

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

CR 19 of 2019

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BETWEEN: **REX**

- **Prosecution**

AND: **POUONO 'AISAKE**

- **Defendant**

Counsel: **Mr 'A Kefu SC and Miss J Sikalu for the Prosecution**
 The Accused in person

Date of Hearing: **3 May 2019**
Date of Ruling: **3 May 2019**

SENTENCING REMARKS

The charge

- [1] Mr 'Aisake pleaded guilty to one count of causing grievous bodily harm contrary to section 106(1) and 2(c) of the Criminal Offences Act. He pleaded not guilty to a charge of serious housebreaking but the Prosecution elected not to pursue that charge and it was withdrawn.
- [2] The maximum penalty for the offence of causing grievous bodily harm is 10 years imprisonment.

rec'd 06/05/19
llk

The facts

- [3] The facts can be shortly summarised. Mr 'Aisake, is a 29 year-old male, farmer and resides at Kolonga, Tongatapu. The victim is Senior Police Constable Tafokitau 'Ahokava who is 37-years old. Mr 'Aisake separated from his wife and at the time of the offending she had formed a relationship with another man. On 23 August 2018 at around 7pm, Mr 'Aisake's wife was at her parents' residence at Hofoa when her partner visited. Mr 'Aisake arrived and was asked to leave but he did not. He went into the house and was again asked to leave, this time by his mother in law. Mr 'Aisake did leave but returned with a machete. The Police were contacted and the victim and another officer arrived whilst Mr 'Aisake was in the house. They entered the house. Mr 'Aisake says he did not know that the Police had arrived but he hid inside the back room while holding the machete. When the victim opened the door to the back room Mr 'Aisake struck him on the head with the machete causing a grievous injury. I will detail his injuries and the effects of the attack upon the victim later. Mr 'Aisake was interviewed and admitted to the offending. When arraigned he pleaded guilty to the charge.

The material before me

- [4] I have been provided with and considered the following:
- (a) The summary of facts;
 - (b) The Prosecution's sentencing submissions;
 - (c) A victim impact report;
 - (d) A pre-sentence report.
- [5] I have also heard from Mr. 'Aisake

Pre-sentence report

- [6] Mr 'Aisake is the youngest of his parent's two children but his father choose to live illegally in New Zealand for many years until deported back to Tonga. Mr 'Aisake reports that his father's alcohol addiction and violent behaviour were a feature of his childhood. He dropped out of primary school and engaged in drinking and drug use. In 2008 he committed an armed robbery and other serious offences for which he was sentenced to 14 years imprisonment (with the final 4 years suspended). In 2010 he was convicted of escaping from custody. He was released in 2015 and married in 2017 but the relationship was not successful as the couple share an addiction to alcohol and drugs. He has a conviction for possession of illicit drugs in the Magistrate's Court in July 2018 and was fined.
- [7] By way of explanation for his offending, Mr 'Aisake said he was angry at his wife and mother in law for asking him to leave and that he had brought the machete from his home for his personal protection from his wife's brother who he had fought before. It is said that he has accepted responsibility for his actions and apologised to the victim and that he has identified that he has an anger problem and alcohol and drug addictions although those addictions were not directly involved in this offending.

The victim impact report

- [8] Following the attack the victim was admitted to a surgical ward on 23 August 2018 and discharged on 3 September 2018. He sustained a serious laceration to the head and a 13 cm depressed skull fracture. He underwent emergency craniotomy and elevation of the depressed skull fragment. A breach of the dura lining of the brain was noted and an extradural haematoma (a collection of blood between the inner surface of the skull and outer layer of the dura) was successfully evacuated. After surgery he had mild neurological deficit of the left upper limb (an abnormal function of a body area) which was consistent with the injury of the right skull and haematoma. After his discharge he was monitored as

an outpatient and it appears that he has no residual neurological deficit. He has been able to return to work but on light duties. Whereas before he was working in the Complaints Department he now is working at the entrance gate to Longolongo Police Station.

- [9] Whilst it appears that the victim has recovered physically the same cannot be said for his mental and his emotional states. When he was attacked he had a genuine and reasonable fear of death and he is most fortunate that this did not occur. He has suffered memory loss and is forgetful at work. He has become cautious, angry at home, is easily startled and has interrupted sleep. He can no longer participate in activities that may risk further injury such as touch rugby.
- [10] Mr 'Aisake did not visit the victim in hospital and apologised to him only the day before he was arraigned and not in the traditional Tongan manner. He admitted to the victim that he had intended to hit him with the machete because of his anger. The victim had already forgiven Mr 'Aisake not because of his apology but because of his faith and he holds no resentment towards Mr 'Aisake.

Discussion

- [11] The Court has signalled that it will deal harshly with perpetrators of machete attacks. *R v Mafi* (Unreported, Cato J, CR 32 of 2013, 11 June 2014) concerned such an attack by the accused after an argument with the victim. The attack was to the shoulder and head of the victim. He lost a lot of blood but fully recovered. In his sentencing remarks Cato J said, at [16], that the starting point for sentencing purposes is six and half year's imprisonment and that it would have been higher had there been any serious permanent injury. He said also quite plainly:

The use of a machete which is a potentially lethal weapon as an instrument of violence must be denounced.

- [12] More recently *R v Tupou* (Unreported, Court of Appeal, CR 97 of 2018, 17 April 2019) was an appeal against sentence. Mr. Tupou was 21 years old at the time and had been drinking alcohol with a group of young men including the two

victims. He got into an argument and fought with one of them and later went home obtained a machete, and returned and then attacked two men with the machete. The first victim suffered lacerations to his left arm, forearm and hand from which he fully recovered. The injuries to the second victim were more serious. He received multiple lacerations to his left arm, forearm and hand, an open fracture to the ulnar bone and cuts to the ulnar nerve and artery and cut tendons on three fingers and it was likely that he would have a degree of permanent chronic arthritis and limited movement of the left wrist and two of his fingers.

[13] In referring to the decision of the sentencing judge the Court of Appeal noted at [10]:

In his sentencing remarks, Cato J observed that a machete is an inherently dangerous weapon, particularly in the hands of a drunken offender. We agree and note that the starting points of 6 ½ years on the first count and 4 years on the second were within range for this offending given the use of a weapon, the serious injuries inflicted...and the sustained nature of the attack.

[14] The Crown submits that consistent with *Тирон* the starting point for sentencing purposes in this case should be 6 ½ year's imprisonment. In my view the starting point must be higher than that. The offending was serious involving a surprise attack. It was an act of extreme, pre-meditated violence using a machete to the head of the victim who was not only entirely vulnerable but had done nothing to provoke Mr 'Aisake and was not even the object of his anger. Mr 'Aisake is extremely lucky that he did not kill the victim and that the victim did not suffer any permanent physical injury but clearly he was entirely unconcerned for his well-being.

[15] There are two additional matters which weigh with me in this case. First, Mr 'Aisake has a previous conviction for armed robbery involving the use of a firearm. The seriousness of that offending is demonstrated by the fact that he was sentenced to 14 years imprisonment (albeit with a period of suspension). He clearly did not learn from that sentence and to my mind when angry he

poses a serious danger to society from which it is entitled to protection. Secondly, the attack in this case was on a Police Officer in the performance of his duty. The victim had been called to the property because Mr 'Aisake was a threat. Police Officers risk their lives every day protecting the public in such circumstances. When they are attacked they are entitled to expect that the Courts will impose appropriate deterrent sentences upon offenders. Mr 'Aisake says he did not know that the victim was a Police Officer and I am prepared to accept that is the case. That goes only a part of the way in mitigation. He struck out without knowing or caring who his victim was and must accept the consequences of that.

[16] In my assessment the appropriate starting point for sentencing purposes is 7 ½ year's imprisonment. I had given considerable thought to imposing an even higher starting point, which I would have done had Mr 'Aisake had prior knowledge that the victim was a Police Officer or had the victim suffered any permanent physical impairment.

[17] In terms of mitigating factors it is said that Mr 'Aisake is remorseful but I am sceptical about that and give him some but not a great deal of credit for this factor. He did not visit the victim in hospital. He visited him only once, months after the attack and just before his arraignment. He did not offer his apology in a culturally appropriate fashion. I do accept that Mr. 'Aisake is entitled to credit for his early guilty plea and co-operation with the Police. I allow him a discount of 18 months (20% of the starting point) for this factor and for such remorse as has been shown. I therefore arrive at a sentence of 6 years imprisonment.

[18] The final issue is whether any part of the sentence should be suspended. Suspension of all or some part of a prison sentence should not be given as a matter of course. It must serve some useful purpose. Based on the principles in *Mo'unga* [1998] Tonga LR 154 I can see no basis to suspend any part of the sentence. Mr 'Aisake is not young nor does he have a good record. There is little in the facts or circumstances that diminish his criminal culpability. He has re-

offended within a relatively short period of being released from prison for a most serious offence. He had the benefit of the suspension of a large portion of his previous prison sentence which did not deter him from offending again. As the Court noted in *R v Petersen* [1994] 2 NZLR 533 (CA) a suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent it should not be imposed. In my assessment Mr 'Aisake has proven himself to be such an offender.

Result

- [19] On the offence of causing grievous bodily harm Mr 'Aisake is sentenced to six years imprisonment which sentence is backdated for time served to 15 March 2019.

NUKU'ALOFA: 3 May 2019



A handwritten signature in blue ink, appearing to read "O.G. Paulsen", is written over the printed name.

O.G. Paulsen
LORD CHIEF JUSTICE