

Accused

ATTORNEY GENERAL'S OFFICE	
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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 122 of 2021

REX

-v-

PENISIMANI ANGILAU

BEFORE HON. JUSTICE NIU

**Counsel** : Mrs 'Aunofu 'Aholelei for the Crown  
The Accused for himself

**Plea** : Not guilty but convicted on 25 August 2021

**Submissions** : by the Crown filed on 29 September 2021  
By the accused on 8 October 2021

**Sentencing** : 22 October 2021

# SENTENCING

## Offence

- [1] Penisimani Angilau, you have committed serious causing bodily harm to Matini Veatufunga by hitting and fracturing his left hand with a piece of timber at Vaini on 27 March 2021. You also at the same time and place simple caused damage to his car by hitting its rear window and side mirror with the piece of timber.
- [2] At first you denied committing those offences but after the Crown called and its witnesses had given their evidence, you then admitted that you committed the 2 offences and I accordingly convicted you of them.
- [3] What happened was that, according to the complainant, he drove his car to the fuel pump at the petrol station at Vaini before you got there, and that when you got there you demanded that he back off his car because, you said you

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were there first. He said he refused to back off and so you got out of your car and came and punched his front passenger, then you went and got a 4x2 piece of timber from your car and came and hit the side mirror of his car with it, and that he got out of his car and that you attacked and hit him with the timber on his left forearm and broke the lower bone (the ulna) of his forearm, and that you also smashed the rear window of his car. His forearm was casted for some 6 weeks for the bone to heal.

### **No report**

- [4] You were to attend at the probation office, as arranged with the officer there, to prepare a report on your circumstances but you did not do so and so no report has been done on you.

### **Previous convictions**

- [5] You have the following previous convictions:

- |     |            |            |         |              |                    |
|-----|------------|------------|---------|--------------|--------------------|
| (a) | CR 330/84  | 28/4/1984  | M Court | Theft        | 8 lashes           |
| (b) | CR 1534/84 | 4/4/1984   | M Court | Loitering    | \$100 fine         |
| (c) | CR 94/10   | 14/6/2011  | S Court | Attempted    | Count 1&2: 6 years |
|     |            |            |         | armed        | Count 3: 4 years   |
|     |            |            |         | robbery      | Count 4: 2 years   |
|     |            |            |         | with         | Count 5: 2 years   |
|     |            |            |         | firearm      | All concurrent.    |
| (d) | CR 103/20  | 24/11/2020 | S Court | Illicit drug | 9 months           |
|     |            |            |         |              | Suspended 2 years. |

### **Breach of suspension**

- [6] Crown counsel points out that when you committed these 2 present offences on 27 March 2021, you committed them during the 2 year period of suspension of your 9 months imprisonment sentence which had commenced on 24 November 2020, and submits that you be ordered to serve those 9 months before you serve any imprisonment sentence you may serve for your 2 present offences.

### **Crown submissions**

- [7] Crown counsel, Mrs 'Aholelei, says that there are aggravating features about your 2 offences, namely:
- (a) your attack on the complainant was premeditated and was unprovoked;
  - (b) you chased after him with a 4x2 piece of timber;
  - (c) you struck his hand with the piece of timber, which in effect was a weapon;
  - (d) you caused a fracture to his hand; and
  - (e) you have a previous conviction for causing bodily harm.
- [8] On the other hand, she says that there are mitigating features in your favour, namely:
- (a) that you admitted the offences by changing your plea, although belatedly after the Crown closed its case;
  - (b) you cooperated with the police; and
  - (c) you have paid for the damages you have caused to the complainant's car.
- [9] She then refers to 3 cases concerning bodily harm:
- (a) ***R v Taliai & Vea*** (CR 56/2018) where one accused struck the complainant on the head with a hammer which caused an injury and internal bleeding. He was sentenced to 21 months imprisonment but with the final 6 months suspended on conditions.
  - (b) ***R v Pekipaki*** (CR 172/2018) where the accused there hit the complainant on the head with an object; he was sentenced to 2 years 3 months imprisonment but with the final 12 months being suspended on conditions.
  - (c) ***R v Palu*** (CR 176/2020) where the accused repeatedly hit a 15 year old complainant with a garden hoe and caused a fracture to his right elbow. The accused was sentenced to 21 months imprisonment but with the final 6 months being suspended.
- [10] She then referred to 2 cases concerning wilful damage, namely,

- (a) ***R v Latu*** (CR 130/2017) a case of housebreaking, theft and simple wilful damage where the accused was sentenced to 9 months imprisonment for the wilful damage and which was to be served concurrently with the sentences for the other 2 more serious offences, which provided that the last 12 months be suspended on conditions; and
- (b) ***R v Ma'asi & Lisiate*** (CR 130/2019) where both accused were convicted of serious wilful damage to a motor vehicle. They were both sentenced to 3 and 4 months imprisonment respectively but fully suspended on condition that they served 80 hours community service and to undertake anger management courses.

- [11] She then says that the starting point for consideration of your sentence for serious causing bodily harm be 3 years imprisonment, in view of the aggravating features she has referred to. As to the wilful damage count, she says it should be 9 months imprisonment, which I understand her to mean that it should be concurrent with the 3 year sentence.
- [12] She then says that 9 months, which is 25%, is to be deducted in view of the mitigating factors in your favour, leaving a sentence of 2 years 3 months.
- [13] As to suspension of that sentence, she says that you are not entitled to any suspension in accordance with the 4 guidelines listed by the Court of Appeal in the case of ***Mo'unga*** [1998] Tonga LR 154. She says that although you cooperated with the police, you are not young and you have previous convictions. You also failed to comply with the condition of suspension of your imprisonment sentence of 9 months, namely, not to commit an offence punishable by imprisonment within the 2 years during which that sentence was suspended. She also says that your offence was premeditated.
- [14] She accordingly, recommends that you be sentenced to 2 years 3 months in addition to the 9 months imprisonment which had been suspended.

### **Your submissions**

- [15] You made your submissions orally in Court and you said that the Crown was wrong to say that you were not provoked to commit the 2 offences. You said that the complainant had provoked you to do what you did by jumping the cue and driving in to and stopping at the pump after you were there queuing behind the vehicle which had just finished being filled. You said that you told him to move his car back but he refused to.
- [16] You said that you only hit him on his hand only once and not repeatedly as in the case referred to by the Crown.

- [17] You said that you were the victim of the improper act of the complainant and his friends instead.
- [18] You said that you gave the complainant \$1000 altogether, that is, \$500 in cash and \$500 in goods which he requested.
- [19] You said that you have turned to Christ and that you work in a group of workers weeding and planting crops for pay.
- [20] You said that you ably support your partner and your baby with her which was born last year with money and food crops of your labours.
- [21] You said that you have no home and that you sleep in your car at a friend's place at Tatakamotonga where you work with your work group.
- [22] You said that you had come back to Tonga in 2009 and that you went to prison here in 2011 and was released in 2015.
- [23] You produced a letter which you wrote in which you say that you are a changed man and that Christ is now the center of your life and that you are now an active member of your church. You ask that you be allowed the opportunity to continue the change in your life as a good citizen. You admit that you have breached the condition of suspension of your prison sentence on the illicit drug offence and asked for mercy to give you another chance.
- [24] You then produced 2 letters in support. One is from your work group leader, Vili Fotofili, who says that you are a hardworking man and that everyone sees the change that you have made to your life.
- [25] The other is from your church bishop, Siosua 'Ofa. He says that you have regularly attended the church services and activities and he has talked with you and is convinced that you have truly changed and improved your life.

### **Provocation?**

- [26] I consider that the justice in this case, and in this sentencing, is the determination of the question of whether or not the complainant provoked the attack and the causing of the two offences committed by the accused. The presence, or absence, of provocation would determine whether or not the sentence for the present offences be suspended, and would also be relevant in considering the breach of the suspended sentence of 9 months imprisonment ordered on 24 November 2020.
- [27] Based on the evidence given by the complainant and one of his passengers, the Crown says that there was no provocation made by the complainant to

cause the accused to do what he did to him and his car. The accused on the other hand says that there was and that he was the victim of that provocation.

[28] This is what the complainant said, as relevant, in his evidence:

"On this day, me, Taniela Tonga and Matini Ahovelo, went in a car to the bowser to fill up. I was driving. Our car was the only one there at the bowser. I turned off the engine and told the girl to fill up the car.

Then the accused's car came and stopped facing our car and told us to back off because he was there before us. I said he was crazy and he swore at us.

The girl said for us to back off our car.

The driver swore at us, he was angry. He got out and came and punched Matini Ahovelo while he was still sitting beside me at the front. Then he went and got a timber from his car and came and hit the left side mirror and hit Matini while he was still in the car.

Matini told him to throw down the timber so that they could fist fight. The accused threw down the timber and Matini got out and ran away instead, together with Taniela.

I got out and went around the back of my car and the accused came around to the back with the timber. I called to him to throw down the timber.

Then I saw two people get out of the accused's car and I heard Taniela call to me, "watch out, you'll be hit." I looked around and the accused came up and hit me and I held up my left hand to fend the blow, and I was hit on my left forearm near the wrist and I ran away and he chased after me and stopped and returned to his car and they left."

"The rear window of the car was also smashed by the accused when he came to chase after me."

[29] When questioned by the accused he said,

"The distance between our two vehicles was about 1 ½ meters. You got out and punched me and then you went and got the timber.

I did not think to back off our car when I saw you come with the timber."

[30] When re-examined, he said that the piece of timber was a 3x2 and was about 2 ½ feet long.

[31] I asked him and he said that there were 4 pumps at the station and that he went and stopped at the pump closest to the road and that when he stopped there, there was no vehicle there at all in front of him or facing him, and that the accused then drove up and stopped facing him 1 ½ meter from him. He said that he did not tell the accused that he was wrong, that he was not there before he had got there because he was afraid that the accused might hit him.

[32] The witness, Taniela Tonga, said, as relevant, in his evidence:

“That day we went to the bowser. We stopped at the pump and the girl came to fill our car and a car came and stopped in front of us and its driver chased us off saying he was there first. We backed off and stopped. The accused got out and swore at us and then came and attacked Matini at the front passenger seat and told him to come out and fight. Matini told him to move back so that he could get out, and the accused backed off. But Matini got out and ran off and that the accused chased after him to the tyre repair place. The driver, Matini (Veatufunga) and I then got out and watched them. The accused came back and I ran away while Matini stayed by the vehicle.

The accused then came at him with the timber he had got out of his car with and Matini put up his hand and the timber hit it and then Matini ran off and the accused chased after him, and then came back and got in his car and left.”

[33] When questioned by the accused, he said to him, “you got out of the car with the timber. You threw down the timber and punched the passenger. I got out of the car and ran when you came back after chasing Matini.”

[34] Against those evidence, the accused allowed his answers in his record of interview to be his evidence, and which I accept as his evidence, which, as relevant, are as follows:

“Q14: What do you recall about it?

A: I remember well that day I went in my rental car to fill up at the Vaini bowser.

Q15: Who was with you?

A: Me and Owen and my cousin Rick.

Q16: And then what?

A: When we got there, there was one car being filled up on the side to the road and we queued behind it to be filled up after it had finished.

Q17: Then what?

A: After that vehicle was filled and moved off this other little vehicle came up in front of me and I shouted to it to back his arse back as I had tired to come and wait whereas he just came to go before me.

Q18: Then what?

A: I said to the girl doing the filling, 'your arse sees this intrusion and yet you do not stop it?' I then got out with a piece of timber and went to this car in front of me and said to them, 'Are you going to back off or I will smash you"', and the boy who was the front passenger said to throw down the timber and we would fist fight.

Q19: Then what?

A: I threw down the timber and the passenger boy got out but then I saw two more people getting out of the car and I picked up the timber again and I hit the rear window of the car with it and cracked it and I went around to the driver and hit him with the timber on his hand and they ran off and I shouted to them to come and fight and they did not say anything and I got into my vehicle and went to Veitongo and took my cousin.

Q20: Do you think that the blow you delivered to the driver would cause an injury?

A: I only now know that the stroke I did did cause injury to him.

Q21: What did you say that the people who got out of the other car did when they got out?

A: They got out but they had not attacked me and that was why I hit the window and the driver, just to warn them.

Q22: Did you know well what was happening that day?

A: Yes, I knew it well.

Q23: Was this at night or day time?



A: Evening, about 6pm.

Q24: Do you know that you committed an offence?

A: Yes."

- [35] When I listened to and watched the complainant give his evidence, and also that of the witness, Taniela Tonga, I did not and I do not believe their evidence at all. I believe the evidence of the accused instead.
- [36] I accept that the accused was there queueing behind the vehicle which was being filled by the bowser girl and that he was rightly the next person to have his vehicle filled, but that after that vehicle in front of the accused left, the complainant drove his vehicle right up to the pump from the opposite direction and thereby blocked the accused from proceeding forward to have his car filled, as was his right to be filled up next. The complainant knew that but he deliberately drove there and stayed there to oust the accused of his right to be filled up next.
- [37] The girl told the complainant to back his car off, so that the accused would have his car filled up first, and the complainant said so himself in his evidence. He said that the girl told him, the complainant, to back his car off. Why would the girl tell him to back his car off if he was the first one there like he said he was? I believe the girl told him that because the accused was there first and was rightly the one to be filled up next.
- [38] The complainant knew he was doing wrong by jumping the que and he knew that the accused was angry with him for doing that. The accused told him angrily to back his arse off from the pump. Yet, he stayed put and refused to back off and caused the accused to be further frustrated.
- [39] He saw the accused get out of his car with the piece of timber. He ought to have realized that the matter was getting serious and he should have backed off. Yet, he chose not to back off or apologise.
- [40] His front passenger did not help either; he in fact said he would fight the accused if the accused would throw down the timber. Yet, the complainant did not back off or apologise or take steps to diffuse the serious situation which was arising.
- [41] I am therefore satisfied, on the evidence, that the complainant unlawfully and wrongfully provoked the accused to hit him with the piece of timber and thereby fracture his ulna, and that he also provoked the accused to damage the rear window as well as the left side mirror of the car.

## **Suspension**

[42] Because of the presence of provocation in the present case, as I have found, I consider that the accused does come within the third of the four guidelines which the Court of Appeal has laid down in the case of **Mo'unga** [1998] Tonga LR 154, for suspension of an imprisonment sentence, namely:

“(3) 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.”

[43] I am satisfied that, but for the provocation which the complainant had given to the accused, the accused would not have attacked and hit him with the piece of timber or to damage the window and side mirror of his car.

[44] I am also satisfied that the accused has apologised to the complainant and that the complainant has forgiven him and that the accused has paid for the damage which he has caused to the complainant's car.

[45] In the circumstances which I have found in this case, I consider that the sentence for the accused should be fully suspended. I am also satisfied that the accused is likely make use of the suspension to rehabilitate himself, as confirmed by the work group leader and the church bishop.

## **Sentence duration**

[46] As to the duration of the sentence, I consider that the sentences in **Taliai and Vea** of 21 months and in **Pekipaki** of 2 years 3 months were commensurate with the offences in those case, namely the complainants were hit on the head with a hammer, and an object, because of the serious risk of death from such blow. But in the present case the blow was only to the forearm and it was not even strong enough to break both the ulna and the radius, but only the ulna. I think that a sentence of 12 months is appropriate.

## **The suspended sentence breached**

[47] As to the breach of the condition of suspension of the 9 months imprisonment sentence imposed by the Court on 24 November 2020, there is no doubt about that. The condition of that suspension was that the accused was not to commit any offence during the period of suspension of 2 years which is punishable by imprisonment. The accused has now, committed these present 2 offences, which are both punishable by imprisonment, within those 2 years, namely, he committed them on 27 March 2021.

[48] I have to consider the relevant provisions of the law concerning it. The relevant provisions are S.24(3)(a) to (e) of the Criminal Offences Act which provide as follows:

- “(3)(a) It shall be lawful for the Court when imposing a sentence of imprisonment to suspend the whole or part of such sentence for any period up to 3 years.
- (b) Such sentence will be conditional on the offender not being convicted of an offence punishable by imprisonment committed during the period of suspension.
- (c) In the event of the offender being convicted of an offence punishable by imprisonment committed during the period of suspension he will thereupon be sentenced to serve the term of the suspended sentence in addition to the punishment imposed for such subsequent offence.
- (d) The Court may also impose conditions during the period of suspension of sentence, including a requirement that supervision by a probation officer or another responsible member of the community takes place. A breach of such conditions may, upon application, result in the rescission of the suspension order.
- (e) In special circumstances the Court may release an offender from operation of paragraph (c) and may extend the original period of suspension for a further period not exceeding 1 year.”

[49] In the present case, I have to consider whether there are special circumstances which would warrant the release of the accused from having to serve the suspended sentence and giving him an extension of the period of suspension. In my view, and in the circumstances which I have found, the accused would not have committed these 2 offences had the complainant not provoked him in the way that he did. I consider that that is a special circumstance for which this provision was enacted. It does justice in the case. It is aimed at forgiving the offender for his breach of his condition of suspension, and giving him a second and only one more chance. I consider that the accused ought to be given that second chance, in the special circumstances of this case.

## Sentences

[50] Accordingly, and for the foregoing reasons, I sentence you, Penisimani Angilau, as follows:

- (a) for the offence of serious causing bodily harm to Matini Veatufunga by hitting and fracturing his left hand with a piece of timber at Vaini on 27 March 2021, as convicted in count 1 of your indictment, you are sentenced to 12 months imprisonment;
- (b) for the offence of simple wilful damage you caused to the car of Matini Veatufunga when you broke the rear window and side mirror with a piece of timber at Vaini on 27 March 2021, as convicted in count 2 of your indictment, you are sentenced to 3 months imprisonment;
- (c) both sentenced in (a) and (b) above are to be concurrent and are suspended for a period of 12 months from today, upon the condition that you –
  - (i) undertake and complete the anger management course of the Salvation Army within the period of suspension,
  - (ii) do not commit an offence punishable by imprisonment within the period of this suspension.
- (d) your period of suspension of 2 years ordered by the Court on 24 November 2020 in the case against you no. CR 103/2020 as from that date is extended for a further period of 6 months from 24 November 2022.

**Nuku'alofa: 22 October 2021**



*[Handwritten Signature]*  
Niu J

**J U D G E**