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SIU 'I VAHANOA TU'IPULOTU

SENTENCING REMARKS

BEFORE: Acting Lord Chief Justice Afeaki
Appearances: Mrs S. 'Aleamotu'a for the Prosecution
The Defendant in person
Date: 18 November 2021

CORRIGENDUM

Pursuant to the order of the Court dated 22 November 2021, the following sentencing remarks are to replace those issued on 18 November 2021.

The charge

1. On 13 October 2021, at the conclusion of his trial, the Defendant was found guilty of one count of serious housebreaking, contrary to s 173 (1) (b) (5); and one count of robbery, contrary to s 154 (1) of the *Criminal Offences Act*.

The offending

2. On or about 18 December 2019, at Ma'ufanga, the Defendant entered the victim, Mr Xiu Ming Zhou's store by stealth where he stole some goods, violently attacked Mr Zhou by punching him six or seven times in the face, stole some more goods and his cell phone.
3. The victim had left his store for a short time to get new stock from a nearby bakery. He locked the front door of his store, but not the back door. When he returned, he opened the front door and the Defendant was standing inside. The victim shouted at the Defendant to get out of his store, but when he tried to push the Defendant away, he punched him in the face around his eyes. The victim then fell to the floor and the Defendant continued punching him. The

Defendant then took some goods and the victims' mobile phone and left the store.

4. A formal complaint was lodge against the Defendant and he was apprehended by the Police. When questioned, he did not co-operate with the police.

Mental Health Assessment

5. On 26 February 2021, pursuant to s 18 of the *Criminal Offences Act*, as recorded in his later Verdict of 13 October 2021, Lord Chief Justice Whitten, following an appearance and comments by the Defendant, responsibly considered that the Defendant needed a mental health assessment before he could be arraigned for the charges.
6. This was necessary because in circumstances where mental capacity becomes an issue, the Court must find out by an assessment by a qualified expert, whether or not a Defendant is mentally fit to plead to the charges against him.
7. Under s 63 of the *Mental Health Act*, His Honour ordered an expert psychiatric assessment of whether or not the Defendant was mentally fit to plead and the Defendant was evaluated by a Psychiatric Specialist.
8. The Psychiatric Specialist, Dr Puloka reported on 25 March 2021 that the Defendant was fit to plead and that on the date of the alleged offending, he was unlikely to have been mentally insane [*see paras 7, 8, Whitten LCJ, Verdict, 13 October 2021*].

Crown's submissions

9. The Crown submits the following as aggravating factors:
 - (i) the seriousness of the offending;
 - (ii) violence was used against the victim;
 - (iii) the Defendant entered the store as a trespasser;
 - (iv) the injury caused by the Defendant;
 - (v) the emotional trauma suffered by the victim as a result of the offending;

- (vi) the Defendant was intoxicated;
- (vii) he showed no remorse; and
- (viii) the Defendant has previous convictions.

10. The Crown submits no mitigating factors exist.

11. The Crown submits the following as comparable sentences:

(a) *R v Te'ekiu, CR 56/2016* – the Defendant was charged with one count of robbery. He had punched the complainant on the face and took about \$400. He pleaded not guilty and was later convicted and sentenced to 2½ years' imprisonment for the robbery charge, with the final 9 months suspended on conditions. For the common assault charge, he was sentenced to 6 months' imprisonment, to be served concurrently with the robbery count and pay compensation of \$300.

(b) *R v Pongi CR 33/2015* – the Defendant pleaded guilty to one count of serious housebreaking and robbery. A starting point of 5 years was imposed, reduced by 12 months for mitigation, resulting in a sentence of 4 years' imprisonment. The final 18 months of his sentence was suspended on conditions.

12. Here the Crown submits the following sentencing formulation:

- (a) the head sentence is count 2;
- (b) a starting point of 5 years' imprisonment;
- (c) no reduction of his sentence; and
- (d) no suspension.

13. The Crown provided a report of the Defendant's previous convictions. His previous criminal convictions make a depressing read of no less than twenty-two (22) convictions from 1990 to 2020.

162/90	Drunkenness	Fine \$15 or 7 days imprisonment
122/91	Drunkenness	Fine \$5 or 2 days imprisonment
232/05	Drunkenness	Fine \$30 or 2 weeks imprisonment
410/05	Drunkenness	Fine \$100 or 2 months imprisonment
382/05	Drunkenness	Fine \$30 or 2 weeks imprisonment
593/08	Drunkenness	Fine \$50 or 2 weeks imprisonment
643/09	Drunkenness	Fine \$20 or 7 days imprisonment
775/09	Drunkenness	Fine \$40 or 2 weeks imprisonment
266/11	Assault	Fine \$150 or 2 months imprisonment
341/14	Drunkenness	Fine \$200 or 1 week imprisonment
83/15	Drunkenness	Fine \$160 or 4 weeks imprisonment
325/15	Drunkenness	Fine \$100 or 2 weeks imprisonment
27/15	Drunkenness	Fine \$100 or 2 weeks imprisonment
271,119,94/16	Two counts of theft and one count of bodily harm	A total of 9 months imprisonment and 100 hours community service
1281/16	Drunkenness	Fine \$500 or 1-month imprisonment
119/16	Failure to comply with court order	6 weeks imprisonment
496/17	Bodily harm	3 months imprisonment
1897/17	Drunkenness	Fine \$200 or 3 months imprisonment

485,486/20	Housebreaking and theft	3 months and 6 months imprisonment, served concurrently
500,501/20	Housebreaking and theft	2 months imprisonment
807/18	Drunkenness	Fine \$400 or 2 months imprisonment
174/20	Drunkenness	Fine \$300 or 6 weeks imprisonment

Pre-Sentence Report

14. Siu Tu'ipulotu is 49 years of age. He is the third of ten children. He grew up in Ma'ufanga and in or about 1992, he went to New Zealand, lived there for 10 years or so, and then was deported back to Tonga after what he described as 'domestic violence' and the end of his marriage. He has two adult children, one in New Zealand and the other in Australia.
15. Since his return to Tonga circa 2005, he was in a de-facto relationship and had then married that woman, but which union later ended by divorce. Three children are the issue of that marriage, but they do not live with him. There was no evidence in the Report about the children's' dependence status or the Defendant's responsibilities to them. He is nearly 50 years old and his parents are now elderly and according to the Report are understandably worried about the Defendant's behaviour.
16. The Probation Officer reported that the Defendant cultivates taro for his own food and which he also sells and that he indicated that he was not comfortable that he "did not fully admit the offences". However, it is noted that despite the Court found that he did indeed commit the offences which he has been convicted of.
17. The Defendant has previous convictions in the Magistrate's Court for various offenses including drunkenness, assault, housebreaking, theft, and bodily harm. However, it is notable that drunkenness and violence are a part of his personal history and he has convictions showing a pattern of intoxicating

himself and visiting violence on other people. His history and the evidence before the court indicate drug and alcohol addiction is a serious problem for him.

18. In relation to the offending, the probation officer reports that the Defendant admits that he understands the seriousness of the offending and the consequences to be faced, especially by his family. He is remorseful and is working on changing his life around. He indicated that he had said sorry to the victim. Although there is no corroborative evidence of any apology having been made to the victim, Mr Zhou or whether, if he did receive an apology, he has actually accepted it.
19. The probation officer concluded that a custodial sentence would be appropriate.

Starting points

20. The statutory maximum penalty for both robbery and serious housebreaking is 10 years' imprisonment.
21. In *R v Fifita* [2020] Tonga LR 289, the Court of Appeal observed that:

"The purpose of a sentence imposed on an offender are to punish so far is just and fitting in the circumstances; the deterrence of criminal behavior by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law abiding members of the community."
22. Following those clear principles of sentencing, the Court finds that in this particular case, protection of the community as well as deterrence of criminal behavior by members of the community are very high priorities.
23. Punishment of the Defendant is also in this case an important component of vindicating society's standards. It is also hoped that rehabilitation of the Defendant to return to fulfilling a useful role in his family, supporting his children and to society in due course. This is a desired outcome of the sentencing process.

24. In the Court of Appeal case of *R v Misinale* AC 13 of 1999, the decision provided clarification that sentences must be consistent for all types of offending and that the similarities between the present case and others need to be taken into account. The question then arises: what is a sentencing starting point for serious housebreaking and robbery?
25. Additionally, from the early stages of his first conviction in November 1990 it is apparent that the Defendant was a teenager grappling with drunkenness and he was convicted of it again six months later in 1991. No further convictions arose in Tonga from 1991 until 2005 which may be explained by the accused's advice to the probation officer that he had gone to New Zealand and lived there for some fourteen years from 1992 until he was deported to Tonga due to as he admitted, "committing offences including domestic violence" in his recollection, 2006.
26. However, he must have been deported to Tonga earlier than 2006 because his conviction record lists him as having been convicted of drunkenness on 10 May 2005, again on 12 July 2005 and again on 6 September 2005. There is a five-year gap with no convictions until unfortunately another spate of drunkenness convictions were entered against him on 8 June, 22 September and 20 October 2009.
27. Ten years ago on 15 September 2011, something changed in his behaviour which led to a conviction for Assault under the *Criminal Offences Act* being entered against him. Without any details of the offence other than the conviction itself, and no official record other than his admitted 'domestic violence' in New Zealand earlier on as disclosed to the probation officer, this is the first incident where the Defendant was convicted of a violent offence here in Tonga.
28. Another series of four convictions for drunkenness followed through 2014 and 2015 but another and higher level of more serious offending was manifest when on 13 May 2016 the Magistrate convicted of two counts of Theft and one of Bodily Harm Criminal Offences Act. He was sentenced to nine (9) months imprisonment and 100 hours' community service.

29. The escalation from drunken behaviour to violent offending and then higher again to theft accompanied by more serious violence was reflected in the nine-month custodial sentence plus 100 hours of community service, for which he received another conviction on 22 November 2016 for failure to comply with the court order and complete his community service. As a consequence, he was convicted and sentenced to six weeks in prison.
30. The Defendant's failure to complete community service in breach of the Court's orders is a contempt of court which is also taken into account in the context of this sentencing.
31. At trial, photographs were exhibited of the injuries to the victims face as a result of the Defendant's violent attack on him. Security video footage from the shop scene was played to the court.
32. The police witness for the Crown was Sergeant Bray Lauti who attended the Defendant's interview at the police station on 20 December 2019. At that time, Sergeant Lauti said the Defendant answered police questions by saying that he could not remember anything that occurred on the day because he was drunk.
33. The Crown prosecutor made submissions at the trial including that the force and violence used by the Defendant was not necessary. He was an intruder who entered the victim's store, assaulted him and stole from him and used violence to intimidate the victim into letting him continue to steal and then leave.
34. From what I have been able to discern from Lord Chief Justice Whitten's 13 October verdict, the Defendant's conduct at trial did not indicate that he had any remorse about striking the victim so many times and indeed sought to raise the issue of self-defense in an attempt to justify his beating the victim. Instead of showing any remorse the Defendant in his cross-examination questions of the victim, accused him of threatening him with a knife, which he sought to assert made him fear for his own life and then attack and beat the victim repeatedly in the head.

35. Having presided over the entire proceedings, Lord Chief Justice Whitten found the Defendant's statements, cross-examination of witnesses and overall conduct untruthful and unhelpful to his case.

36. By contrast on a full assessment of the evidence His Honour accepted the prosecution's evidence and submissions. He also noted at paragraph 40, that in respect of the Defendant's physical attack on the victim:

"Here the complainant was a man of short stature and light build. Although the accused was not much taller, he is of a stronger build and in his drunk and drugged state, would likely have presented to the complainant as a capable and unpredictable threat."

37. Further, at paragraph 42, His Honour found that:

"... I am not satisfied on the evidence that the accused applied force to the complainant as a means of defending himself from any perceived threat of attack by the complainant with the knife. The accused had already demonstrated an intention to steal from the store. His refusal to leave when challenged by the complainant confirmed that intention. The ensuing assault by the accused was therefore solely for the purpose of overcoming the complainant so that the accused could continue stealing from the store, which he did."

38. His Honour was able to find that beyond reasonable doubt, the prosecution had proven each of the elements of both charges and he found the Defendant guilty of serious housebreaking and robbery.

39. However, acknowledging the Crown's sentencing submission and taking into consideration the circumstances of the present case and comparative case law, I find it appropriate to impose a starting point of 3 years' imprisonment.

Mitigation

40. The Defendant did not appear to show any remorse at the trial, but it appears from the Probation Officer's Report discussed above, that in his recent interview, he does feel remorse. Whether that remorse has now arisen because

he was found guilty and has realized how serious his situation is, or whether he is now truly remorseful for the harm and trauma he has caused the victim and the consequences for his family, or both, I consider that he does now feel remorse.

41. Intoxication under the provisions of s 21 of the *Criminal Offences Act* is not a defence available in this case for the Defendant, either at his trial which has led to his conviction, nor in context of sentencing. Within this I refer to analyzing whether or not his ability to reasonably perceive the actions he was taking and make responsible decisions that a person in their right mind would make.
42. The law does not accept that the self-induced intoxication of the Defendant provides any excuse for violent criminal behaviour nor for thieving. However, it can be a factor that may be considered in respect to the state of mind of the Defendant and whether or not they had the ability to discern right from wrong at the relevant time.
43. Whilst there is evidence that the Defendant was intoxicated at the time of the offences, what is not clear is how intoxicated. His interview statement to the police the day after denying all memory of the events because he was drunk contradicts his apparently rather clear, and contested recollection at trial, of the sequence and nature of events demonstrated in his cross-examination of witnesses and also of his further statements and accounts given from the bar in conducting his own defence.
44. In the circumstances and to the limited extent that it was a possible consideration, I do not find that the fact of the Defendant's apparent intoxication to be a mitigating factor in his sentencing.
45. By way of considering mitigation, I have taken into consideration the fact that the Defendant did not plead guilty at the earliest opportunity, his decision not to co-operate with the Police when questioned, combined with his extensive criminal convictions.

46. I am aware that these factors do not weigh any reason for a reduction of his sentence. However, I am optimistic that he will use his time in prison to reflect on his past mistakes, stop drinking alcohol and to turn his life around hopefully for the better.
47. From his expression of remorse to the probation officer stated in the probation report and more importantly, shown in court this morning, it is now evident to me that he is now genuinely remorseful and regrets what he did.
48. Therefore, for that reason and despite the gravity of the offence, I am satisfied that he will rehabilitate himself whilst serving his sentence and with the rehabilitation steps to be taken afterwards, hopefully become a responsible member of society and properly contribute to caring for his children and his family. In these circumstances, I incorporate mitigation of his sentence by 6 months.

Suspension

49. Turning to the question of whether I should suspend his sentence, I have considered the principles in *Mo'unga* [1998] Tonga LR, and I am of the view that the Defendant does not weigh in favor of any suspension to his sentence. The Defendant is not young, he has a significant criminal history, he did not co-operate with the authorities, and his lack of remorse, are strong indicators that he is unlikely, at present, to take the opportunity afforded by a suspended sentence to rehabilitate.
50. The Defendant has appeared many times before the Magistrates' Court but this time appears to be the first time he has been arraigned with an indictment before the Supreme Court. This is because upon conviction for the offences of Serious Housebreaking and Robbery, the law provides heavy prison time of up to ten (10) years, dependent on various factors to be considered.
51. In the context of this serious, repeated and increasingly bad behaviour and attempts by the police and courts to punish and rehabilitate this man and protect law-abiding members of the community, on 18 December 2019, he committed Serious Housebreaking, Robbery and violently beat the victim in his own shop.

52. This is a tragic tale of a young man with good prospects from an upbringing in what appear to be a fine, decent church-going, law-abiding family becoming increasingly influenced by an addiction to alcohol and a lack of ability to control himself when he is under the influence of alcohol or other drugs.
53. His decisions have become worse as he grew older and he has been on a course of self-destruction for nearly 30 years from what his Criminal Conviction Record describes. His own alcoholic self-destruction is becoming more dangerous not only to himself and his family, but also to other people in the community because more and more, he is repeatedly demonstrating dark, violent behavior. The level of his violence is escalating. Unchecked, this behavior is putting other people at increased risk of being attacked, burgled and or robbed or worse, by him.
54. Imprisonment and rehabilitation processes have not worked on improving the accused's behavior. This is unacceptable because the Court has a primary duty to protect the law-abiding members of society from people who behave like this. A fundamental role of sentencing is to protect the safety of the people.
55. In addition, I note that the Defendant was not represented by legal counsel and that as a result, His Honour Whitten LCJ took extra care to ensure that the accused was advised of his rights as much as is possible in the circumstances, so that his rights were protected by appropriate legal procedural advice at relevant stages of the procedures in the court. Having noted this, the Defendant was not a stranger to the court environment and appeared well able to understand the processes as described to him and as recorded in His Honour's 13 October 2021 verdict.
56. It is unfortunate to note that there is no resourcing for a legal aid system in the Kingdom which might otherwise provide competent, experienced legal counsel to assist in important violent criminal cases such as this, in particular where conviction upon indictment carries a custodial sentence of up to ten years.
57. I am not reciting this in any way to complain about the Defendant's treatment leading up to and at trial because as is so apparent in his verdict, Whitten LCJ

has obviously been at pains to afford the Defendant sound, natural justice processes, to explain those at each juncture when the Defendant needed to make decisions about the conduct of his case and to record those steps clearly.

58. My purpose in mentioning the lack of legal aid resourcing for Defendants arises in the context of ensuring that a Defendant will be able to exercise his or her rights to receive a fair trial when pitted against the comparatively very significant resources of the State in serious criminal proceedings where imprisonment for lengthy terms is a possible outcome. This includes the consideration that, if the Defendant had had the benefit of competent legal counsel, he may well have received and possibly taken advice that his best option in the circumstances was to engage in discussions with Crown counsel, enter an early guilty plea, express remorse for the attack on the victim, saving Mr Zhou the trauma and time of trial, all on the basis of seeking some discount from a potentially long sentence of imprisonment.

59. This speculative discussion bears mention here because the Courts are duty bound to consider all aspects of what constitutes a fair and just sentencing in the totality of the circumstances.

60. For the foregoing reasons, I agree with the Crown's submission that no part of this sentence should be suspended.

Result

61. Having considered the reasons provided above; the risk to the community and the need to keep people safe, the need to send the clear deterrent message to the public and would-be offenders that violent robberies will not be tolerated, the Defendant's need for punishment and rehabilitation, and the need to provide some parity in sentences, the Defendant is convicted and sentenced to 2 ½ years or 30 months' imprisonment. Upon release, he will also:

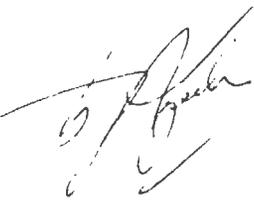
a) be placed on probation for 12 months;

b) report to the probation office within 48 hours of his release from prison;

- c) complete a course in drug and alcohol awareness as directed by his probation officer; and
- d) complete 40 hours' community service as directed by his probation officer.

NUKU'ALOFA
18 November 2021




Tu'inukutavake Barron Afeaki
ACTING LORD CHIEF JUSTICE