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

CR 176 of 2020

REX

-v-

SEMISI PULU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN
Appearances: Mrs Aleamotu'a for the Prosecution
The Defendant in person
Date of sentence: 30 September 2020

The offending

1. On 20 August 2020, the defendant pleaded guilty to one count of causing serious bodily harm contrary to s.107(1), (2)(b) and (4) of the *Criminal Offences Act*. The offence carries a maximum penalty of five years imprisonment.
2. The defendant is a 46-year-old male. The victim is a 15 year old schoolboy. They both reside in the same village and are also related by blood.
3. On 28 May 2020, the defendant's mobile phone went missing from his vehicle. A woman who lived opposite to where the vehicle was parked told the Defendant that she had seen the victim standing around his vehicle and looking inside it. The defendant then drove to another person's residence to ask about his mobile phone and was again told that the victim had taken it.
4. He then drove to the victim's house to retrieve his phone. However, the victim denied taking it. With that, the defendant punched the victim to his face and then picked up a gardening hoe and hit the victim with it multiple times. The victim used his arm to shield himself. The defendant continued hitting the victim until

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the head of the hoe broke off. When he saw the victim's brothers running towards him, he got into his vehicle and left.

5. The victim was then taken for medical treatment. He suffered swelling to his left cheek and right arm. X-rays later showed that he sustained a fracture to his right elbow.
6. On 30 May 2020, a complaint was lodged with police. On 2 June 2020, the defendant was arrested. He cooperated and admitted to the offending.

Crown's submissions

7. The Crown has submitted information from the Magistrates Court which records the defendant as having been convicted on 13 August 2018 of common assault and disorderly behaviour for which he was fined \$300 and \$200 respectively. Further, on 4 September 2000 919 he was convicted of reckless driving and fined \$250.
8. The Crown submits that aggravating features of the case include the youth of the victim, that the victim was assaulted in the vicinity of his residence where he ought be able to feel safe, that after being initially punched he was assaulted with a weapon, that he suffered swelling to his left cheek and a fracture of his right elbow, that there was no provocation for the assault, the defendant's belief that the victim took his mobile phone was no justification for the assault that followed, the offending has impacted the victim's education as he has missed school due to his injuries and that the offending is serious.
9. Mitigating features include the defendant's early guilty plea, his cooperation with police, his attempt to apologise to the victim's family and his genuine remorse.
10. The Crown relies on the following comparable sentences:
 - (a) *Hu'ahulu & anor v Police* [1994] TLR 93 - Both appellants were intoxicated at the time of the offending, pleaded guilty at the earliest opportunity, were providers for their families and first-time offenders. The first appellant thrust a bottle into the victim's face for which he was sentenced to 9 months imprisonment. The second appellant struck a victim in the face with a stone

for which he was also sentenced to 9 months imprisonment. Chief Justice Ward opined that anyone who commits an offence of violence against another person runs a serious risk of immediate imprisonment even if the defendant is a first-time offender. He also emphasised that the likelihood of going to prison becomes a virtual certainty for persons who take part in a joint attack on a victim or where the victim is kicked whilst on the ground or when a weapon of any type is used. In that case, the first appellant's sentence was increased to 12 months imprisonment.

- (b) *Kenneth Havili and Sione Matangi* (unreported, CR 17 & 18 of 2013) – Matangi assaulted the complainant with a bottle and broke his jaw. A starting point of three years was adopted as a deterrent. He was sentenced to two years fully suspended on conditions which included 60 hours community work.
- (c) *Tevita Mahelofa Finau* [2020] TOSC 8 - The drunken defendant struck his brother with a machete severing two of his fingers. A starting point of three and a half years imprisonment was adopted. That was discounted by 18 months for mitigation. The remaining sentence of two years imprisonment was fully suspended, on conditions, primarily because of the advanced age of the defendant, cogent evidence that he had given up alcohol which had already had a rehabilitative effect on his life and the complete forgiveness by his brother with whom the defendant had resumed normal living relations. The defendant was also required to perform 40 hours community service

11. In the instant case, the Crown submits that:

- (a) a custodial sentence is appropriate;
- (b) having regard to the use of a weapon in the form of the gardening hoe, the lack of any provocation for the offending and the nature of the injuries suffered by the young victim, an appropriate starting point is three years;
- (c) the defendant is entitled to a discount for mitigation; and
- (d) 18 months of the remaining sentence be suspended due to the defendant's cooperation, remorse, and likely good prospects of rehabilitation.

12. The Crown recently interviewed the victim. He was reported was still being very upset and afraid because of the offending. He confirmed that his education has been affected by time lost on account of his injuries. He acknowledged that he had not accepted the defendant's apology to him. The victim denied ever taking the defendant's mobile phone.

Presentence report

13. The probation office provided the following information about the defendant. He is the seventh of 10 children in his family. He resides at his family home with his mother, a younger sister of his mother and a foster son. He is single and has followed in the footsteps of his late father by earning a living as a fisherman. He finished secondary school in Form 5 due to financial hardship. Since then, he has provided for his mother and the others remaining at home. He is generally in good health.
14. The day after the offending, the defendant returned to apologise to the victim's mother but she did not accept his apology. The defendant is reported to deeply regret what he did but said that he was very angry when the victim said he knew nothing about his mobile phone.
15. In contradiction to the above information from the Crown about the defendant's previous convictions, the probation report describes him as a first-time offender. I infer that that is what the defendant told the probation officer.
16. The Chief Probation Officer recommends that by reason of the defendant's asserted good record, genuine remorse, offered apology, cooperation, early guilty plea and because he is the primary provider for his mother and others at home, any inevitable period of imprisonment be suspended on conditions including that the defendant be placed on probation and that he complete an anger management course.

Starting point

17. In considering an appropriate starting point, the defining feature of this offending is the use of a gardening hoe to inflict serious injury. I have considered the

comparable sentences presented by the Crown as well as the following previous sentences for similar offending involving the use of objects:

- (a) *Ma'afu Makasini*, CR 2/16 – during an argument fuelled by intoxication, the defendant hit the victim from behind with a rock to his head, rendering him unconscious and then kicked him in the mouth. The defendant was sentenced to 18 months imprisonment, fully suspended for two years on conditions;
- (b) *Taniela Pekipaki*, CR 172/18 - the defendant hit the victim's forehead with an object and was sentenced to two years and three months imprisonment with the final 12 months suspended;
- (c) *Viliami Fa'au*, CR 70/17 – the defendant struck the victim with his fist, an empty alcohol bottle and a bucket of paint causing injuries to the victim's eye and mouth. He was sentenced to two years imprisonment with the final 12 months suspended;
- (d) *Halahone Taliai and Sosefo Malimali Vea* [2018] TOSC 56 - the defendant, Vea, carried a hammer to a fight and used it to strike the head of the victim causing a laceration and some internal bleeding. Cato J adopted a starting point of three and half years. That was discounted by 15 months in mitigation. Of the remaining sentence of two years and three months imprisonment, the final six months were suspended on conditions.

18. At the other end of the spectrum for offences of this kind may be found those involving the use of machetes. For example, in:

- (a) *Siokatame Tupou* [2019] TOCA 8, the Court of Appeal agreed, relevantly, with a starting point of four years for the use of a machete in a sustained attack which inflicted serious injuries. An additional count of causing grievous bodily harm resulted in a total sentence of six years, the last two of which were suspended; and
- (b) *Heamani Lopeti* [2019] TOCA 5, the defendant was sentenced to 10 years imprisonment for armed robbery and 2½ years concurrently for causing

serious bodily harm where a machete was used to inflict serious injuries during the course of the robbery.

19. Although arguably not as readily lethal as a machete, the use of a gardening hoe, with its steel edge, is still very dangerous, and potentially more so than other objects, such as rocks or even hammers. It is not clear on the facts admitted in this case whether the defendant used the edge of the hoe or just the back of the metal head when hitting the victim. I suspect that if the edge had been used, the injuries may well have been far more severe. In any event, and assuming the hoe was in reasonable condition, the fact that the head of it broke off gives some indication as to the degree of force used and number of blows struck by the defendant.
20. I am cognizant of the fact that this offending was the direct result of the defendant taking the law into his own hands. Whilst he started out justifiably seeking the return of his mobile phone which had been stolen from his vehicle, his aggressive outburst of violence, exacerbated by the use of an object to inflict serious harm, is conduct the law cannot condone. In that sense, not only must the sentencing objectives of denunciation and protection of the vulnerable be served, the sentence must also provide specific and general deterrence.
21. I also take into account the defendant's 2018 conviction for common assault which, together with the instant offending, firmly suggests that he either has, or is developing, a serious anger management problem.
22. Having regard to the seriousness of the offending, the resulting injuries to the young victim, the use of a gardening hoe to inflict them during the course of a sustained attack, and the above comparable sentences, I adopt a starting point of three years imprisonment.

Mitigation

23. I allow some credit for the defendant's good record up until 2018. For that, his early guilty plea and demonstrated remorse, I reduce the starting point by one year thereby resulting in a sentence of two years imprisonment.

Suspension

24. The probation report referred to the Defendant being the breadwinner for his mother and other family members still residing at their home as a factor in favour of suspension. As discussed recently in *Rex v PF* [2020] TOSC 30 at [31], the "breadwinner submission" is one that is regularly raised in the courts of the Kingdom but which carries little weight in determining whether an accused should be sent to prison. Imprisonment will fall hard on the family the defendant should be supporting. Unfortunately, however, that is an all too frequent consequence of criminal offending and, for which, the Court is not responsible.¹ Such hardship cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence.² Accordingly, the fact that the offender is the breadwinner for his family, is not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence.

25. Further, in *Siokatame Tupou*, supra at [18], the Court of Appeal declined to increase the period of suspension (of two years of six) as it considered that the factors identified in *Mo'unga v R* [1998] Tonga LR 154 had been reflected in the discounts allowed by the Judge in fixing the length of the sentence and in the partial suspension ordered. Further, the Court warned that:

"... Offenders inflicting serious injury with a weapon must ordinarily expect to serve a term of imprisonment...."

26. Having regard to those principles and the factors referred to in *Mo'unga v R*, I consider it appropriate to suspend the last 12 months of the sentence on conditions.

¹ *Tukuafu v Police* [2001] Tonga LR 151; *R v Motulalo* [2000] Tonga LR 311 at 314; *R v 'Vailea & Pepe* [2020] TOSC 27.

² *Rex v Vake* [2012] TOCA 7, referred to by Paulsen LCJ in *Rex v Fainga'anuku* [2018] TOSC 16 at [33].

Result

27. The defendant is convicted of causing serious bodily harm and is sentenced to two years imprisonment.
28. The final 12 months of the sentence will be suspended on conditions that upon his release, and during the period of suspension, the Defendant shall:
- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within 48 hours of his release; and
 - (d) undertake and complete a course in anger management as directed by his probation officer.
29. A failure to comply with any of the above conditions of suspension may result in the defendant being required to serve the balance of his sentence of imprisonment.

NUKU'ALOFA
30 September 2020



A handwritten signature in blue ink, appearing to read "M.H. Whitten".

M.H. Whitten QC
LORD CHIEF JUSTICE