

Sean + JTB

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

CR 19 of 2021

REX

-V-

MATINI SIOSIUA KULI POAFA

BEFORE HON. JUSTICE NIU

Counsel : **Mr. J. Fifita for the Crown.
Mr. S. Tu'utafaiva for the accused.**

Plea : **Guilty, on 25 February 2021.**

Probation Report : **by 'I. Fifita on 25 March 2021.**

Submissions : **by Mr. Fifita on 31 March 2021.
by Mr. Tu'utafaiva on 16 April 2021.**

Sentencing : **22 April 2021.**

SENTENCING

Offence

- [1] Matini Poafa, you have committed the offence of serious causing of bodily harm to Siosaia Naitoko when you punched him and fractured his lower jaw at Malapo on 28 October 2020, contrary to S.107 (1) and (2) (c) of the Criminal Offences Act. You were charged with that offence and you pleaded guilty to it before me in this Court on 25 February 2021.
- [2] That is a serious offence because it is punishable with imprisonment of up to 5 years imprisonment.

- [3] According to a summary of facts prepared by the Crown, you told the police that prior to your commission of this offence, a group of Liahona High School boys had come and attacked you at your home. You were angry with them for doing that. One of those boys, you said, was Siosaia Naitoko. You were from Tonga College yourself instead.
- [4] On 28 October 2020, the day of the offence, you got on a bus at Pea which was going to the east of the island. Siosaia Naitoko happened to be on the bus as well. He was travelling home to Afa where he lived. At the village of Malapo, you noticed that Siosaia had gone to sleep. You walked over to him and punched him on his jaw.
- [5] It was a big punch because it broke his lower jaw in two places. One fracture was on the front left side and the other fracture was to the rear left of the jaw. It swelled up and it was excruciatingly painful. He could not speak or eat. His mouth was deformed and his face was distorted. It had to be operated to re-set his jaw and to affix a piece of steel to it to strengthen and to maintain the shape of his lower jaw.
- [6] Although he went to the hospital on the same day, 28 October 2020, they could not do that until the 30th October 2020 and so he had to go home and then return the next day to prepare for the operation on the 30th. On the 30th, the first operation was carried out on the front left fracture. His front lower jaw was wired together to rejoin the fractured bones and then the lower jaw was wired to the upper jaw to prevent the lower jaw from any movement until the fractured bones of the lower jaw would rejoin by natural regrowth of the bones of the lower jaw. Wire braces were also inserted to hold the fractured bones at the rear lower jaw together as well.
- [7] He could not open his mouth to eat or speak. He had to drink only water, milk and juice. He had to do that for a week. When the one week ended, the wires which held the two jaws together were removed but the wire braces were kept on to keep the fractured bones of the lower jaw together to continue growing together naturally, but he had to eat only soft foods like liquefied biscuits and weet-bix.

[8] He was discharged from hospital after another week but the wire braces were still kept in place and were not removed until the first week of December 2020, that is, some 5 weeks later, the normal period by which the bones of the lower jaw would have grown and become affixed together again by natural process.

[9] However, and unfortunately, the piece of steel which had been inserted to hold the front left fracture in line together has had to be left in place to maintain the strength of his lower jaw and it will have to remain there permanently. He says that when he presses on that steel piece it hurts.

Probation report

[10] The probation officer, Ms. Fifita, says that you are 18 years old and that you are attending Fokololo Institute and are taking a course on electrical engineering. She says that you are not earning any income and that you are still maintained by your parents, your father growing crops and your mother sewing clothes. She says that you are the 3rd of 5 children of your parents, and that you have an older brother but he is away on Missionary work.

[11] She says that your mother told her that you had attended Liahona High School initially but that you were expelled from there for misbehavior, but she did not say what that misbehavior was. She says that you then went to Tonga College and began at form 4 there. She says that your mother told her that for some unknown reason, Liahona boys would come and challenge you to come out on to the road and fight them, and that at one time they came and attacked you at home and the police were called but that the boys had run away before the police got there.

[12] She says that you told her that it was because of that that you did what you did to Siosaia Naitoko in the bus. You told her that you were getting on the bus to go to Malapo to get your telephone from someone there, but that you saw Siosaia in the bus and that you decided to hit him for what he and the other boys did to you at your home.

[13] You told her and your mother confirmed that you and your parents went and apologised to Siosaia Naitoko and his parents for what you did to

to him and that they accepted your apology and the \$200 which your parents offered with your apology. She also said that your mother told her that she found out then that she, your mother, was related to Siosaia's parents, which parent, she did not say, but that you and Siosaia forgave each other and that your relationship with him is now friendly.

[14] She says that you have no criminal record or previous conviction and she recommends that any imprisonment imposed on you as sentence for your offence be suspended, and that you be put on probation during the suspension and to serve 100 hours of community service and to reside where directed by the probation officer.

[15] Letters of support for you were given by the Town Officer, your bishop and from Fokololo Institute.

Crown submissions

[16] Crown counsel, Mr. Fifita, has submitted in his submissions that you be sentenced to 12 months imprisonment but that it be suspended for 12 months and that you serve 40 hours community service and that you attend and complete the anger management course of the Salvation Army and that you reside where directed by the Probation Officer.

[17] He bases that on the facts which I have outlined above and upon the sentences which the Court has imposed in 4 cases to which he referred, namely,

(a) **Tu'ipulotu, Ikavesi and Kivalu Case** (CR162-164/2019). Those 3 accused were Tonga College boys. They attacked a Liahona boy, and whereas Tu'ipulotu and Ikavesi only punched the boy, Kivalu hit his head on the ear with a rock which injured his head and caused temporary impairment of his hearing. Kivalu was sentenced to 15 months imprisonment but it was fully suspended on various conditions one of which was community work for 80 hours.

(b) **Pohiva Case** (CR58/18). That accused was a police officer who was new to the force. He punched and fractured the

complainant's jaw. He pleaded not guilty but was found guilty and was sentenced to 12 months probation and to pay compensation of \$1,000 to the complainant within 1 month or 3 months in default.

(c) **Sima Case** (CR86/16). That accused was 28 years old and he and another person attacked the complainant and the accused punched and fractured the complainant's jaw, the fracture causing the loss of teeth of the complainant. The accused was sentence to serve 40 hours community service and to pay \$200 compensation to the complainant or 1 months imprisonment in default.

(d) **Sika Case** (CR119/2019). That accused was in the army. He punched the complainant who was drunk and when he fell on the ground he kicked him and fractured and dislocated his jaw. He was sentenced to 18 months imprisonment but fully suspended on conditions including 60 hours community service and to attend and complete the anger management course of the Salvation Army and to pay compensation to the complainant of \$2,000.

[18] In addition to the 12 months suspended sentence and 40 hours community service and anger management course, Mr. Fifita recommends that you, also pay compensation to Siosaia Naitoko in the sum of \$2,000, in pursuance of S.25 of the Criminal Offences Act.

Your counsel's submissions

[19] Your counsel, Mr. Tu'utafaiva, agrees with Crown counsel, Mr Fifita's recommendation that your sentence be 12 months imprisonment and that it be suspended for 12 months, and that you be subject to the conditions that you live where directed and to carry out 40 hours community service and to complete the anger management course of the Salvation Army.

[20] But he does not agree that you pay the compensation of \$2,000 to the complainant as Mr. Fifita has also recommended. He says that you have already apologised to the complainant and gave him \$200 and that the complainant and his parents accepted your apology and that \$200 and

forgave you for what you have done. He says that the complainant has not asked for any further compensation.

Considerations-

Serious causing

- [21] The offence with which you have been charged, and convicted upon your guilty plea, is serious causing bodily harm, as different from simple causing bodily harm. The difference between the two offences is the "causing" of the harm – it may be a serious causing, for example, by use of weapon like a gun, a knife, a rock or stick or even with a fist, or it may be simple causing, for example, by slapping or pushing or other less serious object or mean.
- [22] In your case, you used your fist, and a punch with a closed fist can be as deadly as hitting a person on the head with a rock if struck at certain parts of the head. It also has a more serious effect if it is delivered with sufficient force at a person's lower jaw while that person is sleeping. That is because the person's lower jaw is not clenched tightly to the upper jaw and held securely with the meshing of the upper and lower set of teeth of the person, like when he is awake and is aware of the need to do that as in a fight or boxing match with another person. A sleeping person's lower jaw is just hanging loosely and is completely unprotected.
- [23] Such was the lower jaw of Siosaia Naitoko whilst he was sleeping in the bus at the time. You ought to have known that a heavy punch to his lower jaw at that time would be sure to cause the lower jaw to be fractured. Knowing that, you deliberately delivered a heavy punch to left front of his lower jaw. It immediately broke the lower jaw in two places.
- [24] I find without any difficulty that that was serious causing of bodily harm and your counsel properly advised you to plead guilty and you readily pleaded guilty.

Taking the law into your own hands

- [25] I also consider that what you did was to take the law into your own hands to enforce your own right against Siosaia Naitoko for having attacked you with his Liahona High School friends at your home at Tokomololo. Instead of complaining to the police for what he and his friends did to you, which is what the law required you to do, you thought that you would enforce your own right against him yourself.
- [26] That was a most irresponsible thing to do, because if everyone is allowed by the law to do that, there would be no law and order. There would be chaos. No one would obey the law anymore. Everyone will do what he wants. What if Siosaia and his friends come in the middle of the night and beat you up in your sleep and also beat up your parents in their sleep as well in accordance with what they think is their own right?
- [27] That is no different from what you and the Tonga College boys had done to the Liahona High School. You boys did that because the Liahona High School boys had done the same thing to you boys. You were all taking the law into your own hands without one thought as to the consequences of what you were doing. That is most irresponsible of all of you.
- [28] This Court must express its condemnation of such irresponsible and lawlessness behavior.

Imprisonment

- [29] I therefore agree with both counsel that your sentence must be imprisonment and whereas they say that your imprisonment be 12 months, I consider that the seriousness of your offence warrants at least half of the maximum sentence.

Compensation

- [30] As to the compensation of \$2000 recommended by the Crown to be paid to Siosaia Naitoko for the injury that you caused to his lower jaw, no evidence has been provided to me that Siosaia Naitoko was not one of the Liahona High School boys who had attacked you at your home. I

consider that it is for him to make his own claim for compensation against you if he so wishes to do that.

[31] I am also of the same view which Ward CJ held in the case of ***R v Polelei*** [1999] Tonga LR 110 at p.112 where he stated:

“I have always considered it a fundamental principle of sentencing that a court should not impose a fine when it is clearly outside the means of the person ordered to pay.”

I consider that the same principle also applies in respect of compensation which may be ordered under S.25 of the Criminal Offences Act, because that provision provides that if the compensation ordered is not paid, then the accused is to be imprisoned for a period not exceeding 3 months, which is no different from failure to pay a fine for which he may be sentenced. And that may be contrary to and inconsistent with the suspension of an imprisonment sentence to which the accused may lawfully be entitled, such as is the case in the present case.

Suspension

[32] It is clear, and both counsel and the probation officer all agree, that your sentence of imprisonment be suspended. I also agree. You are young, you are a first offender, you are likely to take the opportunity offered by suspension to rehabilitate yourself and that is evident by your present pursuit of further studies at Fokololo Institute and you have cooperated with the police by pleading guilty.

[33] However in view of the seriousness of your offence, and in particular, in view of your taking of the law into your own hands, which school boys appear to think that they can continue to do, I consider the suspension of your imprisonment shall continue for as long as the law provides, namely, 3 years. If you commit another offence, one that is punishable with imprisonment, within those 3 years, you will serve your suspended imprisonment in addition to any sentence for the subsequent offence. But if you behave and remain law abiding for all those 3 years your imprisonment sentence will be automatically cancelled.

Other conditions

[34] I also agree with both counsel as to the other conditions of suspension of your sentence.

Sentence

[35] Accordingly, I sentence you as follows:

- (a) For the offence of serious causing of bodily harm contrary to S.107 (1) and (2) (c) of the Criminal Offences Act with which you have been charged and to which you have pleaded guilty and of which you have been convicted in this case, you are sentenced to two and a half years imprisonment.
- (b) That sentence of imprisonment shall be suspended for a period of three years from today on the following conditions:
 - (i) that you do not commit an offence punishable by imprisonment within the period of suspension of your sentence;
 - (ii) that you serve 40 hours of community service as directed by the probation officer;
 - (iii) that you are placed on probation and that you live where directed by the probation officer; and
 - (iv) that you attend and complete the anger management course of the Salvation Army.



Niu J

J U D G E

NUKU'ALOFA: 22 April 2021.