

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

CR 174 of 2019

BETWEEN:

REX

-v-

SOANE PATITA TOUTAI'OLEPO

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Ms 'E. Lui for the Prosecution
The accused in person
Date of sentence: 21 February 2020

The charge

1. On 22 November 2019, the Defendant pleaded guilty to one count of grievous bodily harm contrary to sections 106 (1) and (2) (c) of the *Criminal Offences Act*.
2. On 26 April 2019, at approximately 8 PM, a school truck from Tupou College was transporting students home after the last day of a college sports competition. One of those students was 12-year-old Lata 'i Lapaha Funakia ("victim"). As the truck reached Tonga College 'Atele at Ha'ateiho, the Defendant and a few other Tonga College students were standing at their school's front gate.
3. The Tonga College students then started to throw rocks at the Tupou College truck. The Defendant picked up a large rock and threw it at the truck. The rock struck the victim on the left side of his head. He fell unconscious and was immediately rushed to Vaiola Hospital where he underwent surgery for a compound depressed fracture to the left temporal bone of his skull.
4. The Defendant was later arrested. He co-operated with the police and admitted to the offending.

Crown submissions

5. The Crown submits the following as circumstances of aggravation:

- (a) the victim was very young;
 - (b) the attack was unprovoked;
 - (c) the Defendant used a weapon;
 - (d) the victim's injuries were quite serious;
 - (e) the Defendant was motivated by discrimination based on school rivalry;
 - (f) conflicts between schools is a 'big issue' in Tonga.
6. The Crown submits the following as factors in mitigation:
- (a) the Defendant has shown remorse;
 - (b) he is a first-time offender;
 - (c) he co-operated with police;
 - (d) he pleaded guilty at the first opportunity;
 - (e) he is still very young and has a lot of opportunity to rehabilitate and give back to the community.
7. The Crown submitted comparable sentences, summarized as follows:
- (a) *Vea* (CR 126/2011) – threw a torch at his eight-year-old son's head causing a skull fracture; previous convictions for violence - five years, last 12 months suspended;
 - (b) *Moale Vi* (CR 55/2017) - prior altercation between accused and victim; accused returned the same day and struck the sleeping victim's head with a steel pipe causing a skull fracture - starting point of 4.5 years imprisonment, discount of 18 months by way of mitigation, resulting sentence three years imprisonment with last 12 months suspended;
 - (c) *Tu'ipulotu, Ikavesi & Kivalu* (CR 162-164/2019) - serious bodily harm arising out of school rivalry fight; starting point of two years imprisonment, nine months deducted by way of mitigation, resulting sentence 15 months' imprisonment fully suspended on conditions.
8. The maximum sentence prescribed for grievous bodily harm is 10 years imprisonment. The comparable sentences (for grievous bodily harm) indicate a starting point ranging from 4 to 6 years imprisonment. The Crown submits that 4 years is appropriate here and that 18 months should be deducted by way of mitigation resulting in a remaining sentence of 2.5 years. It is submitted that having regard to the principles in *Mo'unga*

[1998] Tonga LR 154, the sentence should be fully suspended on conditions including probation and 100 hours community work.

Pre-sentence report

9. The Defendant was born on 16 August 2000. At the time of the offending he was 18 years of age.
10. He is the eldest of two children. His parents' marriage ended when he was two. He has been raised in his mother's family home under the care of his maternal grandparents and uncle.
11. Since the offence, the Defendant has moved in with his uncle at the Pentecostal Church residence at Nuku'alofa to deter him from further illegal behaviour and to improve his spiritual life. He has been working at the church, helping with cleaning and gardening. His mother reports that since he has been living at the church residence, she has observed positive improvements in her son.
12. The Defendant is interested in mechanical work. Last year, he undertook technical studies under the TVET program at Tonga College. He hopes to complete those studies this year. He is a member of the school's brass band. Money he has earned from performing in band concerts has been applied to paying his own school fees.
13. In relation to the offending, the Defendant told the author of the report that earlier in the day in question, the Defendant and his other band members saw on Facebook that one of their students had been badly beaten by a group of students from Tupou College. They became infuriated. As the Tupou College truck passed, he instantly picked up and threw the rock aiming to only smash a window. He did not know until the next day that the rock had in fact seriously injured the young victim. He felt afraid because of the harm he had caused. When arrested by police, he was detained in custody. The police wanted him to disclose the names of the other boys with him at the front gate. He maintained that he was the only one involved in the incident. After two weeks in custody, he was released.
14. The Probation Office Risk Assessment indicates that the Defendant represents a low risk of re-offending.
15. It is reported that the Defendant is remorseful, has apologized to the victim and has made amends.
16. The Probation Officer recommends a fully suspended sentence on conditions including probation and community work.

Victim impact report

17. Following his surgery, the victim was hospitalized for eight days. He returned to school on 20 May 2019. While his condition has continued to improve since, and there does not appear to be any residual physical or mental disability, the victim reported feeling fearful and anxious when he is out with his fellow students at the possibility of a similar incident happening again at the sight of students from rival schools.
18. The victim is the eldest of five children. His injury and recovery time are said to have also impacted his parents in him not being able to assist them with domestic and farm work during his recovery.
19. The victim and his father deny that the Defendant has apologized. Nevertheless, they say they have forgiven him.

References

20. Three character references have been filed in support of the Defendant.
21. Miss Susiana Kanaongata'a is employed as personal assistant to the Honourable Minister of MEIDECC. She knows the Defendant and his uncle through the church. She describes the Defendant as a humble and well-mannered young man, careful, considerate, efficient and dedicated to the well-being of others. He is said to be well regarded among the church members as a person of high integrity and honesty.
22. Assistant Pastor 'Etimoni 'Aholelei has known the Defendant since he moved into the church residence shortly after the offending. He described the Defendant as 'well-behaved with a heart to help'. He wrote that since the Defendant has become involved in the church, he has changed and become mature and is a great help with youth programs conducted by the church.
23. Pilimilose Kamea is the Defendant's mother. She describes her son as a 'very kind boy' who in the months since the incident has become mature and well behaved compared to to how he was at the time of the offending. She says that he has told her of his regret for what he has done and that he wishes to change the path of his life for a better future.

Starting point

24. In addition to the comparable sentences submitted by the Crown, I have also had regard to the decision of Cato J in *R v Pou'uhila* [2017] TOSC 40. There, the prisoner pleaded guilty to one count of causing grievous bodily harm. He was about 17 years of age when he threw a brick at the victim causing multiple broken facial bones and, ultimately, the loss of sight in the victim's right eye. The prisoner co-operated with the police and had no previous convictions. His Honour described the assault as extremely serious and noted that 'teenage fighting amongst youth in Tonga is not uncommon and often stones and other objects are used as weapons'. As the assault had resulted in serious permanent injury, his Honour considered a starting point of five years

imprisonment as being required to reflect the seriousness of the offending and deter the prisoner and others from acting in that way. He then discounted the starting point by one year for the early guilty plea and by an additional six months to reflect his age, no previous convictions, and remorse. Of the remaining sentence of three and half years' imprisonment, his Honour suspended the final 18 months on conditions, leaving two years to serve.

25. In the instant case, I am not convinced that when he threw the large rock, the Defendant only intended to smash a window of the truck. There were students, including the victim, in the back of the flatbed truck. They were an obvious target. Even if the intention was to smash a window, the rock would still have most likely entered the vehicle thereby injuring an occupant.
26. Having regard to the seriousness of the offence, the prevalence of this type of violence between groups of rival school students, the resulting injuries to the victim and the comparable sentences referred to above, I concur with the Crown that an appropriate starting point is four years imprisonment.

Discounting factors

27. For the Defendant's early plea of guilty, I discount the starting point by one third or 16 months.
28. On account of his lack of previous convictions, relatively young age and apparent remorse, I discount the sentence by a further eight months.
29. The total discount for mitigating factors is therefore 2 years or half of the starting point. The result is a sentence of two years imprisonment. I consider that an appropriate sentence which reflects the gravity of the offending and the special importance of deterrence for offending of this kind.

Suspension

30. In considering whether to suspend all or part of the sentence, the Court is obliged to have regard to the interests of the Defendant and the interest of the wider community in his rehabilitation: *Rex v Tau'alupe* [2018] TOCA 3 at [15].
31. The considerations discussed in *Mo'unga v R* [1998] Tonga LR 154 fall almost entirely in the Defendant's favour:
 - (a) he is young and has a previous good record;
 - (b) in light of the reported improvements in his behaviour since living with his uncle at the Pentecostal Church residence, it is likely he will take the opportunity offered by the sentence to rehabilitate himself;

- (c) despite the gravity of the offence, there is some diminution of culpability through lack of premeditation;
 - (d) further, while the earlier social media report of one of his fellow students being assaulted by Tupou College students cannot be regarded as provocation in any legal sense,¹ it does tend to explain, but does not excuse, the Defendant's conduct. I am prepared to accept as likely that had the Defendant not known of, and been upset by, the reported assault on the other Tonga College student, he would not have thrown the rock; and
 - (e) finally, the Defendant co-operated with the authorities at all times.
32. On that assessment then, I am satisfied that some level of suspension is warranted.
33. However, the real difficulty here is in determining whether any suspension should operate in respect of the whole or only part of the two-year sentence.
34. In relation to sentencing of young offenders, the Court of Appeal in *Tau'alupei*, supra, cautioned:
- "[16] It is well established that the sentencing of young offenders raises special considerations: see for example the discussion in R v Churchward [2011] NZCA 531 at [77]-[92]. An offender's youth may impinge on an assessment of their culpability. As Mr. Mo'ale said, prison for any period is known to carry an enhanced risk of trauma for young people. And, as this Court recognised in Mo'unga v R [1998] Tonga LR 154, young offenders have a greater capacity for rehabilitation."*
35. Equally, I consider I ought have regard to relevant factors other than those catalogued in *Mo'unga*, as discussed by the Court of Appeal in *Rex v Misinale* [1999] TOCA 12, such as the need for an effective deterrence.
36. In doing so, this case presents a fine balancing act between allowing suspension as an aid to the rehabilitation of the Defendant on the one hand and arriving at an overall sentence which provides an effective deterrent in respect of what is prevalent and violent behaviour between rival school students on the other.
37. Notwithstanding the Defendant's relatively young age, good record and positive rehabilitation prospects, I consider that in order to strike the right balance, and:
- (a) afford an opportunity for the Defendant's continued rehabilitation;
 - (b) deter the Defendant and others from future acts of violence between students from rival schools; and

¹ cf *R v Taufeki* (CA 384/2004, 17 February 2005), cited in *R v Mo'ale Vi* (unreported, CR 55/17).

- (c) maintain an appropriate degree of parity with comparable sentences, in particular, those such as *Tau'alupe*,

the final 12 months of the sentence will be suspended and on conditions I will set out below.

38. It is a very great shame that the Defendant must start his adult years by spending a year in prison. However, to suspend the whole of the sentence would, in my view, risk sending a message to those who might consider future rival school violence, and which results in serious injury, that they can expect to escape actual prison time. If that ever was the belief, it must be dispelled. Such mindless violence must not continue. It is incumbent on the Court to apply the law in a manner which reinforces that community expectation, and which serves to protect all school students from street violence instigated for no other reason than that they attend different schools.

Result

39. The Defendant is convicted and sentenced to two years imprisonment.
40. The first 12 months' imprisonment is to be reduced by the two weeks the Defendant was remanded in custody by police.
41. The final 12 months of the sentence is suspended on conditions that he:
- (a) not commit any offence punishable by imprisonment during the period of suspension;
 - (b) is placed on probation for the term of his suspension, to live where directed by his probation officer; and
 - (c) attend a course on life skills and violence under the direction of his probation officer.
42. I direct that during his incarceration, to the greatest extent possible, the Defendant is to be kept with young offenders of a similar age and separated from older offenders with lengthier and more serious criminal histories.

NUKU'ALOFA
21 February 2020




M.H. Whitten QC
LORD CHIEF JUSTICE