

Sean + Lh.

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

CR 2 of 2021

REX

-V-

UINISE TOKI

BEFORE HON. JUSTICE NIU

**Counsel : Ms. T. Kafa for Mrs. L. Aonima for the Crown.
The Accused, Uinise Toki, the accused for herself**

Plea : Guilty, on 5 February 2021, on arraignment.

Probation Report : By Tito Kivalu on 10 March 2021.

Victim Impact Report: by Lute Fakatou Aonima on 19 March 2021.

**Submissions : by Lute Fakatou Aonima on 19 March 2021.
: by the accused, orally, in Court on 24 March
2021.**

Sentencing : 21 April 2021.

SENTENCING

Offence

[1] Uinise Toki, you have pleaded guilty on 5 February 2021, to causing grievous bodily harm to Sione Fualalo on 13 June last year, knowingly and without lawful justification, in breach of S.106 of the Criminal Offences Act, by repeatedly striking him with a machete on his head and on his hands.

[2] Sione was taken to Vaiola hospital shortly afterwards and his injuries were stitched up and he was discharged on 17 June 2020 with a course of antibiotics, and follow up in the outpatient clinic.

Summary of facts

[3] The following is a summary of the facts which the Crown had prepared no doubt from statements made by the complainant (victim), the medical report, your mother and from yourself:

1. The Victim is Sione 'Uhila Fualalo, a 33 year-old male and resides at Kolomotu'a, Tongatapu.
2. The Accused is Uinise Toki, a 36 year old female and resides at Longolongo.
3. The Victim and the Accused are in a de-facto relationship.
4. On or about 13 June 2020 at around 6am, the Victim was talking with the Accused on the phone. The accused was angry with the Victim because he kept lying to her of his whereabouts. The Victim was drinking alcohol with some of his friends at Kolomotu'a.
5. The Accused told the Victim to meet her at the Mohokoi Club at Longolongo. When the Accused got there, the Victim was already there. Whilst explaining to her where he was, the Accused struck his head with a machete.
6. She repeatedly struck him with the machete and he tried to cover his head. This injured his head, his left wrist and also his right palm. When she tried to hit him for the last time, the Accused held the machete and it eventually fell from her hand.
7. The Accused then walked away and there were blood stains on her clothes. When she reached her place, her mother, Mele Satini Toki, asked her why there were blood stains on her clothes. She told her that, that's what happens when you lie

and cheat, you get hit with a machete. Mele asked her who she had hit and she told her it's the Victim.

8. The Police was contacted and the Victim was taken to the hospital. The Accused was arrested on the same day.
9. The Victim was examined by Dr. Marina Tu'inukuafe and a CT scan of the Head plus X-rays of C-spine, right hand and left wrist revealed a 6cm deep wound over the left scalp, 12cm deep wound on the left wrist and a 13cm laceration over the palm of the right hand. The CT scan of the Head did not identify any skull fractures or intracranial bleeding and the X-rays did not identify any fractures.
10. On or about 16 June 2020, the Victim was taken to the surgical theatre for repair of the lacerations.
11. On or about 17 June 2020, the Victim was discharged from Vaiola Hospital with oral antibiotics.
12. On or about 22 June 2020 the Accused was interviewed by the Police and she admitted to the allegations.
13. The Accused has no previous convictions."

Probation Report

- [4] The probation officer Tito Kivalu, says that you are 36 years old. He says that you were born in Vava'u and your parents separated and you were raised by your mother's parents when you were 4 years old until your mother brought you with her to Nuku'alofa in 1996 when you were 12 and that you have lived in Tongatapu ever since. You got married in 2005 and you have 2 children, a girl who is now 14 and who attends form 3 at Queen Salote College, and a boy who is in form 1 at the Longolongo Primary School.
- [5] You and your husband separated in 2011 and you kept and maintained the 2 children together with your mother at Longolongo. You have divorced your husband last year.

- [6] In 2016, Sione Fualalo, the victim, came and lived with you as husband and wife, together with your mother and your 2 children at Longolongo. Unfortunately, Sione had a drinking problem and he was abusive and violent when he was drunk, and he would beat you up and that happened almost weekly, especially in weekends when he would return after drinking with his friends.
- [7] The probation officer says that you told him, and that Sione, who was also present, confirmed that it was true, that on this night (which was a Saturday night) Sione went out drinking again and that he was supposed to have returned before curfew at midnight started but he did not return. You telephoned him several times to return and he said that he would but that he kept lying to you and he did not return until about 6 in the morning. You told him to meet you at the kava club house and when he came there you hit him on his head with the knife and you ran and hid but he came after you and you hit him again twice on his hands before he got the knife off you.
- [8] He says that you have expressed remorse and that Sione has forgiven you and that you and Sione have continued to live together without further problem up to now.
- [9] He recommends that you be given a partial suspension of your sentence to allow for rehabilitation on condition that you complete the Salvation Army courses on life skills and anger management and also the counselling course of the Free Wesleyan Church Life Line and Crisis Centre.

Crown submissions

- [10] Counsel for the Crown says that the aggravating factors against you are that:
- (a) you used a weapon, namely a machete;
 - (b) you used it on your partner's head, as well as to his hands.
 - (c) your partner was drunk and helpless; and
 - (d) the injuries caused were deep lacerations.

[11] She also says that there are mitigating factors in your favour, namely,

- (a) you have had no previous conviction;
- (b) you have pleaded guilty;
- (c) you are remorseful for what you have done;
- (d) your partner has forgiven you; and
- (e) you cooperated with the police.

[12] She has referred to 4 cases, namely:

- (a) **Aisake's Case** (CR19/2019). In that case, the accused's wife left and lived with another man. When the wife went to visit her parents in another village, the accused went there and refused to leave. He went into and hid in a room there with a machete he had brought with him. The police were called to take him away. When a policeman opened the door of the room, the accused hit him with the machete on his head and caused a grievous injury to his head. Although he pleaded guilty, he had previous convictions. He was sentenced to 6 years imprisonment with no suspension.
- (b) **Tupou's Case** (CR16/2018). Counsel did not relate the facts of that case. She only states that the sentence imposed by the Supreme Court of 5 years imprisonment for causing grievous bodily harm was upheld by the Court of Appeal because a weapon had been used by that accused.
- (c) **Pongi Case** (CR138/16). In that case, the accused attacked and hit another man with a machete while the man was sleeping and caused injuries to his chest, right wrist and left foot, and he also stabbed him with a broken bottle causing injury just below his left ear. He was sentenced to 3 years 3 months imprisonment and with the last 12 months being suspended.
- (d) **Mafi Case** (CR32/2013). That accused was convicted by a jury for causing grievous bodily harm when he attacked another man with whom he was arguing and hit him with a machete on his

shoulder and head. No permanent injury was caused. The accused was sentenced to 3 years imprisonment but it was fully suspended because of his age and acute bad health.

- [13] Crown counsel submits that the starting point for your sentence should be 6½ years imprisonment because of your use of the machete to cause the injuries to your partner, and that 12 months be deducted from those 6½ years because of the mitigating factors in your favour, thereby leaving a sentence of 5½ years imprisonment.
- [14] She says that you are entitled to a partial suspension of that sentence because you are a first offender and you cooperated with the police and also because you are remorseful, but she does not recommend what period is to be suspended.

Victim impact report and Medical report of 22 June 2020

- [15] Crown counsel also interviewed the victim and she produced a report of her finding. She found that the victims is still living with you in de facto relationship and that he has forgiven you. She gave no finding as to any effect of the injuries caused, that is, whether he has a suffered any disability or scarring or impairment in any way as a result of the injuries.
- [16] She did however attach a medical report which is dated 22 June 2020 which was made 9 days after the injuries were caused, no doubt, the report upon which the police proceeded to charge you with the present offence for which you are now being sentenced.
- [17] I set out that report in full as follows:

“Re: Mr Sione Fualalo, D.O.B: 17.01.1986, #1097917

The above patient was admitted to the Surgical Ward, Vaiola Hospital on the 13th June, 2020 and subsequently discharged 17th June, 2020.

He was brought to the Emergency Department at approximately 0610hrs by the police with the history of being assaulted by his

partner with a cane knife. He was reportedly struck 3 times before he was able to remove the knife from her possession. Patient was alcohol intoxicated at the time of the incident.

Examination and Imaging (CT Head + X-rays C-Spine/Right Hand/Left Wrist) revealed the following pertinent findings.

- 1) 6cm deep wound over left scalp
- 2) 12cm deep wound on the medial half of the left wrist posteriorly – possibly involving tendons
- 3) 13cm oblique and longitudinal laceration over the palm of the right hand

CT Head did not identify any skull fracture or intracranial bleeding and X-rays of C-Spine/Right Hand and Left Wrist did not identify any fractures.

He was taken into operating theatre on the 16th June, 2020 for repair of the above lacerations and has been discharged on oral antibiotics. He has been booked for follow up in the Surgical Special Outpatient Clinic.”

Your submissions and your partner’s evidence

- [17] You attended in Court on 24 March 2021 and conveyed to me your apology and repentance for what you have done and you promised that you would not do it again. You said that your mother was unhealthy and that you were looking after her and your 2 children and 2 foster children of your brother who is at Vava’u growing kava.
- [18] When asked questions by Ms. Kafa, counsel for the Crown, you said that there are 5 of you children of your parents, two of whom are at Vava’u, 1 in Australia and 1 in New Zealand, the one in Australia working and the one in New Zealand is on dialysis. You said that there was rarely any money sent from overseas.
- [19] You said that you sometimes worked for your aunt for money. You said that the 2 foster children were aged 6 and 7, and that your mother was

suffering from high blood pressure and was attending the clinic and took pills and that she was 63 years old.

- [20] I then asked you questions and this is what you told me: You were working at Sandy Boys motel as housekeeping when you were married and after 3 months you stopped working because you were carrying your first child who was born in 2006. You lived with your husband and children at Makapaeo and he worked mixing cement at Tofoa and because of travelling to and from work and odd hours of work he stayed with his parents at Tofoa while you stayed at home at Makapaeo for up to 2 weeks without him. Things did not work out and you broke up in 2011. You went back to your father's home at Longolongo.
- [21] From 2011 to 2015, you were working at Chinese shops, first at Havelu and then at Longolongo, but your hands began to suffer frost bite from handling frozen chicken every day at those shops. You stopped working and your mother's sister offered to pay you to stay home and look after your mother. She is still paying you \$100 or so each week for that.
- [22] You met your partner and he came and lived with you in 2016. He worked and still works for farmers, planting and weeding crops up to now. He however had a problem with drinking. He had never married and he has no children but he always went and drank in the weekends and thereby spent his wages. You would speak to him and you would quarrel and he would punch you up.
- [23] The beatings got worse and you complained to the police and he was sentenced to prison for 3 months. When he came back, you continued to live with him, but again the same thing happened and he again beat you up. You complained and he was sentenced to 5 years but it was suspended for 3 months and that was in 2019. Within those 3 months, he beat you up again but when you complained, he was only fined \$300, which he paid in 1 week. But after that he did not beat you up again.

- [24] Although he did not beat you up again, you said that he then became abusive and would be swearing at you if you complained about him going out drinking or when he came back drunk.
- [25] In January 2020, you decided to drink kava at a kava club nearby called Mohokoi, but you only drank there about once a month. You said that he would tell you to meet him and drink kava at the club but that when you got there he was not there and he never came there and the men at the club teased and made fun of you as a result. You spoke to him about it and he would swear at you and abuse you instead. You said that that happened every week up to June 2020.
- [26] You said that on this night in June 2020, he had gone drinking again and it was past curfew time and he had not returned. You telephoned him repeatedly but his phone was off. So you went to sleep. At 2am he rang you and said that he was at Sopu and was walking back home. You then set the alarm to ring at 2:30 am and went back to sleep. When it rang, you woke up and rang him but his phone was off. You kept ringing and the fourth time he answered and told you not to worry because he was walking back. You went to sleep. At 4am you woke up and rang him and he said that he was at Lisiate's place at Halavave. You told him to wait there for you and that you would walk there to him, and he said yes.
- [27] You said that you walked to Lisiate's place at Halavave but he was not there and you rang him and he said that he was at Metui's place at Tu'atakilangi. You then walked to Metui's place but he was not there either. You rang him again and he said not to keep bothering him because he was walking back. You then came to the Mohokoi Club house and waited there for him. You said that there was a short machete kept at the club house and got it. You said that if he would swear at you, you would hit him with it, and that if he didn't, you wouldn't.
- [28] You said that you had meant to hit him only once.

- [29] Sione Fualalo, your partner, also gave evidence for you. He said that all you have told me were true. He said that he earned \$200 - \$300 per week and that he maintained the children. He said he does hoeing crops for pay and that he had his own crops of yams, taros and manioke at Simi's tax allotment, and that although you have no vehicle you have the use of Ma'ake's vehicle. He said that he kept and regarded the children as his own children.
- [30] He said that he was not drinking alcohol anymore and that he was only drinking kava now.
- [31] When questioned by Ms. Kafa, he said that when you hit him on his head with the knife, he threw the beer at you and pulled out a pipe fence post and hit you with it but it missed and you hit him on his hand and then ran and that when he called you to come back and you came he dropped the pipe and grabbed your hand but you hit his hand before he grabbed and took the knife off you.
- [32] He tried to show me the scar on his head, but I could not see it because it was difficult to see even upon parting the thick growth of hair on his head. I did see the scars on his hands and they were completely healed.

Considerations –

The machete

- [33] I asked you what sort of machete it was you used and you said that it was a short one and I asked you whether it was an ordinary machete with its blade broken off in half and you said that it was just a short (half size) blade machete. I know that an average length machete is about 65 centimetres, that is, including its handle and that a short one is about half that length. So that the knife you used was only about 32 centimetres long, which is about the length of a 12 inch (30cm) ruler.
- [34] To me, that is a significant difference. A full length machete is much more dangerous when used as a weapon than a half size machete.

The lacerations

- [35] I consider that the lacerations that you caused to your partner is consistent with the use of that half size machete and not with a full length machete. This is because I consider that the doctor may have made a mistake, or the typist who typed out the report may have made a mistake, when he stated the measurements of the injuries.
- [36] He stated that the wound over the patient's left scalp was "6 cm deep". 6 centimetres is equal to $2\frac{1}{4}$ inches. If the wound on your partner's left scalp was in fact $2\frac{1}{4}$ inches deep, the blade of the machete would have had to cut the scalp and the skull and gone into the brain for at least an inch and a half. But the doctor said that the "CT Head did not identify any skull fracture or intracranial bleeding". So obviously he has made a mistake in his measurement or the writing down of that measurement.
- [37] The same goes for the measurements of the lacerations to the hands. In respect of the cut to "the medial half of the left wrist posteriorly", he stated that it was 12 cm deep", that is, $4\frac{3}{4}$ inches deep. That cannot be right because a normal person's wrist is only about $2\frac{1}{2}$ inches in diameter, and your partner's wrist is only normal size. If the cut was $4\frac{3}{4}$ inches deep, the cut would or should have severed the hand of your partner completely off, but it only cut it and it was only stitched up.
- [38] That is the same for the cut to the palm of the right palm. He stated that it was "13 cm oblique and longitudinal laceration over the palm of the right hand." 13cm is $5\frac{1}{8}$ inches. I have to take it as meaning "long" and not "deep" as he had stated in respect of the other 2 lacerations, although he does not use the word "long". If that was so, that would be much longer than the normal palm of the hand and would have continued into a finger but he did not say that.
- [39] I am therefore not sure, on the medical evidence produced in the report, that the injuries caused were "grievous bodily harm", because grievous bodily harm is defined as:

"(a) any harm endangering life; or

- (b) the destruction or permanent disabling of any external or internal organ, member or sense; or
- (c) any severe wound; or
- (d) any grave permanent disfigurement.”

[40] But I have to accept that the cuts may have been “severe” because they required hospitalisation of the patient for some 4 days, that is, from 13th to 17th June 2020, and because you have admitted that they were severe wounds by pleading guilty to the charge.

Domestic violence

[41] I am also concerned that appropriate measures had not been taken when your complaints had been made to the Magistrate’s Court. It was clear that the problem you had with your partner was his consumption of alcohol. And S.16 (1)(c) of the Family Protection Act, which provides for measures to be taken to prevent domestic violence, expressly provides that every protection order shall provide that “the respondent shall not approach the complainant while under the influence of alcohol.”

[42] I do not know if there was any protection order made in respect of your complaints and whether it made any such provision, but it should have and it should have been strictly enforced. It would appear that either it was not ordered or it was ordered but was not enforced against your partner. It is now clear, because he has now stopped drinking alcohol altogether, that had such measures been taken there and then when you made your first complaint, there would not have been the domestic violence which was continued to be committed against you by your partner, and you would not have committed this offence.

Sentence

[43] Taking all those things into consideration and comparing your case to the cases to which the Crown has referred, I consider that your offence is towards the lower end of the scale. The offence is provided to have a maximum sentence of 10 years imprisonment. In view of the matters I have outlined and of your guilty plea and your apology to and

acceptance thereof by your partner, and because your partner has continued to live with you, and because he has stopped drinking alcohol, I consider that your sentence be 2 years imprisonment.

Suspension

[44] As to suspending that sentence or part of it, I consider that you are eligible not only to partial but to full suspension of your sentence.

This is because:

- (a) You are relatively young although you are 36 years old and this is your first offence;
- (b) You are likely to take the opportunity offered by the suspension to rehabilitate yourself, because your partner has now stopped drinking alcohol and because you two are living happily together;
- (c) You were provoked by the actions of your partner, namely,
 - (i) by going out drinking irresponsibly;
 - (ii) breaching of the curfew;
 - (iii) lying to you that he was coming home, that he was at Lisiate's place at Halavave, and at Metui's place at Tu'atakilangi deliverately to cause you to walk there but that he was not at either place, and by swearing at you when he finally came to you at the club house; and
 - (iv) you cooperated with the police and with this Court by pleading guilty to this offence.

Those 4 reasons are the 4 grounds which the Court of Appeal has laid down in the case of ***Mo'unga v R*** [1998] Tonga LR 154 that one or more of which should be present for granting of suspension of an imprisonment sentence.

[45] As to the duration of that suspension, I consider that it should be for as long as the law can provide. It provides for 3 years, and the reason for that is to try and make the offender stay law abiding for that long before his or her imprisonment sentence is cancelled by the provision

itself. I consider that in your case, it is imperative that not only you but also your partner should be law abiding for as long as possible, because he has to help as well, by remaining alcohol free.

Orders

[46] Accordingly, I sentence you to 2 years imprisonment for the offence to which you have pleaded guilty and with which I have convicted you in the present case, namely, causing grievous bodily harm, but which sentence shall be suspended for a period of 3 years from today. If you do not commit an offence punishable by imprisonment within those 3 years, your 2 year imprisonment sentence will be automatically cancelled.

NUKU'ALOFA: 21 April 2021.



[Handwritten Signature]
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