

Sean + PL

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

CR 20 of 2021

REX  
-v-  
KAATI LUKA

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## SENTENCING REMARKS

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mrs. A. 'Aholelei for the Prosecution  
Mr S. Tu'utafaiva for the Defendant  
Date: 8 April 2021

### The offending

1. On 25 February 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. At the relevant time, the Defendant and the victim were in a de facto relationship. During the early hours of 26 October 2020, the victim woke up to find that the Defendant was not in bed. She went to the neighbour's place, opened the door and found the Defendant having sex with another female. The victim was angry and yelled at the Defendant. She ran out of the room. The Defendant chased after her, grabbed her and hit and punched her repeatedly. One, Vaitongi Takapu, tried unsuccessfully to stop the Defendant from continuing to hit the victim who only stopped when his mother tackled him to the ground.
3. The victim was taken to the hospital where she was examined and found to have suffered:
  - (a) moderate to massive general facial swelling with multiple bruises on the right left side and on her left side from her forehead to her lower chin;
  - (b) periorbital hematoma, sub-conjunctiva ecchymosis but intact vision;

- (c) blood stained mouth with swelling to her upper and lower lips, general bruising of mucosa and gingiva, and she was unable to fully open her mouth;
  - (d) a mobile upper left central incisor which resulted in loss of the tooth;
  - (e) swelling of her nostrils;
  - (f) right post auricular bruise and swelling on her ear; and
  - (g) a very painful left arm and forearm.
4. On 6 November 2020, she was discharged from hospital.
5. Upon her discharge, the victim lodged a complaint with the Police. The Defendant was apprehended. He co-operated with the Police and admitted to the offending.

**Crown's submissions**

6. The Crown submits the following as aggravating features:
- (a) the Defendant was in a de-facto relationship with the victim;
  - (b) he was therefore in a position of trust, which he breached; and
  - (c) the victim was admitted to the surgical ward as a result of the assault.
7. The Crown submits the following as mitigating features:
- (a) co-operation with the Police;
  - (b) early guilty plea; and
  - (c) no previous convictions.
8. The Crown relies upon the following comparable sentences:
- (a) *R v Andy Lavelua* [2018] TOSC 50 – the Defendant returned home drunk and, unprovoked, repeatedly punched and slapped the victim, who was only 9 years old, in the face. He pleaded guilty to causing serious bodily harm and domestic violence. He was sentenced to 1 year and 9 months' imprisonment, with the final 9 months suspended on conditions.

(b) *R v Fatani* [2005] Tonga LR 470 – the Defendant kicked his wife repeatedly causing her to suffer two black eyes (but vision intact), cuts to her right cheek and right upper lip, a tooth broken through the enamel, a bony fracture of the right jaw, and a problem with closing her jaws. He was charged with causing grievous bodily harm but was convicted at trial of causing serious bodily harm. He was sentenced to 10 months' imprisonment with the final 5 months suspended for 2 years on conditions.

9. In the present case, the Crown submits a starting point of 2 to 2½ years' imprisonment, 9 months off for mitigation with partial suspension of the balance, on conditions.

### **Defence submissions**

10. Mr Tu'utafaiva did not dispute the Crown's submitted starting point of 2 to 2 ½ years' imprisonment as being reasonable.

11. However, in relation to mitigation, Mr Tu'utafaiva submitted that 12 months should be deducted by reason of the Defendant taking the victim to the hospital and looking after her there, an element of provocation by the victim shouting 'rude comments about his mother and sisters', lack of previous convictions, his co-operation with Police, early guilty plea and remorse.

12. In relation to suspension, Mr Tu'utafaiva submitted that by reason of the accused being only 22 years of age, the other factors relied upon above in relation in mitigation and the fact that the Defendant is likely to take the opportunity to rehabilitate by attending an anger management course, his sentence should be suspended in full or in part.

### **Pre-sentence Report**

13. Apart from the matters already referred to above, the contents of the presentence report may be summarised as follows:

(a) the Defendant is the eldest of six children and the only son;

- (b) he grew up in a stable environment;
- (c) he lives with his mother and sisters;
- (d) his father is currently in Australia as part of the seasonal workers scheme and whose income supports the Defendant and the family. Due to the Covid-19 border restrictions, the father is presently unable to return to Tonga;
- (e) the Defendant dropped out of form 5 at Tupou High School;
- (f) he met the victim in mid-2020. She is 40 years of age. Their intimate relationship began when the victim and her daughter from a previous relationship moved in to live with the Defendant and his family. The victim formed a close relationship with the Defendant's family;
- (g) the Defendant's mother believes that his presence at the home, as the only male, provides safety by deterring thieves and predators from coming to their house;
- (h) the Defendant is active within the community. He helps with cleaning the public areas. He used to be an active member of the church, but as he grew older, he neglected the youth programs, started associating more with his peers and began drinking alcohol;
- (i) he is said to have 'minor problems involving alcohol and stress'. He tends to overreact in certain situations and can become extremely angry and stressed which then causes his nose and eyes to bleed;
- (j) in relation to the offending, the Defendant told the probation officer that he became infuriated when the victim shouted 'rude comments at him about his mother and sisters'. He said that her words were 'too hurtful and that he felt intense anger and could not control himself'. He said 'he felt that he blacked out while punching her and only later realised his harmful behaviour after his mother intervened'; and
- (k) he promptly apologized to the victim who is said to have accepted his apology. The report writer noted that he intended to interview the victim, but no contact information was found. It is unclear from the material whether the

defendant's apology, and the victim's acceptance of it, has resulted in the victim resuming or continuing her relationship with the defendant or whether they have since separated.

14. The probation officer expressed concern about the defendant's serious anger management problems. He described them as requiring extensive treatment, failing which, they could become worse. The officer therefore recommends a partly suspended sentence with conditions including probation, an anger management course and that the defendant be required to abstain from alcohol or drugs.

### Starting point

15. The maximum statutory penalty for causing serious bodily harm is five years' imprisonment.
16. The relatively low sentence in *Fatani*, *ibid*, is difficult to reconcile with sentences in more recent times for what are, in effect, very serious forms of domestic violence. Some elucidation may be found in the remarks of McElrea J when he said:

*"When Mr Kefu opened the case for the Crown at trial he commenced by saying that this was 'a rare case of domestic violence brought to court for criminal sanction'. Such cases are so rare that there appears to be no case law providing guidance for sentencing judges dealing with cases of domestic violence. It is most unlikely that this situation is due to the absence of domestic violence in the Kingdom of Tonga. There are other, more probable, explanations - such as the unwillingness of most wives or female partners in many countries to lay charges with the police, or (even where that is done) to see the matter through as far as Court."*

17. His Honour continued:

*"In these circumstances it is important that the sentence imposed in this case sends the right message to other men, namely that those who beat their wives and cause serious injury can expect to go to prison. In this case the deterrent aspect of sentencing is an important one - but I believe that a sentence of imprisonment is also required to denounce strongly this type of conduct on behalf of all society, and to try and protect the community by making it a safer place for women and other vulnerable people."*

18. And, as Ward LCJ stated in *Hu'ahulu v Police* [1994] Tonga LR 93:

“... 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...”

19. With respect, I agree. Times have definitely changed; unfortunately, in relation to domestic violence, for the worse. To that end, the sentence in *Lavelua*, *ibid*, is more consistent with the courts' prevailing attitude towards offences of this kind.
20. By reason of the seriousness of the offence measured solely by the extensive and serious nature of the injuries inflicted, I would have set a starting point of two years imprisonment. However, having regard to:
  - (a) the incident being instigated by the victim finding the defendant having sex with another woman;
  - (b) the breach of trust which ought to have been enjoyed by the victim living in a *de facto* relationship with the defendant;
  - (c) the fact that he chased her as she tried to escape before then repeatedly assaulting her; and
  - (d) the fact that he would likely not have stopped assaulting the victim voluntarily,

I increase the starting point to 2 ½ years' (or 30 months) imprisonment.

### **Mitigation**

21. In considering the factors in mitigation, I do not accept the submission made on behalf of the defendant that he was provoked by the victim shouting 'rude comments' at him about his mother and sisters. "Provocation is some act, or series of acts, done [or words spoken] ... which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.": *R v Whitfield* (1976) 63 Cr App R 39 at 42 (CA).
22. Even if the victim's statements (which have not been articulated in any of the material) could be regarded as having amounted to provocation, in the legal sense

referred to above (and not by way of any legal defence to the charge: compare ss 88 to 90 of the *Criminal Offences Act*), it must be squarely borne in mind that this whole incident was instigated by the defendant being caught by the victim having sex with another woman in a neighbour's residence. I note that this was not mentioned by the defendant to the probation officer nor in his counsel's submissions. For the defendant to then have the temerity to complain that he was provoked by what the victim shouted at him in her reaction to his infidelity frankly beggars belief.

23. By reason of the defendant's lack of previous convictions, early guilty plea and remorse, I reduce the starting point by one third or 10 months, therefore resulting in an effective sentence of 20 months' imprisonment.

### **Suspension**

24. Application to the instant case of the considerations set out in *Mo'unga* [1998] Tonga LR 154 at 157 results in favour of some suspension. The defendant is young and has a previous good record. He co-operated with the authorities. Based on the presentence report, there is some basis to expect that a partly suspended sentence will have a strong deterrent effect on the defendant. Further, the opportunity offered by the sentence to rehabilitate himself, in particular, by participating in a rehabilitation course aimed at his acknowledged anger management problem, should prove beneficial not only to the defendant, but to his family and the community as a whole.
25. Against those factors, and for the reasons stated above, I do not place any weight on the defendant's claim of provocation, even for the present purpose of considering suspension. Further, I take into account " ... *the seriousness of the offending, the need for an effective deterrence, the effect on the complainant, and the personal circumstances of the offender or those dependent on him*": *Vake* [2012] TOCA 7, referring to *Misinale* [1999] TOCA 12.

26. Balancing all those considerations, I conclude that it is appropriate to suspend the final eight months of the sentence on conditions. Subject to compliance with those conditions, the defendant will be required to serve 12 months' imprisonment.

### Result

27. The Defendant is convicted of causing serious bodily harm and is sentenced to 20 months' imprisonment.

28. The final 8 months of the sentence is to be suspended for a period of 2 years from his release from prison on condition that during that suspension period, the Defendant is to:

- (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;
- (d) reside where directed by his probation officer; and
- (e) complete anger management and alcohol awareness courses as directed by his probation officer.

29. The defendant is advised that if he fails to comply with any of the above conditions, the suspension of sentence may be rescinded, in which case, he will likely be required to serve the balance of his sentence.

NUKU'ALOFA  
8 April 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE