

Sean + RL

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

CR 53 of 2020<sup>1</sup>

REX  
-v-  
'ALIFELETI UASI

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**SENTENCING REMARKS**

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mr I. Finau for the Prosecution  
The Defendant in person  
Date: 11 May 2021

**The charge**

1. On 6 April 2021, the Defendant pleaded guilty to one count of causing serious bodily harm, contrary to s 107(1) and (2)(c) of the *Criminal Offences Act*.

**The offending**

2. On 10 October 2020, at Halaleva, the Defendant went into a Chinese shop to buy a can of soda. He gave the shopkeeper (Complainant) 50 cents. The Complainant rejected the Defendant's offer because the soda did not cost 50 cents. The Defendant then asked another customer for money. She gave him 20 cents. The Defendant then gave the 70 cents to the Complainant. In return, the Complainant gave the Defendant two ice blocks. The Defendant threw one of the ice blocks at the Complainant which hit his chest. The Defendant then threw a number of rocks at the Complainant. The third rock hit the Complainant's hand. The fourth, and larger rock, struck the left side of the Complainant's head. The Complainant was rushed to the hospital by his father suffering from a 5 cm laceration to his left periocular region. After they left, the Defendant stood by the door of the shop with a machete threatening anyone who attempted to stop him.
3. When the Defendant was arrested and questioned, he co-operated and admitted to the offending.

11 MAY 2021  
[Signature]

**Crown's submissions**

4. The Crown submits the following as aggravating features:
  - (a) actions were premeditated;
  - (b) unprovoked attack;
  - (c) motivated by discrimination because the complainant is Chinese;
  - (d) weapon (rock) was used;
  - (e) threw an ice block at the Complainant; and
  - (f) remained at the scene with a machete threatening to kill anyone who would try and stop him.
  
5. The Crown submits the following as mitigating features:
  - (a) early guilty plea;
  - (b) first time offender;
  - (c) he is young;
  - (d) co-operated with the Police;
  - (e) opportunity to rehabilitate and give back to the community; and
  - (f) remorseful.
  
6. The Crown referred to the following comparable sentences:
  - (a) *Toki* [2010] TOSC 12 (CR 106/2009) – the Defendant was found guilty after trial of one count of bodily harm and two counts of common assault. He was a police officer who handcuffed the Complainant and kicked and punched him. He was sentenced to 2 years' imprisonment with the final one-year suspended for three years.
  
  - (b) *Sione Kivalu & others* (CR 162-164/2019) – Kivalu was charged with causing serious bodily harm. His co-offenders were charged with common assault. They all pleaded guilty to the offending which was instigated by school rivalry. For Kivalu, a starting point of 2 years' imprisonment was set,

reduced by 9 months' for mitigation with the resulting 15 months fully suspended on conditions.

- (c) *Ma'afu Makasini* (CR 2/16) – the Defendant pleaded guilty to one count of causing serious bodily harm. During an argument fuelled by intoxication, the Defendant hit the victim from behind with a rock to his head, rendering him unconscious and then kicked him to the mouth. He was sentenced to 18 months' imprisonment fully suspended for two years, probation for 18 months and alcohol and anger management courses.
- (d) *Soane Patita Toutai'olepo* [2020] TOSC 3 (CR174/2019) – the Defendant pleaded guilty to grievous bodily harm. In another incident involving school rivalry, the Defendant, who was 18 years of age at the time, threw a large rock at the victim which struck him on the left side of his head rendering him unconscious with a compound depressed fracture to the left temporal bone of his skull which required surgery. A starting point of 4 years' imprisonment was set, reduced by 2 years for mitigation with the final 12 months suspended on conditions.

7. Here, the Crown submits the following as an appropriate sentence formulation:

- (a) a starting point of 2 ½ years' imprisonment;
- (b) reduced by 12 months for mitigation; and
- (c) only the final 12 months suspended on conditions to ensure adequate deterrence in respect of attacks on Chinese nationals.

#### **Presentence report**

8. The Defendant is 18 years of age. He is the eldest of four children. He is from Ha'apai but moved from around the outer islands due to his father's work. He was educated to Form 6. He was described by his mother as an obedient young man until his father went to Australia in 2020, following which, the Defendant started mixing with the wrong crowd and staying out with them consuming alcohol for weeks at a time. He is formally unemployed. Since December 2020, he has been providing full time care for his paralysed uncle.

9. In relation to the offending, the Defendant says that he had been drinking with some friends. When he went to the store, the Complainant told the Defendant off because he smelled of alcohol. As a result, the Defendant swore at the Complainant and started throwing things at him.
10. In contrast to the Crown's submission, the probation officer reported that the Defendant does have previous convictions, which I assume, the Defendant volunteered. A check of the Magistrates Court records reveals that in or about 2018, the Defendant was convicted of theft (YD51/2018) for which he was discharged without conviction and for drunkenness (CR 313/2018) for which he was fined \$100 immediately or 1 week imprisonment.
11. The probation officer reports that the Defendant has apologised to the Complainant, that the Complainant has forgiven the Defendant and that the Defendant has promised the Complainant he will never harm anyone else ever again. The Defendant told the officer that he has been sober for months and is now focused only on taking care of his paralyzed uncle and serving others. The officer opines that the Defendant has acknowledged his wrongdoing and is remorseful. She recommends a suspended sentence, abstinence from alcohol, a drug and alcohol awareness course and community service.

### **Starting point**

12. The maximum statutory penalty for serious bodily harm is 5 years' imprisonment.
13. In *Hu'ahulu v Police* [1994] Tonga LR 93, referred to in *Toki*, *ibid*, Ward LCJ stated 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 ... when a weapon is used."*

14. I do not accept the Crown's submission that the offending here was aggravated by racism. There is no evidence in the material available on sentence to support that as being the Defendant's motive for the assault. It seems to me that his reaction to being denied what he wanted to buy because he did not have enough

money for it, fuelled by alcohol, would likely have been the same regardless of the nationality of the shopkeeper.

15. Having regard to the seriousness of the offending, including the use of a rock as a weapon, the injury sustained by the victim and the comparable sentences submitted by the Crown, I set a starting point of 2 years' imprisonment.

### **Mitigation**

16. For the Defendant's early guilty plea, I reduce the starting point by 25% or 6 months, resulting in a sentence of 18 months' imprisonment.

### **Suspension**

17. On the issue of suspension, the considerations in *Mo'unga* [1998] Tonga LR 154 at 157, mostly favour the Defendant here. He is young. He has two relatively minor previous convictions, when he must have been about 16 years of age. I suspect alcohol also featured in both. It is clear he has a very real problem with it. He co-operated with the authorities and pleaded guilty at the earliest opportunity. While self-induced intoxication is never an excuse for criminal conduct, and whatever the Complainant said to the Defendant could never operate as provocation, in any exculpatory sense, I do consider that the Defendant's young age combined with alcohol, and resulting impaired judgment, represents some very minor diminution in culpability through lack of premeditation. From his mother's description of him prior to him getting involved with excessive drinking and that he has since been sober while caring for his disabled uncle, strongly suggests that this offending was a spur of the moment foolish act, entirely out of character for him.
18. In considering whether to suspend all or part of the sentence, the Court is obliged to have regard to the interests of the Defendant and the interest of the wider community in his rehabilitation: *Rex v Tau'alupe* [2018] TOCA 3 at [15]. That consideration takes on an added dimension when dealing with young offenders.
19. As referred to by the Crown in its submissions, in the sentence of *Toutai'olepo*, *ibid*, I discussed some of the considerations in sentencing young offenders. They included the caution by the Court of Appeal in *Tau'alupe*, *supra*, that:

*“[16] It is well established that the sentencing of young offenders raises special considerations: see for example the discussion in R v Churchward [2011] NZCA 531 at [77]-[92]. An offender’s youth may impinge on an assessment of their culpability. As Mr. Mo’ale said, prison for any period is known to carry an enhanced risk of trauma for young people. And, as this Court recognised in Mo’unga v R [1998] Tonga LR 154, young offenders have a greater capacity for rehabilitation.”*

20. I also take into account the Defendant’s demonstrated remorse as well as the likely impact any incarceration will have on the Defendant’s disabled uncle for whom the Defendant is providing full-time care. In light of the Complainant’s stated forgiveness, and the absence of any information to the contrary, it appears safe to assume that the Complainant has made a full recovery. Against those positive features, however, I must also have regard to other factors such as the need for effective deterrence: *Rex v Misinale* [1999] TOCA 12.
21. Weighing all those factors in the balance, and noting the strong similarities between the instant case and that of *Ma’afu Makasini*, *ibid*, and distinguishing *Toutai’olepo* on account of the charge there being grievous bodily harm, in this case, I consider it appropriate to fully suspend the sentence for a period which will act as a form of deterrence and on conditions which will offer the Defendant an opportunity to continue his rehabilitation.

## **Result**

22. The Defendant is convicted of causing serious bodily harm and is sentenced to 18 months’ imprisonment.
23. The sentence is to be fully suspended for a period of two years from today, on conditions that during the said period of suspension, the Defendant is to:
- (a) not commit any offence punishable by imprisonment;
  - (b) be placed on probation;
  - (c) report to the probation office within the next 48 hours;
  - (d) reside where directed by the probation officer;
  - (e) abstain from consumption of alcohol;

- (f) complete courses on alcohol and drug awareness and life skills as directed by his probation officer; and
  - (g) perform 80 hours of community service as directed by his probation officer.
24. Failure to comply with the above conditions may result in the suspension being rescinded, in which case, the Defendant will be required to serve his term of imprisonment.

NUKU'ALOFA  
11 May 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE