

SENTENCING

Offences

[1] You four accused appear before me today for sentence in respect of the offences of which I convicted you, Fangatua, Fonua and Niusini on 16 December 2019 and to which you, Tu'ineau, had already pleaded guilty on 18 April 2019, as follows:

- (a) Fangatua, for serious causing bodily harm to Lehopoame Tu'utafaiva by repeatedly striking him with a hoe blade causing injury to his head on 1 September 2018 in breach of S.107(1) and (2)(c) of the Criminal Offences Act. That offence is punishable by imprisonment for up to 5 years.
- (b) Tu'ineau, for assaulting Lehopoame Tu'utafaiva by striking him with a metallic hoe handle on 1 September 2018 in breach of S.112(a) of the Criminal Offences Act.
- (c) Fonua, for assaulting Lehopoame Tu'utafaiva by repeatedly punching and kicking him on 1 September 2018 in breach of S.112(a) of the Criminal Offences Act.
- (d) Niusini, for assaulting Lehopoame Tu'utafaiva by repeatedly punching and kicking him on 1 September 2018 in breach of S.112(a) of the Criminal Offences Act.

The penalty for assault is a fine of up to \$5,000 or imprisonment of up to 12 months or both.

Seriousness and danger

[2] What you four boys, and two other boys who could not be identified and charged, to Lehopoame Tu'utafaiva, was dangerous because you could have caused him much more serious injury or even his death. Whilst he was lying on the road and helpless (with no help from his friends who were there), you, Fangatua, repeatedly hit his head in a stabbing manner with a hoe blade and caused the cut to his head which bled profusely. You, Tu'ineau, was hitting him

with the pipe handle of the hoe. You, Fonua and Niusini, together with the two unidentified boys, were punching and kicking him.

- [3] You all had no lawful justification for doing what you did to him. I am sure that if Lehopoame and his soldier friends who were there were doing the same thing to one of you that night, you would all agree that they should not have done it. It is not an excuse that you were drunk and that you would not have done it had you not been drunk. If drunkenness was a lawful excuse, people can just get drunk and then go and beat up an enemy or a person they hate and then claim that they were drunk and be acquitted. Where would our society be then except lawlessness and disorder. Drunkenness is not an excuse because the drunken person still knows what he is doing. He still intends to do what he is doing and he must be answerable for it. You all knew what you were doing and you all knew it was wrong because you all ran off when the police showed up.

Probation reports submissions and recommendations

- [4] I have read the probation reports which the probation officers have made for each of you and they helpfully give your personal backgrounds and present circumstances. Counsel Sunia Fili and Lesina Tonga have filed very helpful submissions for you, Fangatua, and for you, Tu'ineau, respectively. Letters of references were made by several people including a member of parliament, your bishop and town officer, Fangatua. I have considered them and I am grateful for their assistance and recommendations.
- [5] I have also read and I am grateful to the prosecutor, Mr. Fatai Samani, for his very detailed and helpful submissions and recommendations.

Cases of similar offences

- [6] Mr. Samani properly and helpfully referred to the case of *R v Inoke Tupou* (CR 50/2015) (unreported) in which the accused pleaded guilty to serious causing of bodily harm by striking the complainant with a metal pipe to his head in a drunken brawl and to assault. He was sentenced to 18 months imprisonment for the injury offence and 3 months imprisonment for the assault, but both to be fully suspended on conditions that he served 40 hours community work, attend a course on alcohol and drug awareness and to be of good behavior and not to consume alcohol or drug.

- [7] He also referred to *R v Fukofuka & Maka* (CR57-58/2019) (unreported) where in another drunken brawl, the two accused assaulted the complainant and broke his jaw. They both pleaded guilty to serious causing of bodily harm and they were both sentenced to 16 months imprisonment but to be fully suspended on conditions that they served 50 hours community work, attend a course on alcohol abuse and anger management and not to drink alcohol or take drugs and not to commit any offence punishable by imprisonment.
- [8] He also referred to *R v Tu'ipulotu, Ikavasi and Kivalu* (CR162-164/2019) (unreported) where the three accused all pleaded guilty to their charges, Kivalu for serious causing of bodily harm by hitting the complainant's ear with a rock causing temporary hearing impairment as well as injury to his head, and the other two to assaulting the complainant in an unprovoked attack upon him. Kivalu was sentenced to 15 months imprisonment and the other two to 3 months imprisonment each, but all to be fully suspended on condition that Kivalu served 80 hours of community work, be of good behavior, not to consume alcohol and not to reoffend and the other two accused were to be of good behavior.

Prosecution recommendations

- [9] Finally, he referred quite correctly to the principles of suspension of sentences as laid down by the Court of Appeal in *R v Mo'unga* [1998] Tonga LR 154, and then submitted that all four of you accused are worthy of a fully suspended sentence in respect of your imprisonment sentences but that you,
- (a) Fangatua, serve 40 hours community work, attend an alcohol awareness course, as well as the other conditions imposed in the said cases,
 - (b) Tu'ineau, be placed on recognizance of good behavior for 5 months in view of his wait of 7 months for this sentencing under S.198 of the Criminal Offences Act.
 - (c) Fonua, serve 35 hours of community work and be subject to the same conditions as the others.
 - (d) Niusini, serve 30 hours of community work and be subject to the same conditions as the others.

Present case distinguishable

- [10] I agree with Mr. Samani in his recommendation for fully suspending any imprisonment sentence imposed on you as was done in those cases. But I consider that the present case is distinguishable from the 3 cases to which he has referred. In the present case, it was the complainant and his soldier friends who had provoked the violence which followed and which resulted in the beating and injury of the complainant.
- [11] During the drinking in the soldier's house, one soldier was slapping Fonua on the back of the head and questioning him which finally caused Fonua to leave, as the soldier had intended. Another soldier was literally forcing Niusini to drink a full glass of liquor empty and which he had to do and as a result he spewed right there on the floor of the house and he was told to go outside, as the soldier had intended.
- [12] Both Fonua and Niusini were and anyone, especially in their conditions, would have been angered by the treatment they had been given and so one of them must have thrown the rock at the bonnet of the car parked at the front of the soldier's house and they then ran away to the Tu'ineau's place. The soldiers rightly assumed that the two boys had thrown the rock and they gave chase. They were angered at the gall of the two boys, especially after they had invited them to join their drinking.
- [13] As I had said in my ruling, the soldiers had the right to give chase and apprehend Fonua and Niusini for the offence of damaging the car, but they breached that right when they caught Fonua and beat him up instead. They had no right to do that. They ought to have brought him and take him to the police station where he may be charged with the appropriate offence.
- [14] They not only beat him up, they also caused damage to a motor vehicle at the Tu'ineau place, obviously in exchange for the damage caused to the car. That was quite improper and unlawful. They had no right to inflict damage on someone else's property.
- [15] They then challenged the people at the Tu'ineau place to come out and fight them by shouting out: "We are soldiers, come and fight". It was in fact the complainant himself who had shouted that, as he admitted when cross-

examined by Mr. Fili during his evidence at the trial. That was an invitation to lawlessness, because such a fight was unlawful and would not be refereed by anyone, just as it then transpired. The people at the Tu'ineau place came out with a hoe with pipe handle, including you the four accused. The rest was history. Violence and injury happened, as it was bound to happen but which was instigated by the complainant and his soldier friends themselves.

- [16] That makes the present case different, and so I do not consider that any of you accused should serve any community work. But I would put a long period of suspension upon your imprisonment sentences so that you will decide for yourselves whether you would go and serve those sentences, by committing another offence during the period of suspension, or not serve it at all for the rest of your life by not re-offending during the period of your suspension. I am sure you have all learnt your lessons and you would not reoffend.

Importance of remorse

- [17] Remorse of a person for some wrongful act which he has done is very important when that person comes to be sentenced for that act. It shows acceptance by that person that he has done a wrongful act. He is sorry for what he has done and makes amends by apologising and by compensating or offering compensation for the wrong he has done. And it is best shown, even if no apology or compensation is given, if the person readily admits to the police that he was wrong and cooperates with the police and, most importantly, pleads guilty when first charged in Court.
- [18] If he instead pleads not guilty, then he is saying he did not do wrong or that it was not him who had done the wrong. He thereby shows no remorse at all. When he is convicted, after a full trial, and he then says he is remorseful for what he has done, his statement is of little or no value because it is clear that he is not really remorseful but he only says that he is in order to persuade the Court that he is and that he be shown leniency.
- [19] Everyone has the right to trial because everyone is presumed by law to be innocent until he is proved guilty in Court and then sentenced for the offence he has committed. Clause 10 of our Constitution says that. It provides:

“10. No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case.”

[20] But if a person chooses to exercise that right to trial, he thereby forfeits his right to show his remorse for the wrong that he done, which he can only show by pleading guilty in the first instance.

Tu'ineau only shows remorse

[21] I am therefore led to the view that Tu'ineau is the only one amongst you who is remorseful for what he has done to the complainant, and he is entitled to be treated differently from the other three of you, and I agree with Mr. Samani in his recommendation in that respect.

[22] Accordingly, I sentence you all as follows:

- (a) Fangatua : You are sentenced to 16 months imprisonment for the offence of serious causing bodily harm, to be fully suspended for a period of 2 years from today, upon the conditions that you –
- (i) do not commit any offence punishable by imprisonment during those 2 years, and
 - (ii) attend the Salvation army course on alcohol awareness.
- (b) Fonua : You are sentenced to 3 months imprisonment for the offence of assault, to be fully suspended for a period of 2 years from today, upon the conditions that you –
- (i) do not commit any offence punishable by imprisonment during those 2 years, and
 - (ii) attend the salvation Army course on alcohol awareness.

- (c) Niusini : you are sentenced to 3 months imprisonment for the offence of assault, to be fully suspended for a period of 2 years from today, upon the conditions that you –
- (i) do not commit any offence punishable by imprisonment during those 2 years, and
 - (ii) attend the Salvation Army course on alcohol awareness.

You three must all see the probation officer with a copy of this sentencing as soon as you leave here to arrange for your attendance at the Salvation Army course.

- (d) Tu'ineau : Because of your character which shows true remorse for what you have done and the extenuating circumstances under which the offence was committed as I have described, and it is expedient to release you on probation, you are discharged conditionally under S.198 of the Criminal Offences Act on your entering into a recognizance without sureties to be of good behavior and to appear for sentence for this offence if you breach it within 5 months from today. You will sign a recognizance which has been prepared for you to sign after this.

NUKU'ALOFA: 11 March 2020.



[Handwritten Signature]
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