

Sean + He

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

CR 317, 318 & 319 of 2020

REX
-v-
SULIANA FATE
SAITONI FATE
SIOSI'ANA PALU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Ms A. Aonima for the prosecution
The three accused in person
Date: 25 February 2021

The offending

1. On 15 January 2021:
 - (a) Suliana Fate pleaded guilty to theft and common assault, contrary to ss 145(b) and 112 of the *Criminal Offences Act* ("**the Act**") respectively;
 - (b) Saitoni Fate pleaded guilty to receiving stolen property, contrary to s.148(1) of the Act; and
 - (c) Siosi'ana Palu pleaded guilty to harbouring criminals, contrary to s.13(a) of the Act.
2. On 1 August 2020, at approximately 10 PM, Suliana met the complainant at the Billfish Bar where they had a few drinks. When the bar closed, they agreed to go to the complainant's brother's house at Ma'ufanga to continue drinking.

3. When they reached the house, Suliana hit the complainant on his head with a stick causing him to lose consciousness. Suliana then took the complainant's vehicle (a Black Honda valued at \$11,000.00) to her aunt's house at Ha'alalo.
4. The next morning, Suliana took the vehicle and parked it at Saitoni's residence and told both Saitoni and Siosi'ana that she had stolen the vehicle. Saitoni proceeded to try and sell the vehicle to one, Angilau Palanite, but he refused to purchase it once he knew the vehicle was stolen.
5. The complainant lodged a complaint with the police the same day. Suliana was apprehended and arrested first. The police continued their search, and, on 9 August 2020, Saitoni and Siosi'ana were caught driving around in the vehicle, arrested and remanded in custody.
6. On the same day, all three were interviewed by police and admitted to the charges.

Crown's submissions

7. The Crown identifies the following as aggravating features:
 - (a) Suliana:
 - (i) assaulted the complainant causing him to lose consciousness;
 - (ii) did so with the use of a weapon;
 - (iii) stole a vehicle worth \$11,000.
 - (b) Saitoni:
 - (i) knew the vehicle was stolen property and tried to sell it;
 - (ii) removed the licence plate number from the vehicle; and
 - (iii) used the stolen vehicle for his own purposes.
 - (c) Siosi'ana:

- (i) knew that the police were looking for Saitoni but refused to co-operate with them; and
 - (ii) used the stolen vehicle for her own purposes.
- 8. The Crown submits the following as mitigating features:
 - (a) all three accused are first time offenders;
 - (b) they pleaded guilty at the earliest opportunity;
 - (c) they co-operated with the authorities during the investigation; and
 - (d) they are remorseful.
- 9. The Crown relied upon the following comparable sentences:
 - (a) Theft:
 - (i) *R v Sailosi Lau'i a.k.a Sailosi Misiuata, CR 167/2018* – the Defendant was arrested and pleaded not guilty to the charge of robbery. He was found not guilty of robbery but guilty of theft. Cato J sentenced him to 1 year and 9 months' imprisonment with the final 9 months suspended on conditions.
 - (ii) *R v Tevita Vaka & Rodney Toki, CR 127-128/2016* – the Defendants pleaded guilty to break and enter of a house from which they stole various goods. Vaka was sentenced to 3 years' imprisonment. Toki was sentenced to 2 years and 6 months for the housebreaking count. Both were sentenced to 18 months for theft. The final 18 months of Toki's sentence was suspended.
 - (b) Receiving stolen property:
 - (i) *R v Ma'ake Kali, CR 211/2019* – the Defendant had failed to abide by the conditions of an earlier suspended sentence. He was sentenced to 2

years' imprisonment with the final 21 months to be served cumulatively with the remaining 9 months of his earlier suspended sentence; a total of 30 months.

(ii) *R v Siaki Tongatu'a*, CR 95/2018 – the Defendant pleaded guilty and was sentenced to 2 years' imprisonment with the final 6 months to be served cumulatively upon a 5 year sentence he was currently serving on another matter.

(c) Harboursing criminals:

(i) *R v 'Ofa Ki Vahanoa Fa'u*, CR 201/08 – the Defendant pleaded guilty to receiving stolen property and harboursing of a criminal. He was sentenced to 18 months for harboursing criminals and 3 months' for the receiving, to be served concurrently. The final 9 months of his sentence was suspended for 2 years upon release.

10. The Crown submits the following as appropriate sentences:

(a) Suliana: a starting point of two years' imprisonment for the theft with an additional nine months for the use of the stick in the assault; deduction by way of mitigation for her lack of previous convictions and early guilty plea; and suspension.

(b) Saitoni: a starting point of two years' imprisonment; deduction by way of mitigation for his lack of previous convictions and early guilty plea; and the suspension.

(c) Siosi'ana: a starting point of 18 months' imprisonment; deduction by way of mitigation for her lack of previous convictions and early guilty plea; and suspension.

Pre-sentence reports

Suliana

11. Suliana is 21 years of age. She is the second of eight children. Early on, her family's income was derived from their father's crops and their mother's weaving. The parents separated. As a result, Suliana grew up in an unstable environment in two separate homes. Her mother is in Australia and her father is living with his new partner at Tatakamotonga with her brother, Saitoni. Suliana dropped out of Form 4 at Queen Salote College after falling pregnant. Since then, Suliana has resided with her maternal grandmother in Holonga. Her mother sends money occasionally to assist them and her father visits them when he can.
12. Suliana told the probation officer that on the night of the offending, she had gone drinking with friends. At some point, her friends left without her. She was alone in the bar. The complainant approached her and invited her to drink with him at his home. Suliana described the place she was taken to as a deserted house where the complainant started sexually harassing her. She hit him until he blacked out and stole the keys to his vehicle and left.
13. The probation officer opines that considering that she is a first-time offender, she pleaded guilty at the first instance and regrets what she did, any term of imprisonment imposed on Suliana should be fully suspended on conditions.

Saitoni

14. Saitoni is 19 years of age. He is described as a quiet and shy person who, like his sister, Suliana, grew up in a broken family and an unstable environment. He reached Form 2 at Takuilau College before dropping out to help his father at their plantation. His parent's separation took a toll on him. He lives with his father, his father's partner and 8 children from her previous marriage.
15. The day after the offending, Suliana brought the vehicle to Saitoni and asked whether he wanted to ride in it. Saitoni reported that he was so drunk that day that

he saw it as an opportunity to go for a ride in the vehicle. His friends later encouraged him to take it to a car dealer but the police caught him.

16. On account of his stated remorse and the expectation that he is most unlikely to reoffend in the future, the probation officer also recommends that any sentence of imprisonment imposed on Saitoni be fully suspended on conditions.

Siosi'ana

17. Siosi'ana is also aged 19. She grew up in 'Eua in a good family environment. She was later sent to Tongatapu to live with her paternal grandparents and to attend Apifo'ou College where she completed Form 5. She met Saitoni online. They decided to elope but were too young to get married. They are in a de-facto relationship, residing at Tatakamotonga. They have a son. Prior to this offending, Siosi'ana was employed at Malapo Quarry.
18. Siosi'ana told the probation officer that she did not know the vehicle was stolen until her neighbour told her when she returned from work. She apparently confronted Saitoni and told him to return the vehicle which resulted in an argument between them. Fearing that Saitoni might get angry again, she remained silent and denied knowing his whereabouts when questioned by the police.
19. The probation officer opines that Siosi'ana is still young and will use this mistake to grow and do better in the future. She again recommends that any sentence of imprisonment imposed be fully suspended on conditions.

Consideration

20. The common characteristics of all three Defendants, which weigh significantly in determining their sentences, are their relative youth, lack of previous convictions and that, directly or indirectly, their offending involved property.
21. In *R v Tau'alupe* [2018] TOCA 3 at [16], the Court of Appeal observed that:

“It is well established that sentencing of young offenders raises special considerations: (a) an offender’s youth may impinge on an assessment of their culpability; (b) prison for any period is known to carry an enhanced risk of trauma for young people; and (c) young offenders have a greater capacity for rehabilitation.”

22. “In broad terms when sentencing a first offender who has committed an offence solely against property, the court should consider a sentence that would not immediately result in imprisonment.... However, there are many exceptions to that proposition. The nature of the offence itself and any aggravating circumstances in the manner in which it was committed, the overall harm to the victim and the attitude of the defendant subsequently should all be reflected in the sentence. Some property offences are almost certain to result in imprisonment if committed by an adult offender”: *Eukaliti v Police* [1994] Tonga LR 80.

Suliana

23. The maximum penalty provided by the Act for theft is 7 years’ imprisonment and for common assault, a fine of \$5,000 or 1 year imprisonment, or both.
24. The gravity of Suliana’s offending attracts mixed considerations. On the one hand, she says she assaulted the complainant because he was making sexual advances towards her. On one view, that may be regarded as self defence. But that is not how the Crown has put the case to which Suliana has pleaded guilty. On the other hand, after she rendered him unconscious, Suliana opportunistically stole the complainant’s vehicle. No explanation has been given for that seemingly contradictory behaviour. There is no suggestion of any pre-meditation or plan to effectively rob the complainant. It appears to have been a drunken spur of the moment reaction to the situation in which she found herself. It may also reasonably be attributed to her relative youth.
25. Having regard to the above, the significant value of the vehicle stolen and that it was recovered, I set a starting point for the theft count of 2 years’ imprisonment.
26. In relation to the assault, I know nothing of whether the complainant suffered any particular injuries other than being knocked out. I infer from the fact that the Crown

determined to charge Suliana only with common assault that the complainant has not suffered any serious injuries. I consider the use of the stick as a circumstance of aggravation. On that basis, I set a starting point for the assault count of 6 months' imprisonment.

27. For her early guilty plea, previous good record and expressed remorse, I reduce the starting points by one third, resulting in sentences of 16 months' imprisonment for the theft and 4 months for the assault to be served concurrently.
28. On the considerations for suspension as discussed in *Mo'unga v R* [1998] Tonga LR 154, Suliana:
 - (a) is young and has a previous good record;
 - (b) is likely to take the opportunity offered by the sentence to rehabilitate herself;
 - (c) did not premeditate the offending and the assault was instigated by the complainant's unwelcome advances thereby reflecting some diminution in culpability; and
 - (d) co-operated with the authorities.
29. Accordingly, I consider it appropriate to fully suspend her sentence for a period of two years on conditions which will be set out below.

Saitoni

30. The maximum penalty for receiving stolen property is 7 years' imprisonment.
31. Saitoni's conduct was fuelled by a mix of immaturity, alcohol, misguided peer advice and foolish opportunism. As the vehicle was recovered before Saitoni could sell or dispose of it, I regard his culpability as less serious than the principal offender, Suliana. I therefore set a starting point for the receiving count of 18 months' imprisonment.

32. On account of his early guilty plea, previous good record and expressed remorse, I reduce that starting point also by one third, resulting in a sentence of 12 months' imprisonment.
33. Similar considerations on suspension apply for Saitoni such that I consider it appropriate to also fully suspend his sentence, for a period of 18 months, and on the conditions set out below.

Siosi'ana

34. The statutory maximum penalty for harbouring criminals is 3 years' imprisonment.
35. Siosi'ana is by far the least culpable of the three. She had nothing to do with the theft of the vehicle or Saitoni's attempt to sell it. Once she was told it was stolen, Siosi'ana told Saitoni to return the vehicle. That resulted in an argument between them. However, any sympathy elicited from her explanation to the probation officer that she remained silent and denied knowing Saitoni's whereabouts when questioned by police due to fear of Saitoni getting angry again is extinguished by the fact that she was apprehended by police riding around in the vehicle with Saitoni. Nonetheless, I accept that she, like any spouse, legal or otherwise, was in an invidious position in being asked to inform on her partner. However, that is no excuse at law. Further, a moment's reflection will reveal that co-operating with police in that situation is ultimately to the offending spouse's benefit for by being brought to justice as early as possible, he or she will have an opportunity at least to repent their wrongdoing with the very likely result of a reduced sentence. More generally, of course, it is every citizen's duty to assist police in their lawful investigations not least because the withholding of relevant information may interfere with the course of justice.¹
36. With that more balanced assessment of Siosi'ana's offending, I consider an appropriate starting point to be 12 months' imprisonment.

¹ Section 65 of the Criminal Offences Act.

37. For her early guilty plea, previous good record and expressed remorse, I reduce that starting point also by one third, resulting in a sentence of 8 months' imprisonment.
38. Although, by the definition of her offence, Siosi'ana did not co-operate with the authorities, her diminished culpability and other favourable factors also warrant full suspension of her sentence, for a period of 12 months, and on the conditions set out below.

Result

39. Suliana Fate is convicted of theft and common assault and is sentenced to 16 months' imprisonment for the theft and 4 months imprisonment for the assault, to be served concurrently. The said terms of imprisonment will be fully suspended for a period of 2 years, on condition that during that suspension period, Suliana is to:
- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within the next 48 hours;
 - (d) reside where directed by her probation officer; and
 - (e) perform 80 hours of community service.
40. Saitoni Fate is convicted of receiving stolen goods and is sentenced to 12 months' imprisonment. The said term of imprisonment will be fully suspended for a period of 18 months, on condition that during that suspension period, Saitoni is to:
- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within the next 48 hours;
 - (d) reside where directed by his probation officer; and
 - (e) perform 60 hours of community service.

41. Siosi'ana Palu is convicted of harbouring criminals and is sentenced to 8 months' imprisonment. The said term of imprisonment will be fully suspended for a period of 12 months, on condition that during that suspension period, Siosi'ana is to:
- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within the next 48 hours;
 - (d) reside where directed by her probation officer; and
 - (e) perform 40 hours of community service.
42. Failure to comply with any of the said conditions may likely result in the defaulting defendant being required to serve his or her suspended sentence in full.
43. Pursuant to s.192 of the Criminal Offences Act, I order that the motor vehicle the subject of Count 1 be returned to its owner.

NUKU'ALOFA
25 February 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE

