

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

ATTORNEY GENERAL'S OFFICE	
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CR 54 of 2021

REX
-v-
TA'UFO'OU FALE'OFA

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr F. Samani for the Prosecution
Mr W. Edwards for the Defendant
Date: 21 September 2021

The charges

- On 21 April 2021, the Defendant pleaded not guilty to:
 - carrying an arm with intent to commit an offence;
 - serious housebreaking;
 - serious wilful damage to a vehicle;
 - presenting a loaded firearm at a person; and
 - using an arm without licence.
- On 17 August 2021, the day of trial, the Prosecution entered a nolle prosequi in respect of counts 1 to 4. The Defendant was re-arraigned on count 5 and pleaded guilty. He appears today for sentencing on that count.

The offending

- On 3 January 2021, Sateki Tameilau went to Kolonga to see his mother. While in the living room of her house, with his mother and nephew, Sateki saw the Defendant alight from a vehicle. The Defendant then entered the house and stood holding a .45 pistol. He pointed the gun at Sateki and said "*Sevele, I am going to shoot you now, so don't play games with me again.*" Sateki told the Defendant that he was not Sevele and that he did not know anyone by that name, but the Defendant kept asking him for Sevele. The Defendant then turned and shot Sateki's work vehicle parked outside. He then ran out of the house and disappeared.
- After Sateki filed a complaint with the police, a search was conducted at the Defendant's residence. They did not find the pistol or any ammunition. Police confirmed that the Defendant did not have a licence for either. The Defendant was arrested and he admitted to the offending when questioned.

Crown's submissions

5. The Crown submits the following as aggravating features of the offending:
 - (a) the Defendant has previous convictions including, relevantly, in 2012, when he was sentenced to 8 years' imprisonment for attempted armed robbery and 5 years' imprisonment for grievous bodily harm which also involved the use of a pistol;
 - (b) the use of the firearm in the proximity of others;
 - (c) the pistol has not been located and the Defendant claimed that he disposed of it; and
 - (d) unlicensed firearms are a serious issue in Tonga.
6. The Crown submits that the only mitigating factor is the Defendant's guilty plea before trial.
7. The Crown referred to the following comparable sentences:
 - (a) *Fifita* [2018] TOSC 6 – the Defendant pleaded guilty to carrying arms in a public place with intent to commit an offence. The Defendant was intoxicated and threatened the Complainant with an unloaded .22 rifle. Cato J set a starting point of 3 years and 3 months imprisonment which was reduced by 18 months for mitigation, resulting in a sentence of 1 year and 9 months' imprisonment which was fully suspended on conditions.
 - (b) *Liou* [2010] TOLawRp 27 – the Appellant pleaded guilty to possession of arms and ammunition without a licence. For the possession of arms, he was sentenced to 12 months' imprisonment, suspended for 2 years. For the possession of ammunition, he was fined \$10,000. On appeal, that fine was reduced to \$3,000.
 - (c) *Tu'iha'ateiho* [2015] TOSC 8 – the Defendant was convicted of possession of an unlicensed firearm and fined \$2,500.
8. Here, the Crown submits the following sentence formulation:
 - (a) a starting point of 2 ½ years' imprisonment;
 - (b) further increased by 12 months for the disposal of the handgun and the Defendant's previous conviction in CR 165/2012, which also involved the use of a handgun;
 - (c) reduced by 6 months for mitigation; and
 - (d) that the shell casing found be forfeited to the police.
9. The Crown's submissions were silent on whether to suspend the resulting sentence or any part of it.

Presentence report

10. The Defendant is 45 years of age. He is the youngest of twelve children. His

family emigrated to the U.S. when he was 9 years old. He was educated to year 10. As the youngest, he was allowed to do whatever he wanted. As a result, he started mixing with the wrong crowd which eventually led him to crime. He was first imprisoned at the age of 18 for dealing drugs and possession of firearms. In 2003, he was deported to Tonga.

11. The relevant town officer describes the Defendant as a changed man. He lives with his partner and their 6-month-old daughter. Fatherhood has been a good influence on him. He and his partner grow and sell crops. His siblings overseas also provide some financial assistance.
12. The Defendant admitted the offending to the probation officer. He described himself as being 'very impulsive at times' but is slowly dealing with that problem and is committed to 'being a better person'.
13. The report enclosed a number of references which I have considered.
14. The probation officer opines that the Defendant is remorseful and recommends full suspension on conditions.

Defence submissions

15. Mr William Edwards, who appears for the Defendant, did not take issue with any of the Crown's submissions, save for the 'aggravating features', and agreed with the background and personal details provided in the presentence report. He then added, in summary, that:
 - (a) from the record of interview, it was clear that the discharge of the weapon was a mistake and not done with intent to threaten, intimidate or for any illegal purpose;
 - (b) the Defendant initially pleaded not guilty because the then charges involved using the firearm for illegal purposes. Once the Prosecution elected not to proceed with those, the Defendant pleaded guilty to using the firearm without a licence;
 - (c) the firearm was not used in proximity to others;
 - (d) the Defendant co-operated with the Police during their investigation;
 - (e) the probation report described a change in the Defendant's previous behaviour and greater maturity, compared to when he was first deported to Tonga;
 - (f) the Defendant has shown remorse;
 - (g) he now has a partner and child;
 - (h) the absence of any threat or intimidation sets this case apart from the comparable sentences relied upon by the Prosecution;
 - (i) the starting point should be lower than that in *Hekisou Fifita*; and
 - (j) any sentence should be fully suspended.

Starting point

16. Section 4(2)(b) of the *Arms and Ammunition Act* provides a maximum penalty for use of a firearm without a licence of 5 years imprisonment.
17. In *R v Kohinoa* [2008] Tonga LR 41, Andrew J stated that in offences involving firearms, it was almost inevitable that a jail sentence would follow. And in *Tu'iha'ateiho*, *ibid*, Cato J observed that licensing and security of firearms in any society is a matter of great importance. His Honour added that Parliament has set a clear directive to the Courts that serious consequences should follow a conviction for being in possession of an unlicensed firearm.¹
18. The Court computer management system has a record of a further recent and highly relevant conviction which was not disclosed in any of the material filed in this proceeding. In Magistrates Court proceeding CR 198 of 2018, on 8 August 2018, the Defendant was convicted of discharging a firearm with intent to intimidate contrary to ss 108 and 109 of the *Criminal Offences Act*. He was sentenced to 3 months imprisonment which was fully suspended for 2 years on conditions including 40 hours community service.
19. In endeavouring to assess the seriousness of the offending, by reference to the known and agreed facts, and the Defendant's criminal history, the Court is confronted with a number of unanswered questions. For instance:
 - (a) where or from whom did the Defendant acquire the firearm, being a powerful large calibre pistol;
 - (b) why did he have it;
 - (c) why did he not have a licence for it;
 - (d) why did he go to the complainant's house;
 - (e) why did he go with the loaded firearm;
 - (f) who was Sevele and what did the Defendant want with him which required him to be looking for him with a loaded weapon;
 - (g) if the pistol was accidentally discharged, does that mean the safety was off;
 - (h) what was the distance between Sateki and his other family members in their home and the Defendant when he discharged the weapon;
 - (i) if the Defendant genuinely sought to cooperate with police, why was the firearm not voluntarily surrendered to them;
 - (j) where is the firearm and what did the Defendant actually do with it;
 - (k) why did he 'dispose' of it after the offending.
20. The failure by the Defendant, through his counsel and the information he gave the probation officer, to provide full and frank answers to questions such as those

¹ [14], [16]

posed above does little to assuage concerns about the Defendant's actual intentions while being armed with the loaded pistol on the day in question and using it. By reason of the Defendant's statement to the probation officer about being very impulsive at times, I am also dubious about his assertion that the firing of the weapon was a mistake.

21. For those reasons, I consider the instant offending to be more serious than an ordinary case of using a firearm without a licence for it.
22. However, even though s 109 of the *Criminal Offences Act* provides the same maximum penalty, I do accept that the offending in *Hekisou Fifita*, which involved an intention to intimidate, and notwithstanding that the rifle there was not loaded, was more serious than the instant. Accordingly, the starting point in that case of 3 years and 3 months imprisonment is not applicable here.
23. Similarly, in the recent decision in *R v Koka* [2021] TOSC 90, Cooper J sentenced the Defendant there also for discharging a firearm with intent to intimidate, contrary to s 109. His Honour set a starting point of 2 years and 9 months. Again, the offending there was more serious than here.
24. The other comparable sentences referred to by the Crown are of limited assistance. Unlicensed use of an firearm is plainly more serious than mere possession.
25. Recently, in *R v Tongamoa* [2021] TOSC 51, where the Defendant was sentenced for, among other things, unlicensed possession of a firearm (an M16 assault rifle) and ammunition, the following comparable sentences were also considered:
 - (a) *Talia'uli* [1997] Tonga LR 7 - the Defendant was sentenced to two years imprisonment for unlicensed possession of a pistol and six months for possession of ammunition, both suspended for three years.
 - (b) *Vakapuna* [2018] TOSC 81 - the Defendant was sentenced to 18 months' imprisonment for unlicensed possession of a .22 rifle and six months imprisonment for possession of ammunition. He too was not a first offender and the firearms and ammunition were found during a search which also uncovered illicit drugs. The sentences were fully suspended for two years on conditions including probation and 100 hours community work.
 - (c) *Huni* [2018] TOSC 33, Cato J sentenced that Defendant, along with others involved in a large-scale cannabis plantation, at which .22 rifles were secreted, to 2 ½ years imprisonment for the rifle and 6 months for the ammunition.
26. In *Tongamoa*, where the firearm there had also not been recovered, a starting point was set of 18 months' imprisonment.
27. Here, having regard to the seriousness of the offending and the principles and comparable sentences discussed above, I consider the appropriate starting point

to be 2 years imprisonment.

Mitigation

28. I do not accept that the Defendant should be taken to have pleaded guilty to count 5 at an early opportunity because of the Crown's decision to enter a nolle prosequi in respect of the other charges. On the facts accepted by the Defendant, his guilt on count 5 was incontrovertible. He could have, and should have, entered that plea when first arraigned.
29. The Defendant does not have a good previous record.
30. Therefore, for his late guilty plea and apparent remorse, I allow 1/6th off, which amounts to 4 months.
31. The result is a sentence of 20 months imprisonment.

Suspension

32. Having regard to the considerations for suspension discussed in *Mo'unga v R* [1998] Tonga LR 154, I consider that the following factors weigh against suspension:
 - (a) the Defendant is not young;
 - (b) he has a significant criminal history, both here and in the United States, including for violence involving firearms, for which he received lengthy prison terms and, more recently, a conviction for discharging a firearm with intent to intimidate;
 - (c) the offending, at least insofar as it involved the Defendant being in possession of the firearm when he went to the complainant's home, involved some premeditation;
 - (d) that the Defendant has either disposed of the pistol or simply not surrendered it to police tends to belie his stated remorse; and
 - (e) in 2018, the Defendant was afforded the opportunity of a fully suspended sentence. The Defendant committed the instant offending only 5 months after the expiration of the suspension period for that matter.
33. Against those considerations, I take into account that:
 - (a) the Defendant is said to have co-operated with police during their investigation;
 - (b) his assertion that the pistol was fired by mistake offers some diminution in culpability; and
 - (c) he is said to have committed to changing his life since commencing his current relationship, becoming a father and establishing a business with his partner.
34. The Court is also obliged to consider the seriousness of the offending, the need

for effective deterrence,² and the interests of the Defendant and the interests of the wider community in his rehabilitation.³

35. All up, I consider that:

- (a) the circumstances of this offending and the unresolved concerns expressed above in paragraph 18 about it;
 - (b) the Defendant's criminal history; and
 - (c) the need to effect to all the sentencing objectives referred to above,
- do not permit full suspension.

36. However, as there is some basis for optimism as to the likelihood of the Defendant taking the opportunity offered by a partly suspended sentence to rehabilitate himself, I will order that the final 10 months of the sentence be suspended on the conditions set out below.

Result

37. The Defendant is convicted of using a firearm without a licence and is sentenced to 20 months' imprisonment.

38. The final 10 months of the sentence is to be suspended for a period of 12 months from the date of the Defendant's release from prison on condition that during that 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 48 hours of his release from prison; and
- (d) complete a course in anger management as directed by his probation officer.

39. Pursuant to s 37 of the *Arms and ammunition Act*, the shell casing found at the scene is forfeited to the Crown for disposal.

NUKU'ALOFA
21 September 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE

² *Rex v Misinale* [1999] TOCA 1.

³ *Rex v Tau'alupe* [2018] TOCA 3 at [15].