

causing a fracture to it with an iron rod contrary to S.106 (1) and (2) (a) of the Criminal Offences Act, and

(b) you wilfully and without lawful justification assaulted Halemoana Fisi'ihoi by punching his face contrary to S.112 (c) of the Criminal Offences Act, and

(c) you, Sitiveni, wilfully and without lawful justification assaulted Halemoana Fisi'ihoi by kicking him contrary to S.112 (c) of the Criminal Offences Act,

at 'Utui on 15 February 2020.

No previous conviction

[2] Neither of you have any previous conviction.

Probation officer's reports

[3] The probation officer has prepared a report on each of you after he had spoken with you, Samisoni, and your wife, and with you, Sitiveni, and your father.

[4] You, Samisoni, are 24 years old and have just got married in March of this year. You work with your father growing crops for consumption and for sale at the market. You left school at form 5 and you completed one year of learning to do welding. You had gone fruit picking in each year from 2017 to 2019.

[5] The officer says that in respect of these offences, you told him that it was not true that you had carried, and had hit Lotolua with a pipe, but that you accept that you have been convicted that you did do that, and that you are repentant for what you have done and that you have learnt your lesson from it.

[6] He also says that these two families, the Tu'i'onetoas and the Fisi'ihos, have now come together and have made peace with each other and have ended this feud between them which had been going on for some 3 or 4 generations.

[7] That is confirmed by counsel, Mr. Taufaeteau, in his submissions on both your behalf, and by Mr. Paula Tatafu in a letter which he has

forwarded to the Court dated 23 July 2021. Mr. Tatafu says that your father, Samisoni, Sione 'Ovaleni Tu'ionetoa, representing the Tu'ionetoas, and Halemoana Fisi'ihoi, representing the Fisi'ihois, met with him, Police Sergeant Hausia, and Mr. To'imoana Taufateau, your counsel, and the Free Wesleyan Church Minister of the village. He says that peace and friendly relationship have been reached between these two families, thereby ending this long standing feud.

[8] The probation officer has attached letters from your church pastor, Tevita Taiala and from the town officer of 'Utui, Siope Lonitenisi, and from your wife, Samisoni, all of which confirm that you are hardworking and active with the Church youth activities and village functions as well as in your family works.

[9] You, Sitiveni, are 25 years of age, still single and that you work in rubbish collection at the Waste Authority for 3 months now and that you earn \$324 per fortnight. You had left school at form 5 as well and that you helped your grandfather in the plantation, as your parents are missionaries of the Seventh Day Adventist Church.

[10] The probation officer says that you told him that you lived close by to where this fight happened and that you just got up and ran out and saw that Halemoana Fisi'ihoi had fallen down and that you just ran up and kicked him. You told him that you are really sorry for what you did and that you are truly repentant.

[11] He says that you are a good rugby player and you are in the big rugby competition which is being held in Vava'u at present.

[12] Letters from your Church Minister and from the town officer were attached and they confirm that you participate and are active in Church and village youth activities.

Crown submissions

[13] Mrs. Vainikolo has submitted for the Crown that you, Samisoni, have far more aggravating factors against you than mitigating factors in your favour. She says that

(a) you hit Lotolua with a weapon.

- (b) a deadly weapon, a metal pipe,
- (c) you hit him on the head,
- (d) 3 times,
- (e) Lotolua did nothing to anybody to provoke being hit,
- (f) Lotolua was helping his brother Halemoana to try and stop the fight.
- (g) the wound caused to Lotolua was serious, a cracked skull.
- (h) the punch on Halemoana was unprovoked and was hard,
- (i) it felled Halemoana to the ground.
- (j) it bruised his face.

In your favour, she says that these are your first offences, and that you have apologised and that both victims have accepted your apologies. However, she says that your remorse may not be genuine because you have maintained that you did not hit Lotolua at all.

[14] She has referred to 3 cases which may be comparable to what has happened in the present case:

- (a) **R v Vi** [2017] Tonga LR 361 where the accused pleaded guilty to causing grievous bodily harm by hitting the victim on the head with a metal rod causing an open fracture on the skull. With the maximum sentence for the offence being 10 years imprisonment, the Court fixed a starting point of 4 years 6 months for the offence in view of the provocation by the victim which lowered the starting point from 5 years and he was further allowed a deduction of 18 months in view of his early guilty plea, his cooperation with the police and for having no previous conviction. Of his remaining 3 years imprisonment sentence, the last 12 months were suspended on conditions.
- (b) **R v Fangatua anors** (CR51-54/2019) where 2 of the 3 accused were convicted of assault of punching and kicking the victim. They were sentenced to 3 months imprisonment but fully suspended for 2 years on conditions.

(c) **R v Fusikata** (CR313/2020) where the accused was convicted of causing grievous harm by punching the victim repeatedly and causing blindness to his left eye. He was 34, married and had 2 children aged 2 and 1. The Court set a starting point of 5 years imprisonment and deducted 6 months for having no previous conviction leaving a sentence of 4 years 6 months with the final 18 months being suspended for 2 years on conditions.

[15] Mrs. Vainikolo submits that in view of the aggravating features and in accordance with those cases, you, Samisoni, should have a starting point of 5 years imprisonment for the offence of causing grievous harm and 3 months imprisonment for the assault offence, but both of which to be concurrent. She says that 6 months be deducted for your having no previous conviction, and that part of the remaining 4 years 6 months be suspended as were done in the cases referred to.

[16] As for you, Sitiveni, she submits that you be sentenced to 3 months imprisonment but to be fully suspended as was done in the **Fangatua Case**.

Accused submissions

[17] Your counsel, Mr. Taufaeteau, says, Samisoni, that you have worked well helping your father in the plantation and that you have worked well and have been law abiding in that you been able to go on the fruit picking trips overseas for 3 years in a row and would have gone again in 2020, and 2021, but for these offences which occurred in February 2020.

[18] He says that because the feud between your family and the Fisi'ihoi family has now been ended and because you are now married and now have the responsibility of raising a family, you would be sure to lead a law abiding and responsible life.

[19] He says that you have apologised to both Lotolua and Halemoana and that they have accepted it and forgiven you.

[20] He submits that your sentence be suspended and that you serve a community service.

Starting point

- [21] In considering the starting point for your sentence, Samisoni, I consider that your case is not much different from the cases referred to by the Crown and to the cases referred to in those cases. In your case, you and your father and your brother, Takilesi, had stopped Lonitesi Fisi'ihoi on the road while he was in Lesili Tonga's vehicle. You opened his door to do something to him but he drove off before you did. You and your father and brother had no lawful justification to stop him or do anything to him at all.
- [22] When Lonitenisi's brother, Sione Fisi'ihoi, but commonly known as Sione Hoi, came out onto the Free Wesleyan Church field and challenged you and the Tu'i'onetoas to come and have a fist fight ("tau hoka"), you did not come out with just your fists; you all came out with metal pipes, sticks and stones instead. You were carrying a metal pipe and you used it and you hit Lotolua with it on his head. He had done nothing but to try and stop the fight. He had no weapon with him. He was not a threat to anyone. He was 65 years of age. Yet you hit him on his head without him knowing it. He fell on the road immediately, unconscious. He posed no threat to anyone whilst he so laid unconscious on the road. Yet, you stepped up to him and struck him again, twice, on the head, with the metal pipe. He was defenceless when you so hit him.
- [23] Those strokes caused a hairline fracture of the skull and 2 separate intracranial haemorrhages inside the skull and laceration of the scalp and left external canal. He was fortunate not to have died from the strokes you delivered.
- [24] I consider that you had come out with the metal pipe to do grievous harm, to anyone of the Fisi'ihois.
- [25] I therefore consider that your case is no different from those cases and that the same starting is warranted. I consider that the starting point in your case is 5 years imprisonment.

Mitigation

- [26] Because you have maintained to the probation officer that you did not do anything to Lotolua, I have very little regard to your claim of remorse. What you did to him was deliberate, premeditated and totally unwarranted.
- [27] The probation officer and your counsel have pointed out that the two families have made up and have ended the feud between them and I am glad that they have come to their senses and have ended such barbarous behavior. One can only hope that this will never happen again between them.
- [28] But that does excuse or minimise the very serious offence which you have committed. If I was to make allowance for and reduce your sentence in view of the fact that your offence was committed in pursuance of the long standing feud, I would thereby be condoning what you did or part of what you did. That can never be. What you did was a criminal offence, a serious criminal offence punishable by imprisonment of up to 10 years, and it can never be mitigated by the unlawful feud that existed between your two families.
- [29] The only mitigation you have is that you have no previous conviction and I agree with Crown counsel that it warrants 6 months deduction from the starting point of 5 years, leaving a sentence of 4 years 6 months imprisonment.

Suspension

- [30] As to suspension of that sentence or part of that sentence, I consider that you qualify under the guidelines laid down in **Mo'unga v R** [1998] Tonga LR 154 at 157 for partial suspension in view of your young age and for having no previous conviction. I consider that the partial suspension should not be such that it diminishes the deterrence which the Legislature had intended when it enacted that this offence be punishable by imprisonment of up to 10 years.
- [31] I do not see any reason to depart from the suspension of the last 18 months which the Courts in the cases referred to have ordered to be

suspended or for the period of suspension of 2 years applied in those cases.

[32] As for you, Sitiveni, I agree with Crown Counsel that your sentence be 3 months imprisonment but that it be fully suspended for 2 years for your offence of assault of Halemoana.

Sentences

[33] Accordingly, and for the reasons I have given, I sentence you, Samisoni and Sitiveni as follows:

(a) **Samisoni Tu'i'onetoa**, you are sentenced –

- (i) for the offence of causing grievous harm to Lotolua Fisi'ihoi as convicted in count 1 of your indictment, you are sentenced to 4 years 6 months imprisonment, and
- (ii) for the offence of assault on Halemoana Fisi'ihoi as convicted in count 3 of your indictment, you are sentenced to 3 months imprisonment; and
- (iii) both sentences in (i) and (ii) above are to be concurrent, and that the last 18 months of your sentence of 4 years 6 months are to be suspended for a period of 2 years from the date of your release from prison, on the condition that you do not commit an offence punishable by imprisonment during the period of suspension.

(b) **Sitiveni Moala**, you are sentenced for the assault on Halemoana Fisi'ihoi as convicted in count 4 of your indictment to 3 months imprisonment but which shall be fully suspended for a period of 2 years from today upon the condition that you do not commit an offence punishable by imprisonment during the period of suspension.



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

Niu J

J U D G E

NUKU'ALOFA: 16 August 2021.