

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

ATTORNEY GENERAL'S OFFICE	
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CR 77 - 79 of 2021

REX

-v-

Rodney TOKI
Tuiaki Muli PAHULU
Taniela POHAHAU

SENTENCING REMARKS

BEFORE : THE HONOURABLE COOPER J
Counsel : Ms. E. Lui for the Prosecution
Defendants in person
Mr. S. Fili for Mr. Pohahau
Date of sentencing : 29 November 2021

1. The defendants in this case are to be sentenced for a string of armed robberies of Chinese run supermarkets in Tongatapu, three in all, which took place between 7th and 12th January 2021.

8th January robbery

2. On 8th January 2021 Mr. Pahulu was driving his car from Puke to Nuku'alofa, he met by chance Rodney Toki's brother along the road and gave him a lift his home.
3. When they arrived Rodney Toki got a lift from Mr. Pahulu to pick up Mr. Pohahau from Tokomololo.

4. The decision must then have been made to rob a supermarket because they next drove to Jinrong's supermarket in Ma'ufanga.
5. Mr. Pohahau and Mr. Toki ran inside. Mr. Pohahau was armed with a steel bar. As they did that Mr. Pahulu got out of his car and turned around the car registration plate to disguise it.
6. Mr. Pohahau threatened Mr. Jinrong, who was in his shop, behind the counter. He initially held the steel bar over his head with both hands in a gesture as if to club Mr. Jinrong with it, telling him not to move, while Mr. Toki rushed him coming around behind the counter. They both grabbed the contents of the register and fled the shop.
7. A total of \$1,500.00 in cash was taken.
8. Mr. Pohahau and Mr. Toki then ran out the shop and Mr. Pahulu drove them away and they escaped and shared the cash amongst themselves.

9th January robbery

9. The next day, 9th January 2021 at approximately 1130 hrs Mr. Pahulu drove to pick up both his co-defendants.
10. Again, Mr. Pahulu's role was get away driver and look out.
11. Mr. Pahulu drove all three to Quaing's supermarket at Kapeta.
12. It was just at the time for closing up the shop when they struck. Mr. Qiang was behind the cash register looking at his mobile phone and his brother Xiaowang Yu was pulling the shutters across to close the store for the night.
13. Mr. Toki armed with a knife and a Mr. Pohahau armed with a machete burst in. Mr. Toki covered his face with a T shirt with eye holes cut out, Mr. Pohahau used a brown hoodie to disguise himself, wrapping it around his head and face.
14. They rushed into the shop. Mr. Toki went straight to stand by Xiaowang Yu while holding the knife in his hand to menace him.
15. Mr. Pohahau rushed the counter climbing on to it and lying across it brandishing the machete so at the same time both forcing Mr. Qiang back and away from the register

and allowing Mr. Pohahau to pull open its drawer. Both Mr. Mr. Pohahau and Mr. Toki then riffled through the register, alternating who was guarding Xiaowang Yu, until they had seized all the cash, putting it in a plastic bag, making their way to the entrance to the store, concealing their weapons and checking they could make their get away, before doing so.

16. They got away with \$1,900.00 , fleeing in the car their co-defendant drove.

11th January robbery

17. Two days later on 11th January 2001 in at about 1800 hrs, Mr. Toki and Mr. Pahulu drove together and bought some drugs then returned via Ms. Huang's shop in Tofoa.
18. Armed with a knife and a machete respectively Mr. Pahulu and Mr. Toki, both covered their faces with vests.
19. Ms Huang had momentarily moved from behind the till. A third robber ran around behind the counter and Mr. Toki hid himself in an aisle with his machete.
20. As Ms Huang came back and realised there was someone stealing from her shop, Mr. Toki sprang from out of the aisle and pointed the tip of the machete towards her face before brandishing it over his shoulder as if to strike her with it and holding his finger to his lips to bid her be silent.
21. They escaped with the items they stole and Ms Huang bravely tried to follow, she went to the getaway car and tried to wrestle some items back out of Mr. Toki's grasp before he pushed her to the ground. But she got up and tried again to get back into the car as it pulled off and left her grasp.
22. They took \$7,400.00, and a handbag containing amongst other things three Chinese passports and also an iPad that was to hand.
23. They then drove to Mataki'eua and discarded the passports and iPad and divided the money.
24. Meanwhile Ms Huang had contacted the police and handed over the shops CCTV recordings.

25. That CCTV appeared to show Mr. Toki as one of the assailants and it led the police executing a warrant to search his home address. He was arrested there and when he was cautioned admitted the robbery on 11th January and implicated Mr. Pohahau.
26. The search recovered 3 knives and a machete, trousers and a T shirt that matched items they were concerned with as well as \$1,200.00 in cash hidden under the floor boards.
27. They were led to the discarded property from Ms. Huang's shop at Mataki'eua. They recovered a red handbag that contained MBF bank books belonging to Ms. Huang and a Chen Jun as well as the passports of those two and of a Chen Ligan.
28. CCTV from the shops on both 8th and 9th January were similarly seized and examined. In turn the co-defendants were arrested.
29. All were interviewed and Mr. Toki and Pahulu both admitted the offending. Mr. Pohahau declined to be interviewed.

Comparable sentences

30. Armed robbery carries a maximum sentence of 20 years and a greater starting point is appropriate when lethal weapons are employed.
31. There are two aspects to sentencing that are at the fore of my mind, firstly what is the correct tariff for armed robbery where a lethal weapon is used but there are no injuries caused ? Secondly, how to calculate the overall sentence where there are a string of offences of a similar character ?
32. In the first robbery a steel bar was used as the weapon to threaten the victim, but in the latter two robberies the weapons on both occasions were a knife and a machete.
33. The steel bar in the first robbery appears to be a meter in length. In fact if one watches the CCTV for that robbery, the inside camera, camera 2 and slow that down at 07:57:36 one can see the end that is raised above the head of the robber is curved around and it has every appearance of being a crow bar and I am sure that is what it was.
34. In relation to the second robbery the knife appears to be kitchen knife with a black handle and a blade at least some 6 inches long, the machete has a blade that appears to be at least a meter in length, both plain to see on the CCTV.

35. In the third robbery, by looking carefully at the CCTV clips that were served, viewing the camera entitled “Entrance & Exit” and slowing down the playback to as much as one can, at 13 seconds from the start, the robber with the knife, Mr. Pahulu, can be seen holding it in his left hand as he ran into the shop, the blade protruding down from his clenched hand and it appears to be some 6 inches in length. The other robber, Mr. Toki, had the machete and just like in the robbery of 9th January that appears to be one with a blade at least a meter in length.
36. In relation to each offence no one was struck with any of the weapons or physically injured in any way.
37. That said these would have been terrifying incidents for the victims and that fear would plainly leave some form of lasting impression.
38. Cases where lethal weapons were used in armed robberies and injury sustained to the victims the starting point has been one of 10 years, for example *Samuela 'Alatini v Rex*, AC 4/2018, a shotgun was used to shoot a man who tried to stop the robbery; the Court of Appeal concluded that a starting point of 10 years was the correct approach.
39. *Heamani Lopeti v Rex*, AC 11/2018 a robbery where the victim was struck with a machete and seriously injured by the defendant.
40. *Rex v Alaisia Matangi* CR 68/18 and 117/18, these were two separate offences of armed robbery. The first a robbery of a restaurant armed with a machete, the second breaking into the residential home of a Chinese couple where two men burst in and brandished knives to rob the victims.
41. The starting point of 8 ½ years was adopted for the first offence and 7 years for the second.
42. *Rex v 'Amoni Fifita & Pakileata Fukofuka* 49 & 51 2017 Cato J went on to consider the appropriate tariff for a case of armed robbery where a machete had been brandished but not used and no physical injuries had been inflicted.

“Thus, in *Maikolo Fifita* CR 109-11/ 15 the starting point I adopted was 10 years where the accused was one of three men who had pleaded guilty to an armed robbery of a Chinese store in Vava’u using a rifle as a weapon. There was no injury in that case, but in *Sefo Moala* Cr

166 of 2012 on a charge of attempted robbery where the prisoner had shot a service station employee in the leg I sentenced him to 9 years imprisonment.”

43. He then adopted a starting point of 8 ½ years.
44. In *Foliaki v Rex* [2015] TOCA 12, the co-defendants in *Samuela 'Alatini v Rex*, the Court of Appeal took into account the aggravating features of disguises, vulnerable victims and planning, as well the “...deployment of firearms and the actual violence inflicted.¹” before confirming 10 years was the correct starting point.
45. In this case the prosecution have submitted that for each defendant in respect of each’s head count a starting point of 10 years is appropriate.
46. I have carefully considered their submissions on this and also the cumulative sentence that they submit ought be passed.
47. Following the analysis of the cases concerning armed robbery I consider the Crown’s submissions arrived at too high a tariff.
48. I go on to consider each defendant in turn, the offences they pleaded to and their roles, back ground, pre-sentence report and ages.
49. I shall also go on to analyse how the courts have approached cumulative sentences in like cases.
50. For Mr. Toki and Pahulu I take as the head count the 11th January robbery, where the victim was a woman, Ms Huang and the machete was pointed at her face by Mr. Toki when he jumped from out of the aisle to surprise her and stop her trying to thwart the robber going through the till and stealing the money and other items.
51. The victims in each case were vulnerable, soft targets, sometimes trapped behind their tills and unable to escape let alone protect themselves. These were gang robberies and as noted, armed at that.
52. Disguises were used and they were planned. At least on one occasion their car licence plate interfered with so as to try to evade detection.

¹ *Samuela 'Alantini v Rex* AC 4 2018; at paragraph 8

53. In respect of Mr. Pohahau the head count is the robbery 9th January 2021 when both shop keepers were threatened with the machete and the knife.
54. Next I turn to the question of how I should approach the overall tariff for the series of offences.
55. *Rex v 'Alamoni Makafilia* CR 87/2019 & 19/2020, three armed robberies were considered, with sentences of 11 years, 12 years and 10 years imposed. The first three years of the first was cumulative to the second giving a total of 15 years; two years of the third cumulative to that to give a total of 17.
56. In *Samuela 'Alantini v Rex* the appellant was sentenced for two offences, a March 2008 robbery and a May 2008 armed robbery. A cumulative sentence of 13 years was considered the correct tariff (before the discount of 25 % for an early guilty plea and then the activation of a suspended sentence gave the final tariff 12 years and 9 months).
57. The point I make being the Court of Appeal took the 3 years of the robbery sentence to add the armed robbery sentence for two separate offences committed relatively closely in time.
58. I respectfully consider that approach puts into effect a careful consideration of the totality principle, I have seen it used in these two examples and as such it provides a formula I shall adopt.
59. In *Rex v 'Amoni Fifita & Pakileata Fukofuka* Cato J stated of offences of armed robbery :

“The principal sentencing rationales for this kind of offending is deterrence and protection of society, and sentences for armed robbery must reflect this.”
60. He could well have added that the need for punishment for committing these vicious offences was essential.

Mr. Toki

61. He is 27 years old and has 6 previous convictions for 9 offences from 2014 and 2020, including 2 for robbery, both in 2016, the second of which he received a sentence of 6 years' imprisonment, the final 18 months suspended. Other offences include 4 for theft as well as serious house breaking and common assault.

62. His probation report concludes that he was untruthful with the report author when stating drugs was not a factor in the commission of the offence. It notes that he is not active in his community, has no significant educational achievements. He has no children and has not been married. He has never been formally employed, saying he relied on his father's plantation income and his mother's weaving of traditional mats for his money.
63. He stated the offences were not planned, but given the lengths gone to with the disguises and weapons, that does not appear to be true. He claims to have paid back some of the money to a store keeper in these robberies, but that was not confirmed and out of \$10,800 taken in all three robberies, only \$1,200 of his share was recovered.
64. The report writer concluded that he showed no genuine remorse and was a "high risk" or re-offending. And noted "He also has a substance abuse problem...[and] continues to be a threat to society especially foreign residents seems to be his target group."
65. It is of note that he failed to complete the rehabilitation program of his robbery sentence in 2017 saying only that he had forgotten to.
66. He pleaded guilty to three counts of armed robbery on the morning of trials.
67. I take the head count the robbery 11th January 2021. For that offence I impose a sentence of 8 ½ years, the offence on 9th January 2021 a sentence of 8 years and the offence on 8th January also 8 years.
68. 8 ½ years for the head count I consider appropriate, even where these were group robberies, with the attackers wearing disguises and the targeting of vulnerable people. To increase it above that is to stray into the territory of sentences for offences where weapons were used, for example *R v Sefo Moala* Cr 166 2012, an attempted robbery where a service station employee had been shot in the leg, attracted a sentence of 9 years' imprisonment.
69. I have therefore distinguished between robberies with the use of lethal weapons and being armed but not using the weapon to injure, accepting still those aggravating features I mention above.

70. Adopting the formula as mentioned above, 3 years 9th January and 2 years for the 8th January offences will both be taken cumulatively and added to 11th January offence. Giving a total of 13 ½ years' imprisonment as a starting point.
71. For his late guilty plea there shall be some discount but it can not be more than 10 %. For which I shall deduct 1 year 3 months so giving a total of 12 years and 3 months' imprisonment.

Suspension

72. As for suspension, I consider the case of *R v Mo'unga* [198] Tonga LR 154 paragraph 130.
73. Mr. Toki is 27 years old, so no longer a young person. The considered approach is that a Young Adult is a person up to the age of 25². Until that age the brain is still developing neurologically and research strongly supports the view that Young Adults are a distinct group with needs different to people under 18 and those over 25.³
74. While I have considered this and there will not necessarily always be hard a fast distinctions, returning to the criteria at hand Mr. Toki has not been out of trouble for a long time, the contrary and his record is not good. He has shunned opportunities at rehabilitation in the past, I consider there are no factors that diminish the culpability and his co-operation is questionable in the light of his not guilty plea and demonstrable lack of empathy with probation.
75. For all these reasons there can be no part of his sentence suspended.

Mr. Pohahau

76. He is 27 years old, 28 in January and falls to be sentenced for armed robbery and for abetment of armed robbery. Those are the offences said to encompass his criminality by virtue of his involvement in the offences 8th and 9th January 2021.

² 'The treatment of young adults in the criminal justice system': UK House of Commons Justice Committee (October 2016); 'Young adults in the criminal justice system' House of Commons Justice Committee (June 2018).

³ UK Equal Treatment Bench book. Chapter 2, paragraph 20 et seq. <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-cover-scaled.jpg>

77. Like Mr. Toki he is both 27 years old and has a number of previous convictions recorded against him; 8 convictions for 19 offences over 10 years from 2010 to 2020.
78. There are 8 for house breaking and 10 for theft and 1 for escape from prison and has variously served sentences ranging from 3 months to 2 years and 3 months' imprisonment.
79. His pre sentence report is not as detailed as Mr. Toki's. It notes he is a father to a 7 year old child and has been in a steady relationship with his partner and they intend to marry. He supports them by working on an allotment.
80. The probation officer states that Mr. Pohahau is remorseful.
81. I conclude that given he did not plead until the morning of trial, the level of violence that he was involved in as well as his previous record he is also at a high risk of reoffending and is a danger to society.
82. The right offence to have charged him with in respect of 9th January was also armed robbery, not abetment. But it matters not at this point, in respect of sentencing powers it is still 20 year maximum and I shall sentence him for his role in that offence accordingly.
83. In the offence on 8th January 2021 Mr. Pohahau had the crow bar and in the robbery the next day he was armed with a machete.
84. Following the authorities and structure and approach to reaching the correct starting point I make the offence 9th January the head sentence and he gets 8 ½ years for that offence and for the offence on 8th January 8 years.
85. Three years from that 8 is to be cumulative to the 8 ½ and so his starting point is 11 ½ years.
86. For his guilty plea he gets a discount of 10 % which I shall round up to 14 months.
87. That gives a sentence of 10 years and 4 months.

Suspension

88. I apply the same criteria as I did for Mr. Toki and consider the *R v Mo'unga* guidelines.

89. Given his age, his criminal record and that nothing about the offences diminishes the culpability and that any apparent earlier cooperation is marred by his not guilty pleas until the morning of trial, I can find nothing, when applying the relevant principles, that would allow me to suspend his sentence.

” Mr. Pahulu

90. His is 23 years old. He is to be sentenced for his role in the offences of 8th and 9th and 11th January 2021.

91. He has a conviction for drunkenness in 2015 and a sexual assault matter in 2017 when he was sentenced to 2 ½ years’ imprisonment.

92. He is classified as being at moderate risk of re-offending. That said he was the only one to be forthcoming about the role of drugs in their offending and to enter a timely guilty plea.

93. He had this year secured himself employment in construction and was earning \$50-\$80 a day.

94. Mr. Pahulu married this September and completely changed his peer group, his attitude to life has been said to have turned around from the way it was at the start of the year when these offences were committed and leading up to that time.

95. He is to be sentenced for the armed robbery 11th January when he had the knife and took the money from the cash register Ms Huang had momentarily turned her back on, while Mr. Toki stood watch and then threatened her with the machete he carried.

96. 8th and 9th January his role was driver, taking the robbers to the venues and then driving them away.

97. He would have well known on 9th January that weapons were to be used and I infer that on 8th too, which stands to reason as there would have been a discussion as to roles that Mr. Pahulu was privy to and the crow bar plainly must have been in the car he was driving before that robbery.

98. When I consider carefully the CCTV of the 11th January robbery when he took the knife into the shop he plainly went there armed, but there is no evidence he produced it or threatened anyone in the shop.
99. All three camera angles I have reviewed at the slowest play-back speed whereby it takes 3 seconds to play 1 second's worth of footage.
100. Mr. Pahulu was the man who went around the counter and after taking the cash jumped onto it and then over and made his way out, loosely shaking himself from Ms Huang's grasp, as she tried to follow, but not fighting her, then he got into the driver's seat of the car.
101. There is no sign of the knife after he ran from the car towards the shop. Once in the shop, from then on, there is no evidence he had the knife in his hand.
102. When he escaped over the counter and then shook himself free of the pursuing Ms Huang, there is no evidence he had the knife in his hand then either.
103. Of course this is a joint enterprise and he was part of a group that robbed Ms Huang whereby he was fully aware of Mr. Toki having the machete.
104. But there is a distinction to be drawn, albeit not vast. For him I consider the correct starting point for 11th January robbery is 8 years.
105. For his involvement in the offences 8th and 9th January 2021 6 years for each and I shall take a year of each sentence and add to the head count to give 10 years. I do not add more than a single year from each because his role was very different for those earlier offences. He did not leave the car, he did not have weapons nor did he put others in fear.
106. Like the point I made just now about joint enterprise, he facilitated the others in their robberies and menacing of others with weapons; but I do draw a distinction in my approach to the overall sentence where this younger offender was not armed nor entered the venues in question.
107. That cumulative 10 year tariff I reduce that by 30 % for his timely guilty plea. That gives 7 years.

108. Mr. Pahulu falls into the category of Young Adult, as noted above.
109. For that and his cooperation with the police and because of the real attempt to change his life for the better I reduce that by a further 24 months to 5 years.
110. Because of the well founded hope that he can turn his young life around given his finding work and the reports as to his new determination for the better I am prepared to suspend the last 2 years of his sentence for 24 months on the recommended conditions, that on his release he :
- i. Report to the probation office and be put on probation;
 - ii. Live where directed by his probation officer, and
 - iii. Complete a drug rehabilitation program.
111. That gives total sentences of 12 years and 3 months' imprisonment for Mr. Toki; 10 years and 4 months' imprisonment for Mr. Pohahau. Mr. Pahulu 5 years the last 2 of which are suspended for 24 months as above.
112. Mr. Toki's sentence will be back dated to his remand 31st August 2021.
113. Any error in the maths can be mentioned and dealt with administratively.

NUKU'ALOFA
29 November 2021



N. J. Cooper
J U D G E