

Sum & H.L.

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NEIAFU REGISTRY**

CR 39 of 2021

REX

-V-

RODNEY TALILOA HAVEA

BEFORE HON. JUSTICE NIU

Counsel : **Mrs. T. Vainikolo for the Crown.
Mr. P. Tatafu for the accused.**

Plea : **Guilty, on 11 March 2021.**

Probation Report : **9 April 2021.**

Crown Submissions : **13 May 2021.**

Accused submissions : **22 April 2021.**

Sentencing : **28 May 2021.**

SENTENCING

Offence

- [1] Rodney Havea, you have committed the offence of serious causing of bodily harm contrary to S.107 (1) (2) (c) and (4) of the Criminal Offences Act, and you did that when, on 19 September 2020, at Kolofo'ou, Niuafou'ou, you wilfully and without lawful justification hit Siosaia Kalu's head with a machete causing a laceration to his head.
- [2] Such offence is serious and it is punishable by imprisonment of up to 5 years.

The facts

- [3] Very little is known about what happened because no trial was held because of your guilty plea and I have not been provided with the statements of the witnesses, including the complainant. All I have is the summary of facts and of what you told the probation officer.
- [4] It appears that you were in a group that went for a picnic at Futu at about 8:00 am, and that after you all ate at about midday the group, except for 4 people, went and worked at some plantation. The four who remained then began drinking homebrew. Those four were Siosaia Kalu, Niua Kata, Nemea Folau and yourself.
- [5] Whilst talking during the drinking, the topic of a girl at 'Eua having given birth to a child came up and that it was said that you were the father of the child, and you denied that you were. Niua told you to shut up and not to deny it but you insisted that you were not the father. Nemea went to hit you for denying it, but Siosaia stopped him.
- [6] Soon after that, the people who had gone to the plantation returned and you all left in the vehicle and returned to town. During the trip to town, you were babbling on about something to Siosaia and Siosaia punched you.
- [7] In town, Nemea and Siosaia got off first and the vehicle went on and dropped you off at your place with Niua. In the meantime, Nemea disappeared and Siosaia went to look for him. He came to your place and saw you and Niua talking there. He came in there and talked with Niua. You got up and stood at the door and looked outside and then you picked up a machete and hit Siosaia on the head with it and caused a cut on his scalp 4 inches long and 2 cm deep. It bled profusely and Siosaia fell down unconscious. He did not come around until the next day.
- [8] It is not clear whether Siosaia was taken to the hospital at Niuafu'ou on the day of the injury or on the following day. Because of lack of x-ray facility in Niuafu'ou, Siosaia was brought to Vaiola Hospital in Tongatapu where his head was x-rayed and it was found that no fracture was caused to the skull.

- [9] When you were arrested, you cooperated with the police and you readily confessed to having committed this offence.

Probation report

- [10] The probation officer says that you are 40 years of age and that you are married and that you have 2 children but that your wife and the 2 children are in Australia with the wife's father so that she can look after him because he is unwell. You have not been able to obtain a visa to join them there.
- [11] She says that you completed a diploma in education at the Institute of Education and that you were a teacher at 'Apifo'ou College and at Kelana College, that you were a newsman for the Kele'a newspaper and that you were a health promotion officer at the Ministry of Health. She says that you told her that you went to Niuafou'ou as a way of helping the people there, because your mother is from Niuafou'ou. She says that you have been growing kava there for 2 years now and that you have started a development group that is incorporated "Si'i kae amo 'o Vailahi Inc" and you told her that you have made many proposals through this group and many donations have been made for the people of Niuafou'ou as a result. She says that that group is now running well with its own president and membership.
- [12] She says that she spoke with the president of the group and with the town officer about you, and that they both said that you are normally well mannered but that you have a bad temper. They say that you seem to be a different person when you get angry. They also say that you brought new ideas to the people which conflict with their way of thinking especially about the civil servants and the government work on the island.
- [13] As to the offence you committed, you told her that you had an argument during the drinking and so you broke up and you and one of the boys went home and continued drinking there, and that whilst you two were drinking, Siosaia came over and he came and sat on your bed. You thought that he had come to apologise to you for having argued with you, but he did not apologise and so you got up and got the machete and hit him on the head with it.

[14] She say that you have apologised to Siosaia and that he accepted it but she could not talk to him to confirm if that was so because he has gone overseas.

[15] She says that the impression that she got after speaking with you is that you do not seem to show any remorse for what you did to Siosaia and that you appeared to think that the people at Niuafou'ou do not appreciate what you have tried to do for them.

[16] In her recommendation, she says that imprisonment is inevitable for the offence you have committed and makes no recommendation whether or not the whole or part of it be suspended.

The Crown submissions

[17] Counsel for the Crown, Mrs. Tupou Kafa Vainikolo, has confirmed that you have no previous conviction.

[18] She says that the aggravating factors against you is that:

- (a) the injury you caused was serious because it was 4 inches long and 2 cm wide;
- (b) you caused that injury with a weapon, namely, a machete;
- (c) there was no provocation;
- (d) you are short-tempered; and
- (e) you have shown no remorse for what you have done.

[19] But in your favour she says that:

- (a) you are a first offender;
- (b) you have pleaded guilty;
- (c) you cooperated with the police and admitted your offence.

[20] She refers to 3 cases which are comparable to your case:

- (a) ***R v Finau*** (CR3/2020) where the accused 61 years of age pleaded guilty to serious causing bodily harm to his 63 year old brother. He was drunk and he was angry with his older brother for teasing him and he hit him with the machete and severed his little finger and

pursued him and hit him again on his head with the knife. The brother was hospitalised for 2 weeks and his treatment continued for some 3 months. He apologised and made up with the brother and quit drinking altogether. He was sentenced to 2 years imprisonment but fully suspended for 2 years on conditions he abstained from drinking, take the alcohol course and anger management course and serve 40 hours community service.

- (b) **Lopeti v R** [2019] TOCA 5 where the accused committed armed robbery with a machete and he hit the victim with the machete on the leg causing serious cut to his leg. He was sentenced to 10 years for the armed robbery and 2½ years for the serious causing bodily harm but to be served concurrently. His appeal against both sentences were dismissed.
- (c) **Tupou v R** [2019] TOCA 8 where that accused attacked 2 men with a machete causing very serious injury to one and less serious injury to the other. He was sentenced to 6 years imprisonment but that the last 2 years be suspended. He appealed to the Court of Appeal but the Court of Appeal upheld his sentences. It approved the statement of the sentencing Judge Cato J, that a machete is an inherently dangerous weapon, particularly in the hands of a drunken offender.

[21] She says that in accordance with those cases, a custodial sentence be imposed on you and that you be sentenced to imprisonment for one and a half year to 2 years but that part thereof be suspended.

[22] She attached a medical report of the injury of Siosaia Kalu that the injury to his scalp was 4 inches long and 2 cm wide and that it was cleaned and stitched up, but that 4 days later he returned complaining of chills, discomfort and loss of appetite. He was sent down to Nuku'alofa and was x-rayed but it revealed no fracture or skull injury. He was treated and discharged with antibiotics. That report was on 18 November 2020.

[23] The doctor was consulted for an update on Siosaia's present condition and he advised that Siosaia never went back to see them at the hospital when he returned to Niuafou'ou and that he just carried on his normal

work as a group worker (toungeaue), and that he has left to Australia on fruit picking work.

You counsel submissions

- [24] Your counsel, Mr. Tatafu, says that you are 40 years old, you are married and that you have 2 children, He says your wife and 2 children are in Australia and that you are awaiting the outcome of application that you join them in Australia.
- [25] He says that you told him that the boys had picked you up and you went and drank home brew with them and whilst you were drinking there was talk about a girl who was pregnant to you and Siosaia attacked and punched you and that your eye was swollen. You said that you then returned and you were dropped off at your home, but that later on Siosaia and Nemea walked over to your place and that they came and sat on your bed. You told your counsel that you felt afraid that they were there to beat you up again, so you then got up and got the machete and hit Siosaia on the head with it and you broke up and dispersed.
- [26] He says that you pleaded guilty because you say you were the one who caused the injury, because they had beaten you up at the drinking. You told your counsel that you had gone and apologised to Siosaia with gifts of Tongan kava and several tins of corned beef and a box of cracker biscuits and several boxes of milk and that Siosaia accept them and your apology and has forgiven you.
- [27] He says that you are remorseful and has pleaded guilty at the start and have apologised and that it has been accepted, and that you have no previous conviction. He asks that your prison sentence be fully suspended for 2 or 3 years.

Consideration

- [28] I consider that your case is more in line with the **case of Finau** than with either of the other two because of the provocation given which should not have mattered but for the effect of alcohol which you had drunk. I accept your word that you have apologised and have made up with the victim and that he has suffered no permanent disability from the injury.

- [29] The offence which you have committed, that is, serious causing bodily harm is punishable with imprisonment of up to 5 years. And where a weapon, such as a machete, is used to cause the injury, then it must warrant imprisonment closer to 5 years than to 1 year. As in the **Finau Case**, the starting point was 3 years imprisonment, and because of your guilty plea and your previous good record and your apology and cooperation with the police, I consider that 1 year be deducted leaving an imprisonment of 2 years.
- [30] As to suspension of that, or part of that, sentence, I have to consider whether you qualify under the guidelines laid down by the Court of Appeal in **Mo'unga v R** [1998] Tonga LR 154. One of those guidelines is that there was some provocation which caused you to inflict this injury on Siosaia. According to your counsel, you told him that you were afraid that Siosaia and Nemea had come to your house to beat you up again, and so you got the knife and hit Siosaia on the head with it. But according to the probation officer, 'Ema To'ia, you told her that you thought that Siosaia had come to your house to apologise to you for having argued with you, but that he did not apologise to you and so you got up and got the knife and hit him on the head with it. So I have 2 conflicting reasons given by you for hitting Siosaia with the knife. One version, the one your counsel has told me, may entitle you to suspension of your sentence, and the other version may not.
- [31] The probation officer appears to accept the views of the town officer and of the president of the incorporated group that you are short tempered and that that was the reason you had hit Siosaia with the knife for not apologising to you. However, I consider that whereas it may be true that you have a short temper and that you appear to be a different person when you are angry, you have not been charged or convicted of any offence for hitting any person, let alone causing injury to any person in all your 40 years. I am therefore convinced that what you told your counsel was the reason why you hit Siosaia with the knife, namely, that you were afraid that they had come to beat you up again.
- [32] I therefore consider that you do qualify for suspension of the imprisonment sentence, because you are a first offender, and because

you have never had any trouble or caused any trouble before, you are likely to make use of the suspension to abstain from drinking alcohol, and not reoffend, and because you have cooperated with the police and with this Court by pleading guilty.

[33] I agree with your counsel that the suspension of your sentence be for 2 or 3 years. I consider that 3 years would be better, because you would always remember during those 3 years that you must not commit another offence punishable by imprisonment, because if you do, you will then serve the suspended imprisonment sentence, as well as the sentence for the subsequent offence. But if you do not re-offend, your imprisonment sentence for this offence will automatically be cancelled upon the expiry of the 3 years. You will have deserved its cancellation.

[34] But that as in Finau's Case, you are to serve community service.

Sentence

[35] Accordingly, I sentence you for the serious causing bodily harm to Siosaia Kalu on 19 September 2020 to 2 years imprisonment but which sentence shall be fully suspended for 3 years from today on the conditions:

- (a) that you do not commit an offence punishable by imprisonment with those 3 years,
- (b) that you abstain from drinking alcohol,
- (c) that you take and complete the alcohol and anger management course directed by the probation service, and
- (d) that you serve 40 hours community service as directed by the probation service.

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a cross, surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter, with a star at the bottom. A blue ink signature is written over the seal.
Niu J
JUDGE

NEIAFU: 28 May 2021.