that this was out of character for him. I find that, although the officers were entitled to take reasonable steps to restrain and subdue the prisoner who had plainly become a nuisance and prevent any violence, Officer Fifita did use excessive force when kicking him several times to the head area. In my view, that was unjustified and dangerous although I

am satisfied that the prisoner was not injured and nor did he lose consciousness as he had originally claimed.

- [5] I note all Mr Niu had to submit about provocation his submission being based on the fact that his action was so out of character for his client that it could only be explained by the fact that he had been assaulted by Officer Fifita earlier, and this was a material reason why he had reacted in the way he did. I accept that the actions of the fire officers in restraining the prisoner using force as they did and probably the kicking by Fifita was a likely trigger that motivated the prisoner to return to the station and exact revenge later that morning. Provocation as a mitigating factor in sentence was usefully described in R v Taufeki (CA 384/2004, 17th February 2005) by a Full court of the New Zealand Court of Appeal in this way;

“Provocation: Where the offender has been provoked, that may justify a lower starting point. It is not enough simply to claim to have been incensed by the actions of the Victim or another, rather the sentencing Judge will need to be satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence.”

- [6] I accept that the actions of Officer Fifita in particular could reasonably be said to have inflamed or provoked the prisoner so that he returned to exact revenge on him. It seems the only rational basis for his actions and a motivating factor. However, as a mitigating factor I do not consider that I should regard this as a significant mitigating factor. The actions of Fifita arose well before the prisoner returned to the station and in my view long after a normal person's angry reaction to a provocative act would have been expected, to have subsided. I qualify this by saying a normal person who was not greatly affected by alcohol, as the

prisoner was that evening. Further, the retaliation, in my view, was out of proportion to the perceived wrong suffered by the prisoner earlier. I consider the actions of the prisoner were essentially motivated by his already angry disposition, and a desire to seek revenge on Officer Fifita. Because the actions of Officer Fifita, were excessive and contributed further to the prisoner's already angry disposition and hostile actions and to that extent was a material part of the background to this offending, I uphold Mr Niu's submission to the extent that I will reduce the starting point by 6 months imprisonment to reflect the complainant's excessive use of force in apprehending the prisoner at the station until police arrived. I did not hear from Officer Fifita who was overseas.

- [7] As to the starting point, I agree with the Crown submission that a starting point of 5 years imprisonment was appropriate for using a weapon to inflict serious injury upon the complainant who was in bed at the time. Had there been any permanent injury and I am satisfied, having heard from Mr Aho this afternoon, that there probably is not then the starting point would have been significantly higher and one that would reflect the seriousness of the injury. The starting point I adopt here after reduction for the factor in paragraph 5, is 4 and half years imprisonment. A significant starting point is required in cases of this kind where weapons are used to attack the head of a victim and this may include also kicks delivered to the head which can be just as damaging. Often it is a mere matter of chance where the head is impacted what the nature and the extent of any injury will be. It is the duty of this Court to deter such actions and to protect society from violence of this kind. Mr Niu emphasised that this was not a large pipe but a narrow pipe but even so, it did significant damage.

[8] As to mitigation, I accept that the accused has pleaded guilty at an early stage, has been co-operative, probably is remorseful, and had lost a job of which he was very fond. I accept the offending was out of character for him this being his first offending, and that he is well regarded in the community in which he lives. I have read the references and his probation report. His wife speaks well of him and he is the father of two young children. This, I consider, is another case of which this Court sees, unfortunately too many, involving people of good character who fall from grace because they have drunk excessively and have lost their power of rational thought and control. The degree of his intoxication here and the prisoner's mood together with what is reported on this topic in his probation report would suggest that he had developed a problem with alcohol which this judgement will assist him to arrest. I allow the accused 18 months imprisonment by way of mitigation. The sentence I impose upon his conviction for grievous bodily harm is 3 years imprisonment. That sentence is backdated to the date of his remand in custody on this offending.

[9] I consider that he is plainly deserving of some suspension of this sentence. He has pleaded guilty, been co-operative and is a first offender with a young family. I consider, however, that the minimum he should serve, consistent with the seriousness of his offending, is two years custodial imprisonment. Thus, I suspend the final 12 months of his imprisonment on the following terms;

1. He is not to commit any offences punishable by imprisonment for the period of his suspension;
2. He is placed on probation for the period of his suspension;
3. He is to live where directed;

4. During the period of his suspension he is not to consume alcohol;

5. He is to undergo a course under the direction of probation in alcohol and drug abuse under the Salvation Army and one in anger management.

[10] He is warned that a failure to abide by these conditions may result in his being returned to prison to serve the final 12 months of his sentence of imprisonment.

DATED: 31 AUGUST 2017



A handwritten signature in black ink, appearing to read "Cato", is written over the printed name.

C. B. Cato
JUDGE