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

CR 325 of 2020

REX
-v-
'INIVENESI HELU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs 'A. 'Aholelei for the prosecution
The Defendant in person
Date: 5 March 2021

The offending

1. On 29 January 2021, the Defendant pleaded guilty to one count of causing serious bodily harm, contrary to ss 107(1), (2)(b) and (4) of the *Criminal Offences Act*.
2. On 12 July 2020, Tevita Hafoka ("the victim"), who was 17 years of age, was at home when Siua Moimoi and Tevita Fuafili arrived with a bottle of liquor looking for food. Around 3:30 PM, they went to a Chinese shop. Upon arriving at the shop, a woman approached them complaining that Siua's younger brother, Moli, took her vehicle.
3. Not long after, Moli arrived in a vehicle with the Defendant. Siua punched Moli which resulted in the Defendant taking a baseball bat from the vehicle and chasing Siua. After an altercation between the Defendant and Siua, the Defendant left.
4. People, including the victim, started to gather. They saw the Defendant return to where the crowd had gathered. The Defendant yelled in Tongan "drink like people who have pubic hair". When no one responded, the Defendant punched the victim.
5. The victim then ran out on the road and challenged the Defendant to a fight. The Defendant walked over to the victim and produced a machete. As the victim

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turned to run, the Defendant swung the machete and hit the victim's right arm. The Defendant chased the victim but could not catch him.

6. The victim was taken to hospital where he was treated for a 7cm deep laceration which required internal and external sutures.
7. Later that day, the Defendant was arrested. The following day, his mother and de facto partner apologized to the victim's mother.
8. On 14 July 2020, the Defendant was interviewed by police and admitted to the charge.

Crown's submissions

9. The Crown submits the following as aggravating features of the offending:
 - (a) the assault was premeditated because the Defendant left the scene after the initial fight and returned with a machete, indicating that he intended to use it;
 - (b) he punched the victim first;
 - (c) he used a machete; and
 - (d) he chased the victim after assaulting him.
10. The Crown submits the following as mitigating features:
 - (a) the Defendant is a first time offender;
 - (b) his early guilty plea; and
 - (c) he co-operated with the authorities.
11. The Crown relies upon the following comparable sentences:
 - (a) *R v Siokatame Tupou v R* [2019] TOCA 8 – the Defendant attacked two men with a machete. He pleaded guilty to grievous bodily harm and causing serious bodily harm. He was sentenced to 5 years' imprisonment for the grievous bodily harm and 3 years for causing serious bodily harm with 1 year

to be served cumulatively on the first count. The total sentence was 6 years' imprisonment, with the last 2 years suspended.

- (b) *R v Vaingalu Pulotu* (Unreported, CR 159 of 2019, 7 February 2020) – the Defendant pleaded guilty to stabbing the victim with a knife during a fight causing grievous bodily harm. The starting point was set at 5 years. That was reduced by 18 months' for mitigation. Of the resulting sentence of 3 ½ years' imprisonment, the final 6 months of which was suspended.
- (c) *R v Semisi Pulu* (Unreported, CR 176 of 2020, 30 September 2020) – Defendant pleaded guilty to one count of using a garden hoe on the victim causing serious bodily harm. The starting point was set at 3 years and reduced by 1 year for mitigation. The final year of the resulting sentence of 2 years' imprisonment was suspended on conditions.
- (d) *Heamani Lopeti v R* [2019] TOCA 5 – the Defendant was convicted of armed robbery and serious bodily harm. He was sentenced to 2 ½ years' imprisonment for the serious bodily harm.

12. In this case, the Crown submits a starting point of 3 ½ to 4 years' imprisonment, 12 months' deduction by way of mitigation, and partial suspension of the balance.

Pre-sentence report

13. At his arraignment, the Defendant was directed to attend the probation office within 48 hours to make arrangements for the preparation of his pre-sentence report. That report and submissions on sentence were directed to be filed by 26 February 2021. He failed to attend the probation office as directed and left it until earlier this week to attend. No reason for his delay has been provided. Thanks to the dedication and industry of the probation office, a report was able to be prepared and filed yesterday afternoon.
14. The probation officer reported that the Defendant:
- (a) is 39 years of age;

- (b) is the eldest of four children;
 - (c) was brought up in a stable home until his parents' separation and divorce and his father moved to the United States. His mother remarried and moved to Kolofo'ou. When she moved, the Defendant started mixing with the wrong crowd, living with friends, and eventually got involved with alcohol and drugs
 - (d) did not complete his school education due to financial difficulties;
 - (e) worked in a plantation to help provide food and fund the education of his siblings. His employer there speaks highly of him, describing him as a quiet, honest, trustworthy and hardworking man;
 - (f) is in a de-facto relationship although his partner is currently in Australia as a seasonal worker. They have had 5 illegitimate children, the fourth of whom is deceased. The children live with their maternal grandmother; and
 - (g) for the past year, has been employed as a taxi driver earning \$150 per week.
15. In relation to the offending, the Defendant told the probation officer that:
- (a) he was parked at the Wellington taxi base with his friend, Moli, waiting to pick up his children from church;
 - (b) as they were waiting, a group of drunk boys approached them and one of them punched his friend; and
 - (c) the Defendant was furious and walked to a neighbour's place, got the machete and returned to the scene.
16. According to the probation officer, after the incident, the Defendant apologized to the victim and was forgiven. Both the victim and his father ask for the Court to show leniency and mercy as the Defendant has a responsibility to take care of his children.
17. In contrast to the Crown's submissions, the probation officer reported that the Defendant has two previous convictions in the Magistrates Court for theft.

18. Notwithstanding, the probation officer opines that on account of the Defendant's remorse, and because he is the sole provider for his family, any term of imprisonment should be fully suspended on conditions.

Defence submissions

19. In the expectation that a presentence report may not be prepared in time, Mr William Edwards, described as 'Counsel assisting the Defendant', also filed submissions yesterday on behalf of the Defendant. While most of the Defendant's antecedents have already been canvassed in the presentence report, in contrast to what the Defendant told the probation officer, Mr Edwards submitted that the Defendant, among other things:
- (a) has three illegitimate children with his partner; and
 - (b) no previous convictions.
20. In relation to the offending, Mr Edwards submitted that the Defendant:
- (a) was affected by alcohol;
 - (b) suffered from bullying due to his relatively small stature but knows that does not justify his use of a weapon;
 - (c) was friends with the victim; and
 - (d) by the forgiveness of the victim and his family, their friendship has been maintained.
21. Mr Edwards submitted that since the offending, and during the few weeks he was in custody on remand, the Defendant has reflected on his actions, regrets what he did, and is remorseful.

Starting point

22. The maximum statutory penalty for causing serious bodily harm is 5 years' imprisonment. The comparable sentences referred to by the Crown involving

grievous bodily harm are inapposite as that offence carries a maximum penalty of 10 year' imprisonment.¹

23. In *Hu'ahulu v Police* [1994] Tonga LR 93, Chief Justice Ward said:

".... the fundamental point is that anyone who commits an offence of violence against another person runs a serious risk of immediate imprisonment. That will apply even to a first-time offender. The likelihood of going to prison becomes a virtual certainty if.... a weapon of any type is used."

24. The use of machetes in assaults in Tonga constitutes a special category of aggravation. Recently, in *Rex v Finau* [2020] TOSC 8, this Court observed:

"In Siokatame Tupou [2019] TOCA 8, the defendant was sentenced to an effective term of 6 years imprisonment with the last 2 years suspended after pleading guilty to attacking two men with a machete causing grievous bodily harm to one of them and serious injury to the other. Alcohol had been involved leading to an argument and a fight between the defendant and one of the victims. The victim apologized and the defendant accepted the apology. However, he then went to his home, obtained a machete, and returned to the place where the victims and others were still drinking. He then carried out a sustained attack on the first victim, attempting to strike him on five occasions with the machete and then once more after he fell. The defendant then chased the other victim and hit him repeatedly about the head with the machete after he fell. When he got up and tried to run away, the defendant chased him, caught him and continued hitting him with the machete. The attack only stopped when the defendant's younger brother took the machete away from him. The less serious injuries, constituting the serious bodily harm charge, included multiple lacerations to that victim's left arm, forearm and hand, which all healed with no long term complications.

In his sentencing remarks, Cato J observed that a machete is an inherently dangerous weapon, particularly in the hands of a drunken offender. The Court of Appeal agreed and noted, relevantly, that the starting point of four years for the serious bodily harm charge was within range for this offending given the use of a weapon, the seriousness of the injuries inflicted and the sustained nature of the attack. In also declining to interfere with the period of suspension, the Court of appeal stated:

'... Offenders inflicting serious injury with a weapon must ordinarily expect to serve a term of imprisonment. That is particularly so given the prevalence and availability of machetes.'

¹ Section 106 of the Criminal Offences Act.

25. Having regard to:

- (a) the comparable sentences referred to by the Crown;
- (b) the principles and salutary warnings referred to immediately above;
- (c) the Defendant's unprovoked initial assault by punching the victim;
- (d) the premeditation displayed in the Defendant going and getting a machete and returning to attack the victim;
- (e) the use of the machete;
- (f) the Defendant striking the victim with the machete as the victim was trying to flee;
- (g) the fact that the Defendant only struck the victim once with the machete;
- (h) the Defendant chasing the victim clearly suggesting he intended to strike the victim again had he caught him; and
- (i) the moderate seriousness of the injury inflicted,

I consider the appropriate starting point to be 3 years' imprisonment.

Mitigation

26. Notwithstanding the mixed reports on the Defendant's previous record, for his co-operation with police, early guilty plea, relevantly good previous record and expressed remorse, I reduce the starting point by 1 year.

Suspension

27. On the question of suspension, there are two preliminary matters to be addressed.

28. The first is the asserted forgiveness by the victim and his family. The circumstances of that vary between the Crown's summary of facts and what the Defendant told the probation officer and Mr Edwards. There is no independent statement by the victim or any member of his family before the Court to confirm the Defendant's assertion. I am therefore left with a degree of skepticism about it. I

recommend that, in future, the Crown, as a matter of course, obtain impact statements from victims of crimes such as the present in which any expression of forgiveness may be recorded firsthand.

29. Further, any verified forgiveness by a victim cannot operate as exoneration. Even though the crime here is against a person, all criminal prosecutions taken in the name of the Crown involve offence to the State representing the whole community. To elevate the forgiveness of a victim to the level of virtual exculpation, with the Court being expected to essentially take no effective action on sentencing, would have the result of subverting the statutory proscriptions imposed by Parliament and the criminal common law. A Defendant may express genuine remorse, explicitly or implicitly by the act of apologizing to a victim and seeking the victim's forgiveness. That the remorse is genuine will often be demonstrated when the offender so acts before being arrested or charged. By contrast, remorse expressed after arrest and charge, is often felt by some offenders not so much for the suffering they have inflicted on the victim but for the suffering the offender anticipates experiencing upon being caught and being dealt with according to law. Genuine remorse is always a relevant factor in sentencing. So too is forgiveness by a victim. Some forgive before or without any request by the offender. Ultimately, in my view, the weight to be attributed to forgiveness is to be measured not so much by reference to anything the Defendant has done or not done following the commission of the offence, but rather by reference to the effects of the offending on the victim and his or her family.
30. The second matter is the oft-cited 'breadwinner plea'. For the reasons discussed in *R v PMP* [2020] TOSC 112,² the Court of Appeal has made it abundantly clear that the fact that an 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*'.
31. I therefore now turn to the other considerations relevant to suspension as discussed in *Mo'unga* [1998] Tonga LR 154 at 157. Here, once again, they

² Referring to *Wolfgramm & ors* [2020] TOSC 78 at [47] to [49].

produce a mixed result. Factors in favour of suspension are the Defendant's relevantly good record and his co-operation with the authorities. Factors against are his age, that the offence was premeditated and there are no other factors which might diminish his culpability.

32. In considering whether to suspend any part of the sentence, I have also taken into account:
- (a) the Defendant's suggested influence of alcohol. However, this too is unverified and, in any event, is unmeasurable. That he was in his vehicle waiting to collect his children from church, meaning he was intending on driving while affected by alcohol only demonstrates a greater degree of recklessness and irresponsibility;
 - (b) the Defendant's remorse and the victim's forgiveness; and
 - (c) the need to give "weight to public denunciation and outrage and to the need to stop or control conduct which detrimentally affects all members of the community": *R v Manu* [2020] TOSC 82 at [47]. Attacks with machetes fall within that class of conduct.
33. On balance, I do not consider that the sentencing objectives of punishment, denunciation, protection of the community and rehabilitation, in this case, can be effectively achieved by full suspension. I am prepared to offer the Defendant the opportunity and incentive for rehabilitation by partial suspension. Of the decisions referred to above, the instant case bears similarity to the *Semisi Pulu* case. It may be distinguished from *Finau*, where full suspension was ordered by reason of the exceptional mitigating circumstances in that case including that the Defendant there being quite elderly, the victim was his brother, there had been verified full reconciliation between them, and the Defendant had demonstrated a propensity and determination for rehabilitation by giving up alcohol and committing himself to the support of his church.
34. In this case, therefore, I order that the final 12 months of the sentence of 2 year sentence be suspended on conditions.

Result

35. The Defendant is convicted of causing serious bodily harm and is sentenced to 2 years imprisonment. He is to be given credit for any time spent in custody on remand in relation to this matter.
36. The final 12 months of the said sentence will be suspended for a period of 2 years on condition that during that suspension period, the Defendant is:
- (a) not to commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within 48 hours of his release from prison;
 - (d) reside where directed by his probation officer; and
 - (e) complete a course on alcohol awareness and life skills as directed by his probation officer.
37. Failure to comply with the above conditions will likely result in the Defendant being required to serve the suspended period of his term of imprisonment.

NUKU'ALOFA

5 March 2021



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

M. H. Whitten QC

LORD CHIEF JUSTICE