

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 147 of 2019

REX

-v-

TAVALEA TUPOU

BEFORE : HON. JUSTICE NIU

Counsel : Mr 'Inoke Finau for the Crown

Mr Siosifa Tu'utafaiva for the Accused

Probation Report: filed by Tito Kivalu on 22 May 2020

Submissions : by Mr Finau on 29 May 2020

no Submissions were made by Mr Tu'utafaiva as directed

Sentencing : 16 June 2020

SENTENCING

[1] Tavalea Tupou I have convicted you of the offence of causing grievous bodily harm to Wesly Vi on 16 February 2019, after a 2 day trial on 16 and 17 March this year because you pleaded not guilty to the charge.

[2] Because this offence carries a maximum sentence of 10 years imprisonment, I directed that a pre-sentence report be conducted by the probation officer in order that I am provided with all relevant information about you, and that submissions be made by both counsel as to the sentence that may be appropriate in your case.

Probation Report

[3] The probation officer, Mr Tito Kivalu, carried out interviews of yourself, your mother, your father and the head tutor of your school, Tonga College, and

made his report on 22 May 2020. Now having read it, I have very serious concerns about you.

- [4] He says that your mother told him that ever since you entered Tonga College your behavior began to turn bad. She said you have been living away from home and that you live with friends instead. The officer said that you had moved and lived with a friend at Lapaha and a week later when he tried to contact you again, your father told him that you had not returned home since you went to school in the day before. He said that he (the officer) contacted Mr Tu'ifangaloka, the head tutor at the college, who told him that you had been absent and been missing classes and not attending school for quite a period of time up to that time.
- [5] He said that your mother told him they had done their best to give you good advice and discipline but that you have not heeded their advice or pay attention to them. She says that you avoid attending and participating in the Mormon Church religious and youth activities and programs altogether, although you are a member of that Church.
- [6] Your school head tutor says that you entered Tonga College at Form 3 level in 2018 and then you withdrew from school early in the first term of 2019, and that you returned to school again this year in a TVET study program, but since the first term you have missed a lot of classes by failing to attend school altogether. The tutor says that you have now failed to complete the requirements of the course you have taken.
- [7] But what is of greatest concern is that the head tutor says that in 2019 "you were identified to be very much involved in attacking and starting up school fights against Tonga College students around the areas of Pea and Ha'ateiho after school hours", and that the school had contacted your parents about your conduct and behavior and despite your parents efforts you have made no change for the better at all.
- [8] In his assessment, Mr Kivalu says that:
- "The accused's attitude and behavioral problems towards the key institutions (family, religion and school) that he should follow and obey is seen to be disrespectful and unacceptable. In considering the circumstances of the offence and the way he denied the allegation it is seeming that he may be did it to cover up what he did in the offence. He is identified with a very dangerous attitude and behavior that posted him as a threat to the peace and safety in the community, especially the prevalent and ongoing social problems of school boys conflict and fightings."

[9] He also says – the accused shows no remorse for what he did in committing this offence – but that the accused asks for the court’s leniency and mercy.

Crown submissions

[10] Mr Finau for the Crown says that the only two things in the accused’s favour is that he has no previous conviction and that he is still young and has a chance to rehabilitate. Against that, he says that the accused used a weapon, a sharp object, which the accused told the probation officer was a knife, and that the wound was severe as it was an injury to this complainant’s head, that it was committed in a fight between two schools and that the accused has shown no remorse for what he has done.

[11] He says that the offence is serious because the Legislature has enacted that it be punishable by imprisonment for up to 10 years, and he helpfully referred me to the three cases which he says are relevant to considering the sentence for you.

[12] In *R v Timani* (CR 32/15 – unreported), the accused stabbed the complainant with a knife on his back and punctured his lung. Blood entered the lung and the complainant would have died had he not been treated right away at the hospital. The accused was sentence to 4 years 9 months imprisonment with the last 2 years being suspended for 2 years on conditions that:

- (a) he committed no offence punishable with imprisonment during the 2 years suspension,
- (b) he consumed no alcohol during said 2 years,
- (c) he lived where directed by the probation officer,
- (d) he attended classes on alcohol and drugs with the Salvation Army,
- (e) the sentence was to commence from the date he was taken into custody.

Mr Finau points out that, like the present case, Timani had pleaded not guilty and had gone through a full trial. He also points out that Timani had hidden the knife while he exchanged punches with the complainant until he pulled it out of his back pocket and stabbed the complainant with it without the complainant knowing what hit him.

[13] In *Tupou v R* (AC 16/2018) (unreported), the accused attacked and hit one man in a drinking party with a machete, hitting and injuring him some 6 times. He then chased another man and attacked him and repeatedly hit him with the machete. Both men suffered injuries but the second man’s injuries were more serious because he had to have two major operations to try and

restore some mobility to the victim's wrist and fingers. The Court sentenced him to 6 years imprisonment with the last 2 years suspended for 2 years on same conditions as in *Timani's case*.

- [14] *R v Toutai'olepo* (CR 174/2019 – unreported), the accused a Tonga College student, threw a rock at a group of Tupou College students riding on the back of a truck travelling along the road. The rock hit the complainant on the head and caused a compound depressed fracture to the left temporal bone of his skull. The Court sentenced the accused to 2 years imprisonment with the second year being suspended subject to conditions. The Court also directed that the prison authorities were to the greatest extent possible, keep the accused with young offenders of similar age and separated from offenders with lengthier and more serious criminal histories.
- [15] Mr Finau says and submits that the starting point for the accused is 4 years imprisonment in view of the aggravating features he has pointed out, and that 12 months be deducted for the mitigating features, leaving 3 years imprisonment. He says that whereas there was no premeditation in *Toutai'olepo case*, the present accused had premeditation when he carried in his pocket a concealed knife to be used, and which he did use, as a weapon to inflict this severe injury to the victim's head.
- [16] Mr Finau says that the accused is eligible for partial suspension in view of his young age but that only the last 12 months of the 3 years sentence be suspended, in view of the present behavioral problems manifested by the accused, as related by the head tutor of his school.
- [17] Furthermore, he says that the accused had shown no remorse at all for what he has done. He also points out that the accused has breached orders made by Cato J last year, when the accused appeared and pleaded before him in this matter, that he resided with his parents at Ha'ateiho and that he was not to go out of that home after 7pm every day and before 7am of the following day. The accused has gone and resided at Lapaha and elsewhere instead, as the probation officer has confirmed.

Starting point

- [18] I consider that the present case is closer to *Timani* and *Toutai'olepo* than to *Tupou* because in *Tupou*, the attack was carried out with a machete upon one man with repeated slashings and then upon a second man with again repeated slashings with the machete – causing serious and severe wounds. In *Timani* and *Toutai'olepo* and the *present case*, the attack was only once with the stroke of a knife which had been hidden until then, and by a

throwing of a rock at a moving truck with persons on the back thereof, and the injury left no permanent disfigurement or disability.

[19] Mr Finau does not say what the starting point was in *Timani* but he says that *Timani* was sentenced to 4 years 9 months imprisonment with the last 2 years being suspended on conditions. In *Toutai'olepo*, the starting point was 4 years, in view of the seriousness of the offence, the prevalence of this type of violence between groups of rival school students, the resulting injury to the victim and the sentences referred to in that case, namely, *R v Po'uhila* [2017] TOSC40, *Veā* (CR 126/2011), *Vi* (CR 55/2017) and *Tu'ipulotu, Ikavesi & Kivalu* (CR 162-164/19).

[20] In those cases, the facts and sentences were briefly as follows:

- (a) *Po'uhila* – accused was 17 years old; he pleaded to causing grievous bodily harm; he threw a brick at the victim causing multiple broken facial bones and ultimately the loss of sight in the victim's right eye; he cooperated with the police and had no previous conviction. Because of prevalence of teenage fighting amongst youths in Tonga, and as the injury result in permanent injury, a starting point of 5 years was considered appropriate, to reflect the seriousness of the offence and deterrence that was called for. One year was deducted for the early guilty plea, 6 months for his young age and clean record and remorse. He was sentenced to serve 2 years before the remaining 18 months was suspended.
- (b) *Veā* (CR 126/2011) – the accused threw a torch at his eight-year-old son's head causing a skull fracture; he had a previous conviction for violence. He was sentenced to 5 years imprisonment with the last 12 months suspended.
- (c) *Vi* (CR 55/2017) – prior altercation between accused and victim; accused returned the same day and struck the victim on the head with a steel pipe while the victim was asleep, causing a skull fracture. The starting point was 4 and a half years discounted by 18 months by ways of mitigation resulting in 3 years imprisonment with the last 12 months being suspended.
- (d) *Tu'ipulotu, Ikavesi & Kivalu* (CR 162-164/2019) – serious causing of bodily harm arising out of school rivalry fight. A starting point of 2 years with 9 months deducted by way of mitigation and the resulting 15 months imprisonment being fully suspended.

[21] Considering all those case, I think that your case is comparable to *Timani*, *Po'uhila* and *Toutai'olepo* because of the seriousness of the injury caused by use of a weapon. I consider that a starting point in your case is 4 years imprisonment.

Mitigation – none

[22] In mitigation of that starting point, there is not much that can be used to discount that starting point. Had you pleaded guilty or cooperated with the police or shown remorse at what you have done I might have considered a discount of the starting point. Instead, as the probation officer and your school head tutor have said, you have shown no effort at all to change. You do not show any rehabilitation at all since this offence occurred over a year ago. The only thing in your favour is that you are 17 years old.

[23] On the contrary, you appear to be very much involved in the fightings that have happened between the schools, especially between Liahona High School and Tonga College. In fact it is clear that whilst you were attending Tonga College as a student in February 2019, you attacked and stabbed Wesley Vi, the victim in the present case, who was a Tonga College student. It was not because you mistook him to be a Liahona High School student, because he was wearing the red Tshirt and grey shorts commonly worn by Tonga College students for their sports. You knew he was a Tonga College student at least by the clothes he wore. Yet you went at him with the knife you told the probation officer you always carried with you and stabbed him with great force at his head – so great that the knife penetrated the cap he was also wearing and also his scalp and then his cranium to leave a hole in his skull.

[24] During this trial, the complainant, Wesley Vi, stated in his evidence that you were from Liahona High School because you had been with other Liahona boys who had teased them, Tonga College boys, at the bus stop by the waterfront the Saturday before this incident occurred. You did not deny or give evidence that you were not doing that. I therefore accept that. You were siding with Liahona boys in early 2019 to cause trouble against Tonga College boys whilst you were attending Tonga College as a student at that time. You confirmed that by stabbing Wesley Vi in the following Saturday.

[25] I can only conclude that you did that to a Tonga College student to make out to the Tonga College students that a Liahona student did it to him so that the rivalry and fightings between the two schools would continue. That is proved by your subsequent continual involvement in the school fights in the later part of 2019, as your head tutor has told the probation officer.

[26] I do not see any reason to discount any part of your 4 years imprisonment sentence.

Suspension

[27] I have to consider whether any part of your sentence should be suspended, in view of your young age. The probation officer does not recommend any period of suspension but he says that if you are granted a partial suspension, then you should be placed under the direction of the Probation Officer to be on probation and to live where directed and to attend the Life Skills course of the Salvation Army.

[28] Mr Finau for the Crown says that you should have the last 12 months of your sentence suspended and to comply with the same conditions that the probation officer recommends.

[29] I agree. I consider that any person who participates in or encourages fightings between youths in the community, and especially between schools, ought to be sentenced to serve imprisonment sentences so that there is no longer any such needless violence, injury or death amongst the youths of this country. There is need for deterrence to bring such senseless violence to a halt.

Sentence

[30] Tavalea Tupou, I sentence you to 4 years imprisonment commencing today, but with the last 12 months of your sentence being suspended for 2 years upon the condition -

(a) that you do not commit another offence punishable by imprisonment within the 2 years of suspension,

(b) that you are on Probation and you live where the Probation directs,

(c) that you undertake and complete satisfactorily a life skills course with the Salvation Army.

[31] I direct that the Commissioner of Prisons shall, to the greatest extent possible, keep you with young offenders of a similar age and separated from older offenders with lengthier and more serious criminal histories.

Nuku'alofa: 16 June 2020



[Signature]
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