

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

<b>ATTORNEY GENERAL'S OFFICE</b>	
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CR 86 of 2021

REX

-v-

KALAPU FELEMI

BEFORE HON. JUSTICE NIU

**Counsel** : Mrs. 'A. Fifita 'Aholelei for the Crown.  
: Mr. S. Tu'utafaiva for the accused.

**Plea** : Guilty on 2 September 2021.

**Report** : by Probation Officer, 'Ilaisaane Fifita, filed on 30 September 2021.

**Submissions** : by Mrs. 'Aholelei filed on 14 October 2021.

**Sentencing** : on 28 October 2021.

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## SENTENCING

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### Offence

[1] Kalapu Felemi, you have committed an offence of serious causing of bodily harm, contrary to S.107 (1) (2) (c) and (4) of the Criminal Offences Act, in that you wilfully and without lawful justification repeatedly hit Tesimoni Kalapu with a knife causing injuries to his head, arms and thigh, at Tatakamotonga, on 9 January 2021.

[2] You readily admitted to the police that you committed that offence on 14 January 2021 and you pleaded guilty to it when you were charged with it before me in this Court on 2 September 2021.

[3] You had initially pleaded not guilty when you appeared before Cooper J with counsel, Ms Alyssa Kafoa, on 7 May 2021, and your trial was transferred to be held before me and I set it down to be held on 29 July 2021. I however was subsequently required to do the 'Eua circuit in that week and your trial was adjourned to be held on 2 September 2021. But on that day you appeared with your counsel Mr. Siosifa Tu'utafaiva and you changed your plea and pleaded guilty.

### **The facts**

[4] According to the summary of facts which the Crown produced on 14 September 2021, you and your younger brother, who is 10 years younger than you, were drinking alcohol at your parent's home at Tatakamotonga from the evening of 8 January up to the morning of the next day, 9 January 2021.

[5] Later in that morning you had an argument with your brother over the ownership of the house on the property and you told your brother to leave and he left. You however ran after him with an iron rod but your nephew, Palatavake, who also lived with you at the property, stopped you and you went back to the house. You then came out with a knife and attacked your brother with it.

[6] The summary does not say what type of knife it was but you hit your brother with it, repeatedly, on his head, arms and leg causing injuries to him.

[7] The doctor at the hospital found, when your brother was taken to hospital in the evening of the same day, the following injuries:

(a) 4 superficial lacerations on the scalp,

(b) 2 superficial lacerations on the left of the forehead,

- (c) 5 superficial lacerations on the upper limbs, and
- (d) 1 superficial laceration on the left thigh.

[8] There was no tissue swelling or fracture.

[9] No description is given of the depth or length of the lacerations, or the treatment given to them at the hospital or if your brother was admitted, but according to the victim impact report of Crown counsel, "the complainant confirmed that he did not stay long at the hospital. He was stitched up on the same day and was discharged," and "that it took about a month for his injuries to heal and during that time he could not go to the bush."

**Previous convictions**

[10] You have previous convictions and they are as follows:

<b>CRS ID</b>	<b>Case No.</b>	<b>Case Date</b>	<b>Court</b>	<b>Offence</b>	<b>Sentence</b>
7411936	33/91	19/1/1990	Mu'a Mag.	Drunkenness	Fine \$15 or 7 days imprisonment
	341/91	8/5/1991	Mu'a Mag	Drunkenness	Fine \$20 pay within 14 day or 1 month imprisonment
	229, 230/91	20/5/1991	Nuku'alofa	Bodily Harm Assault	Fine \$15 pay within 1 month
	491/91	14/8/1991	Mu'a Mag.	Drunkenness	Fine \$10 pay within 2 weeks or 1 week imprisonment
	000324	13/1/1992	Mu'a Mag.	Disturbance	Fine \$15 pay within 2 weeks or 14 days imprisonment
	408/92	6/5/1992	Mu'a Mag.	Trespass	Fine \$10 pay to Government plus \$10 compensation to the complainant or 2 weeks imprisonment
	691/92	12/8/1992	Mu'a Mag	Drunkenness	Fine \$60 pay now or 1 month impris.

	11, 119, 120/92	13/1/1993	Mu'a Mag.	i) GBH ii) Assault iii) Drunkenness	(i) Fine \$500 pay within 3 months or 1 year impris. (ii) Reprimand. (iii) Fine \$5 or 1 day impris
	364, 365/12	15/8/2012	Mu'a Mag.	i) Housebreaking ii) Theft	i) 3 months impris, suspended for 2 years; ii) Compensation \$100, pay within 2 weeks to 'Uheina or 2 months impris.

### **Pre-sentence report**

- [11] The probation officer has prepared a report after she spoke with you and with your sister, 'Elisiva, and the town officer.
- [12] She says that you are 49 years old (your brother, the complainant, being 39) and that you were married but now divorced and that you live with 2 children and your ex-wife lives with 3 of the children of your marriage. You now live with a partner but have no children with her.
- [13] She says that your parents had 13 children and you are the sixth, and that you attended 'Atenisi school but left in form 4 due to "laziness" and staying away from school. You grow crops for your livelihood.
- [14] She says that you regret and are genuinely remorseful for what you have done and that you are trying to quit drinking alcohol and that you have apologised to and have made up with your brother. That is confirmed by your sister, 'Elisiva, who says that you and your brother have already reconciled and have resumed your normal bond as brothers. She also notices that you do not drink alcohol anymore and that you have changed in a positive way.
- [15] The town officer, Saineha Lautaimi, also confirms that. He says that you are one of the good and hardworking members of the village and that what

happened was a “drunken matter” and that you and your brother are still on good terms, and that you have continued to live together with your brother.

[16] The probation officer accordingly recommends that you be given a suspended sentence but that you be on probation and to do the following things:

- (a) undertake and complete the alcohol awareness course of Salvation Army,
- (b) do not drink any alcohol during the probation period, and
- (c) carry out community service.

### **Crown submissions**

[17] Crown counsel, Ms. `Aholelei, does not agree with that recommendation. She says that, in accordance with other cases similar to your case, an imprisonment sentence of 2 ½ years is appropriate for what you did, but that the last 12 months of that sentence be suspended for 2 years on condition that

- (a) you do not commit an imprisonable offence,
- (b) you be on probation,
- (c) you reside where directed, and
- (d) you complete the alcohol awareness course.

[18] The cases to which she referred are:

(a) ***R v Finau*** (CR3/2020) where a 61 years old man attacked his 63 year old brother with a machete as a result of which the brother lost his ring finger and half the little finger while they were both drunk and after they got into an argument. A starting point of 3 ½ years was reduced to 2 years because of his –

- (i) cooperation with the police,
- (ii) guilty plea,

- (iii) having no conviction for 40 years, and
- (iv) remorse and complete forgiveness by his brother.

He was further given a full suspended sentence on conditions:

- (i) not to commit an imprisonable offence,
- (ii) be on probation,
- (iii) reside where directed, and
- (iv) carry out 40 hours community service.

(b) ***R v Helu*** (CR325/2020) where the accused chased after and cut a deep laceration on the right arm of a 17 year old person with a machete without provocation and without alcohol being involved. A starting point of 3 years was reduced to 2 years because of his early guilty plea, cooperation with the police and good previous record and his remorse. The final year of that sentence was suspended for 2 years on conditions:

- (i) he did not commit an imprisonable offence,
- (ii) he be on probation,
- (iii) he reside where directed, and to
- (iv) complete the alcohol aware course.

### **No submissions of accused**

[19] No submissions were made by you or your counsel as I had directed (with the consent of your counsel) on 2 September 2021, and of which you were aware.

### **History of offences**

[20] Looking at your previous convictions, you were convicted of drunkenness 3 times in 1991 and twice in 1992. You were convicted of causing bodily harm and assault in 1991 and of causing grievous bodily harm, assault and drunkenness in 1993. You were 22 years old at the time. You then had no

offence until 2012 when you were convicted for housebreaking and theft for which you were sentenced to 3 months imprisonment but suspended for 2 years, and to pay \$100 compensation.

[21] It is clear that you have had a problem with drinking alcohol in your early adult life and it appears that you still do and that it has got worse because you have now manifested violence when drunk as well.

[22] It also appears that it has come about after the prolonged bout of drinking which you and your brother were doing on this occasion all through the night and into the next day. That was most irresponsible and it shows that you do not know when to stop. It is only fortunate that you did not cause a worse injury, or death, as a result of your irresponsible drinking.

### **Extent of the injuries**

[23] One of the critical considerations in sentencing in any bodily harm case is the extent or seriousness of the injury or injuries caused. However, I am not provided by the Crown with any information about the seriousness of the injuries which you caused to your brother. I am not provided with the medical report of the injuries, and Crown counsel does not describe the injuries in any detail, and no photograph was produced.

[24] Therefore I have only the description which the doctor gave which counsel conveyed namely, that all the injuries were "superficial lacerations", which I take to mean that the lacerations, or cuts, were not deep or serious, although, counsel says that the complainant told her that he "was stitched up on the same day and was discharged". A cut or laceration to the scalp would necessarily need to be "stitched up", not because it is serious but because, if not stitched up, it would leave a scar, or a worse scar, on the scalp which would cause embarrassment to the injured person later in life.

[25] So that the fact that stitches were carried out to the cuts of the complainant, without more information about the cuts, does not make the superficial lacerations of the complainant necessarily serious.

### **Knife used and how used**

- [26] Because of the description by the doctor that the injuries were superficial lacerations, despite the repeated blows delivered by the accused with the knife which caused those injuries, that, to me indicates that the blows were not with a machete but with a much lighter knife.
- [27] That is also relevant in considering sentence. The size, length, weight, sharpness and flexibility or otherwise of the blade are important.
- [28] How the knife was used is also relevant. If the knife was small and light it may still be a lethal weapon if it is used by way of stabbing rather than by way of a hacking motion. In this case, the description of the way you used the knife was hacking rather than stabbing instead.

### **Less serious causing**

- [29] The offence which you have committed is serious causing bodily harm and it is a serious causing because you used a weapon or dangerous object to cause the injuries to your brother.
- [30] But because the injuries caused to your brother were not serious, as described by the doctor, your case may be distinguished from the two cases to which the Crown has referred. In ***Finau's Case***, a machete was used and it was used by way of slashing, or hacking motion, which severed the ring finger and half the little finger of that accused's older brother. In ***Helu's case***, a machete was also used, and it was similarly used to cause a deep cut on the right arm of the 17 year old boy.

### **Starting point**

- [31] I therefore think that, whereas a starting point of 3½ years and 3 years were considered appropriate in those two cases, a starting point of 2½ years is appropriate in your case because although the cuts were not serious they were delivered some 12 times, causing 12 cuts to your brother on his head, forehead, arms and thigh.

### **Sentence duration**

[32] From that starting point, I would deduct 1 year on account of your guilty plea, your cooperation with the police and your remorse and the complete forgiveness which your brother has given you, leaving a sentence of 1 ½ years.

### **Suspension**

[33] I now have to consider the question of suspension of that sentence. The Court of Appeal listed 4 situations, in the case of *Mo'unga* [1998] Tonga LR 154, in which an imprisonment sentence may be suspended, and they are as follows:

- (a) where the offender is young, has a previous good record or has had a long period free of criminal activity;
- (b) where the offender is likely to take the opportunity offered by the (suspended) sentence to rehabilitate himself or herself;
- (c) where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, presence of provocation, or coercion by a co-offender, and
- (d) where there has been cooperation with the authorities.

[34] I consider that you may be eligible for suspension of your sentence under situation (b), because you have already apologised and your brother has forgiven you and that you have made up and have continued to live together peacefully with him at your parents' home, and I accept that you have refrained from drinking as you have told the probation officer and which is confirmed by your sister. I therefore consider that you are likely to take and make proper use of the opportunity offered by a suspended sentence to rehabilitate yourself to refrain from drinking and violence.

[35] I also consider that you may be eligible for suspension under situation (d) because you cooperated with the police when you were arrested and you readily admitted to them what you had done.

[36] A suspension of your sentence does not mean that it is cancelled. It is still there and if you re-offend during the period of suspension, you will still serve that sentence as well as the sentence for the subsequent offence.

[37] I however think that you need counselling with regard to drinking and to control of your temper as recommended by both the probation officer and Crown Counsel.

### **Sentence**

[38] I therefore sentence you, Kalapu Felemi, for the offence of serious causing bodily harm to Tesimoni Kalapu at Tatakamotonga on 9 January 2021, willfully and without lawful justification, contrary to S.107 (1), (2) (c) & (4) of the Criminal Offences Act, as convicted under count 1 of your indictment, to 1 year and 6 months imprisonment, but which sentence is suspended for 2 years from today, upon the following conditions:

- (a) you are placed on probation;
- (b) you will report to the office of the probation service with a copy of this sentencing within 24 hours after receiving it;
- (c) you will undertake and complete the alcohol awareness and anger management courses of the Salvation Army;
- (d) you will not drink any alcohol; and
- (e) you will not commit any offence punishable by imprisonment during the period of suspension.



Niu J

**J U D G E**

**Nuku'alofa: 28 October 2021.**