

Sean + H6.

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

CR 267 of 2020

REX

-V-

KAPUANA 'UNGA

BEFORE HON. JUSTICE NIU

Counsel : **Mr. 'A. 'Aholelei for the Crown.
Kapuana 'Unga, accused for herself.**

Probation Report : **by 'Ilaisaane Fifita on 22 March 2021.**

Victim impact report : **by Kelela Fetu'u on 15 March 2021.**

Submissions : **by Ms. 'Aholelei on 25 March 2021**
: **by the accused, in Court, on 31 March**
2021.

Sentencing : **30 April 2021.**

SENTENCING

Offences

[1] Kapuana 'Unga, you have committed two offences on 20 July 2020 at Ha'alaufuli:

- (a) you seriously caused bodily harm to Viola Loloma wilfully and without lawful justification by striking her on her left arm with a machete, and

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*need 30/04/21
JH*

(b) you seriously damaged Viola Loloma's vehicle intentionally and unlawfully by smashing its rear left window with a machete, causing damage to it of \$600.00.

[2] You were charged with those offences here in Nuku'alofa on 15 February 2021 and you pleaded guilty to them and I convicted you of them. You now appear before me for sentence.

Facts

[3] A summary of facts was given to you together with the indictment showing those 2 charges against you as directed by the Court on 29 January 2021.

[4] According to that summary of facts, you were in 'Alamita Moala's house at Vete on the night of 20 July 2020. You told me that 'Alamita is your sister and that you were there at that time.

[5] Four women came to that house that night. They were Viola Loloma, Lusinita Sikaleti, Valensia Latu and Petiola Masila. They had been drinking at Valensia's house. They were in Viola's vehicle. They came to 'Alamita's house so that Petiola Masila could take her and her husband's, Taniela Masila's, vehicle which they saw was parked at 'Alamita's place.

[6] A fight between these 4 women and 'Alamita and yourself and others broke out and in consequence thereof Viola and Lusinita got into Viola's vehicle and drove away. You and 'Alamita and 2 other persons chased after them in another vehicle. Twice your vehicle overtook their vehicle to stop them but they escaped and continued and you followed them all the way to the village hall in Ha'alaufuli where the village police were. You got out of your vehicle and smashed the rear left window of Viola's vehicle with a machete and when Viola came out of her vehicle you hit her on her left forearm with the machete causing a deep cut to her hand.

[7] You and 'Alamita and the other 2 persons were arrested and put into custody shortly after that.

Probation report of 22 May 2019

- [8] I had ordered that the probation officer prepare a report on your circumstances. However, she could not do that because you did not go back and see her for preparation of that report. You just did not contact her at all and you moved from where you lived and she could not find you. She therefore forwarded to me the report that was done on you in 2019 in respect of a drug offence you pleaded guilty to then.
- [9] From that report, I gather that you are 39 years of age, having been born on 25 December 1981, after your sister was already born. Your parents separated and your father went overseas and your mother remarried. You went to Liahona High School and that after form 5 you went to Fiji where you also attended college. You were in Fiji for 10 years. You then returned to Tonga.
- [10] Your sister told the probation officer that you were married on 14 June 2007 and that you have a child but that that child is fostered by your grandmother. She told the officer your marriage was dissolved on 12 December 2011 and that you have not remarried since.
- [11] The officer said that you were looking after your grandaunt and that your grandaunt died early in 2019 and that you then went and lived with your mother. She said that you were healthy but that you suffer from asthma and that you did not drink alcohol but that you had taken cannabis whilst you were in Fiji. She said that you had no employment and that the financial support you had were monies sent from your family.
- [12] That report was made on 22 May 2019.

Victim impact report

- [13] The officer prepared and filed also a victim impact report on the victim of the offence you committed in the present case, the woman whose forearm you hit with the machete. She did not describe what her forearm looks like now but she says that her arm cannot lift heavy objects anymore and that she feels pain on the part of the hand where the cut had been when pressed lightly. She said that she was treated for the cut for a month and a half, and afterwards, she felt constant anxiety even

leading to social isolation. She said that certain situations triggered her memory and she relives the traumatic experience of that night again. She said she cannot play tennis properly again and she does not know when she can ever again do so. She also says that you have not apologised or show any remorse to her for what you have done to her up to now. You yourself told me that you have not done any apology to her at all up to now.

The Crown submissions

[14] Ms. 'Aholelei for the Crown has listed your previous convictions in her submissions and they are as follows:

- | | | | |
|------------------|--------------|-------------|---|
| (a) No. 343/1994 | Mag. Ct | Theft | 6 mths probation. |
| (b) No. 284/1999 | Mag. Ct | Theft | 2 years probation. |
| (c) No. 319/1999 | Mag. Ct | Assault | \$100 fine or 3 days impr. |
| (d) No. 859/2004 | Mag. Ct | Bodily Harm | \$100 fine or 2 mths impr. |
| (e) No. 42/2007 | Mag. Ct | Theft | \$100 fine in 28 days or 6 mths impr. in default. |
| (f) No. 42/2015 | Mag. Ct (Vv) | Theft | 1 year probation & \$1,500 Compensation in 3 mths or 3 mths impr. in default. |

I looked in your file CR28/2019 and found the Conviction for which the probation report was made:

- | | | | |
|-------------------|---------|------|--|
| (g) No. CR28/2019 | Sup. Ct | Drug | 8 mths impr. but suspended on conditions: to live where directed, not to consume drug, to complete the drug abuse course of Salvation Army and to do 40 hours community service. |
|-------------------|---------|------|--|

[15] She referred to 4 cases which are comparable to your case:

- (a) **R v Pulu** (CR176/2020) where the accused there beat a 15 year old boy with the handle of the garden hoe causing a swelling to his left cheek and right arm and a fracture to his right elbow. The accused was sentenced to 2 years imprisonment but that the final year was suspended on condition that he be on probation and to complete the anger management course directed by the probation officer.
- (b) **R v Helu** (CR325/2020) where the accused there hit a 17 year old boy on the arm with a machete and caused a deep cut which required internal as well as external stitches to hold the wound together to heal properly. Like the **Pulu Case**, the accused was sentenced to 2 years imprisonment and that the final year was suspended for 2 years on condition that he be on probation and to live where directed and to take and complete the anger management course directed by the probation officer.
- (c) **R v 'Iongi** (CR86/2019) where the accused there committed serious wilful damage, as well as robbery, and he was sentenced to 2 years imprisonment for the wilful damage which was to be concurrent with his sentence for the robbery which was for a much longer period of imprisonment.
- (d) **R v Lisiate** (CR130/2019) where the accused there committed serious wilful damage to a motor vehicle and he was sentenced to serve 80 hours community service and probation for 6 months and to complete the anger management course directed by the probation officer.

[16] She also refers to the statement of the Court of Appeal in **Tupou v R** [2019] TOCA 18 which is as follows:

“,,, 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.”

She accordingly recommends that you be given a custodial sentence, because you pursued the victim in this case and cut her hand with a machete causing a 7.5 cm long cut to her hand which was also deep.

[17] She says that given that you chased and pursued the victim all the way from Vete to Ha'alaufuli, you had premeditated the causing of the injury, and to cause it with the machete you were carrying all the way from Vete. She therefore submits that your offence warrants 3 years imprisonment, but that because you have pleaded guilty and you cooperated with the police, 12 months should be deducted leaving a final sentence of 2 years imprisonment.

[18] As to suspending that or a part of the 2 years, she agrees that only a partial suspension may be warranted, as was done in the **Pulu Case** and the **Helu Case** namely that the last 12 months be suspended for 2 years but subject to similar conditions as in those cases.

Your submission

[19] You told me that you live with your mother and with your brother Siua and his wife, Luse and their 2 children and with your mother's mother who is 80 years old. You told me that you were the one looking after your grandmother, and you told me that you were also looking after your father's mother who lives at Halaleva and that you spend more time with her than with your mother's mother because she is on a wheelchair and she is 89 years old. You told me that because you carry out those caretakings, you cannot work or be gainfully employed, and that your families overseas send you the money so that you continue to look after these elderly people.

[20] I gathered from your account of what happened that night at Vete in Vava'u was that you had been drinking alcohol and had fallen asleep inside a motor vehicle at your sister's place at Vete, and I

asked you whether you were still drinking alcohol and you told me that you had stopped and were no longer drinking alcohol and that you were voluntarily attending the Salvation Army courses on drug and alcohol awareness. I asked you to provide me with a letter from the Salvation Army to confirm that and you said you would.

[21] You provided me with a letter from the Salvation Army on 8 April 2021 and it is dated 7 April 2021, but it refers to a matter. "RE: Ms. Kapuana 'Unga - CR28/2019". That is the matter on which the probation report of 22 May 2019 to which I have referred was about. And in the first paragraph of the letter, the writer stated:

"we have received your Court Decision in the 28th May 2019 regarding our client mention above under such condition elaborates on her Court order".

[22] I therefore think that what is contained in the letter which I have received was a report of what you were required to carry out with the Salvation Army in 2019. What I had wanted from the Salvation Army was a letter confirming that you were and are currently and voluntarily carrying out their alcohol courses like you told me you were doing on 31 March 2021.

[23] I therefore had the Assistant Registrar, Ms. Mamaite Tuputupu, to make inquiries of Ms. Mele Prescott who has written the letter from the Salvation Army, and Ms. Tuputupu advised me that:

"Mele Prescott confirmed that indeed Kapuana was required to complete 100 hours but that she completed only 60 hours, and the reason she completed only 60 hours in nearly 2 years was because she just never turned up towards late 2019. She said that Kapuana asked for permission to go to Vava'u and they informed her to get the approval of the Probation Office. After she failed to turn up for her course,

they made attempts to contact her including letters addressed to her but without any response.

She said that Kapuana only returned and resumed her hours in February 2021 and that she has been attending once every week up to date.

She said that it was then they were informed of this offence of serious causing bodily harm and they accordingly extended Kapuana's course to include courses dealing with alcohol, life skills and anger management."

[24] The difficulty they had with you was confirmed by the report of the probation officer dated 15 March 2021 which states:

"As regards to the abovementioned subject, Miss Kapuana 'Unga cannot be found to make arrangements for interview to prepare a pre-sentence report.

She attended the probation office on the day of the date of the court order and left her phone number 7713350. She was informed that her probation officer will contact her for arrangement. Several phone calls were made but to no avail. The probation officer managed to retrieve her old contact number 8732206 and her sisters contact number from her case file CR28/2019 but still unreachable. The probation officer who worked on her previous report stated that the accused has no permanent residence and that there is no exact address to find her."

[25] I accept the information which the Salvation Army has provided that you have not completed the hours required for the drug course and that you have not completed the hours required for the alcohol, life skill and anger management courses which you have begun on your own with them. But I cannot say and I have no way

of knowing if you will complete them, given your past performance and complete disregard to complete the drug course which this Court had ordered. I am satisfied that you only resumed taking that course again in February this year (since late 2019) because of the present sentencing.

Seriousness of your offence

[26] Your offence in the present case is serious causing of bodily harm and it is far more serious than your drug offence because you have caused a serious offence to another person. And what is most serious is that you could have and would have inflicted other and much more serious injuries to Viola Moala had you not been held back by the village policemen who removed the knife from you. That was evident in your pursuit of Viola from Vete to Ha'alaufuli, a long way and over a long period by which time you ought to have cooled down but you did not.

[27] I also consider that because you had not cooled down, you would have egged and encouraged the driver of your pursuing vehicle to overtake and try to stop Viola's vehicle, twice, on the way to Ha'alaufuli. I hate to think what you would have done to Viola, let alone Lusinita, had you and the others stopped Viola's vehicle before it got to the Ha'alaufuli village police, because the village police would not have been there to stop you at all.

[28] I also consider that your pursuing vehicle could have caused a tragic accident to her vehicle let alone your own vehicle. There would be deaths and inquiries in all probability. What you and the people who were with you were doing was most irresponsible and reckless that you did not stop to think of the consequences.

[29] What you ought to have done, because you knew who they were and where they lived, was to lodge a complaint with the police in Neiafu that Viola and Lusinita, and the other 2 women had

deliberately come to and did cause a disturbance at your sister's place and that they did smash the window of the vehicle at her place, as you told me they did. But you didn't. You decided to take the law into your hands and to inflict the same damage to Viola's vehicle and to inflict injuries on her as well. Such lawlessness act on your part made your offence much more serious, and which the Court must not be seen to condone or to take lightly.

[30] The maximum sentence provided by the law for your offence is 5 years imprisonment. And this offence is not so much the seriousness of the injury you caused but the seriousness of the way in which you caused it. That is why it is called "serious causing bodily harm".

[31] I consider that your offence is much more serious than the serious causings which were done in the **Pulu Case** and **Helu Case** to which Ms. 'Aholelei has referred because of the way you pursued the victim in the vehicle, smashing her vehicle window and cutting her hand with the knife. I consider that the starting point of your sentence is 4 years imprisonment and not 3 years as in those cases.

[32] I accept Ms. 'Aholelei's suggestion that 1 year be deducted from that starting point in view of your guilty plea and cooperation with the police so that your sentence be 3 years imprisonment.

Suspension

[33] As to suspending that sentence or part of that sentence, Ms. 'Aholelei suggests that part of your sentence be suspended as was done in the **Helu Case** where the second year of the 2 year imprisonment sentence was suspended for 2 years but subject to conditions, in accordance with the guideline laid down in the **Mo'unga Case**.

[34] The **Mo'unga Case** sets out 4 situations in which suspension, whether partly or fully, may be appropriate:

- (a) where the offender is young, has a good record or has had a long period free of criminal activity.

I do not consider that that applies in your case, because you are not a young offender and you have 6 previous convictions and you just committed a drug offence in 2019 in addition to those convictions.

- (b) where the offender is likely to take the opportunity offered by the suspension to rehabilitate himself or herself.

You were offered the opportunity of suspension in 2019 to rehabilitate yourself by attending and completing the drug course in 2019 but you did not rehabilitate yourself. You failed to complete the course and you went and reoffended in 2020 by committing the present offence.

- (c) where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.

I do not consider that that applies to you either because you had premeditation and that any provocation should have dissipated by the time you inflicted the damage and the injury with which you are now sentenced.

- (d) where there has been cooperation with the authorities.

That may be the only one that may apply to you in view of your guilty plea, but I also consider that you have been credited for your

guilty plea by having 1 year deducted from the starting point of your sentence.

Caregiver

[35] One of the things which you told me in mitigation of your sentence was that you are the one taking care of your mother's mother and of your father's mother who you say are in their 80s, and that one of them was only mobile by wheelchair. A similar mitigation was raised in *R v Motulalo* [2000] Tonga LR 311 where the accused pleaded guilty to attempted carnal knowledge and indecent assault on a 9 year old female child of whom he was the stepfather. The Supreme Court sentenced him to 2 years imprisonment but suspended for 2 years and to serve 100 hours community service on the second charge, because the accused was the breadwinner of the family. The Crown appealed the sentences and the Court of Appeal held that the fact that the offender was the breadwinner for his family was not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence. Accordingly, the Court of Appeal quashed the suspension of the 2 year imprisonment sentence so that the accused had to serve the whole of the 2 year sentence.

[36] I consider that being a care-giver to the two grannies is the same as being the breadwinner, and that whereas the accused in that case was the only breadwinner for the family, your grannies have other people beside yourself to care for them because you were in Vava'u for quite some time and they were being looked after by some other people.

Partial suspension

[37] I consider that partial suspension may be helpful to you in order that you take and complete not only your drug awareness course, but that you also take and complete the alcohol awareness course

and the life skill course and anger management course of the Salvation Army. You will have to complete them all within and as a condition of the partial suspension of your sentence.

Community service

[38] As for your sentence for the wilful damage of the window of Viola Moala's vehicle, I consider a sentence of 80 hours of community service is appropriate, and that you are to serve and complete those hours within the period of partial suspension of your sentence.

SENTENCE

[39] Accordingly, I sentence you as follows:

(a) For the offence of serious causing of bodily harm in count 1 of your indictment, you are sentenced to 3 years imprisonment, but that the final 18 months of that sentence are to be suspended for a period of 3 years from the date of your release, upon the following conditions:

(1) that you will take and complete the –

- (i) drug awareness course;
- (ii) alcohol awareness course;
- (iii) anger management course; and
- (iv) life skill course

of the Salvation Army within the 18 months which are being suspended.

(2) that you are placed on probation and to live where directed by the probation officer during the period of suspension;

- (3) that you are not to commit an offence punishable by imprisonment within the period of 3 years of suspension of the final 18 months of your sentence.
- (b) For the offence of wilful damage in count 2 of your indictment, you are sentenced to serve 80 hours community service as directed by the probation officer during the 18 months which are being suspended.

NUKU'ALOFA: 30 April 2021.



A handwritten signature in black ink, appearing to be "Niu J", is written over the seal and extends to the right.

Niu J
J U D G E