



fracture and displaced nasal bone, fracture of a wall of the left eye orbit, and some degree of post – traumatic stress disorder. He was abandoned having been driven for a lengthy distance into bushland.

[2] On sentencing, Mr Ngaue appeared to accept in statements to his probation officer that he and Mr Tupou were involved in the events of that morning, but Mr Tupou continued to maintain his innocence to his probation officer until his counsel Mr Corbett acknowledged to the Court on sentence that he too now admitted his involvement. Both men, accordingly, now it seems accept that the evidence they gave under oath to this Court denying participation was false.

[2] The aggravating features of this robbery (and I propose to take the robbery as the offence on which I will impose the head sentence) were that it involved a combined assault on a slightly built Chinese man working alone tending his market garden on the 21<sup>st</sup> November, 2014 near the township of Nuku'alofa around day break. He recalled receiving a blow which rendered him unconscious and he recalled little of what happened, afterwards. He was then taken in his vehicle several miles where he was callously abandoned in bush area by the prisoners. Fortunately, somehow he made his way to the road, where he was assisted to hospital. He spent 7 days in hospital before being discharged. He was, plainly, at trial still distressed about what had happened and understandably so. Giving evidence about the matter was plainly an ordeal for him. Having abandoned him, in a bushy area, which I consider a significant aggravating feature of their offending, the prisoners then drove his car to another remote area where it was set alight.

[3] The actions of the prisoners who are both in their mid twenties, they being stepbrothers, were in my view premeditated, callous, brutal and ruthless with no apparent consideration for the welfare of the victim or his property. Mr Aho submitted that this was conduct at the upper end of the 10 year period for robbery. I agree. Mr Corbett in

his competent submissions drew to my attention the case of Rex v Kafalava, [2006] TOSC 10 CR 226-9-2005 (26 May, 2006) where Ford J had imposed sentences of 7 years for robberies where an gun was used and another in which the victim had also received quite serious injuries. Those sentences were arrived at after guilty pleas. I agree with the sentiment of Ford J that offending of this kind requires a strong deterrent message not only to the accused but to other would be robbers. It also, in my view, must reflect the need to protect the public from this kind of offending and retribution or an appropriate level of punishment. This episode was in my view also aggravated by the prolonged nature of the offending which, if the victim were conscious for any of the quite long journey before being abandoned, must have been terrifying for him. Ford J must have considered that before discount for guilty pleas an appropriate starting point in Kafalava would be about 8 years. I consider this offending to be worse because of his abandonment in bush land, and I commence with a starting point of eight and half years.

- [4] There is little, if nothing in my view available to these offenders by way of mitigation. Both maintained their innocence in the face of their admissions of involvement to Police, falsely they admit now, at trial. In doing so, they effectively abandoned any credit that could have been achieved by a claim to have co-operated early with Police and entered guilty pleas. They are adults in their mid-twenties both with families. They are not young offenders, however. Both have convictions. Mr Ngaue has one offence of receiving for which he was sentenced to three months imprisonment in February of this year. Mr Tupou also has only one previous conviction. He was involved in a serious housebreaking and theft of electrical equipment on the 19<sup>th</sup> June 2014 in the sum of \$18, 780.00 for which he pleaded guilty and was sentenced, perhaps rather leniently, on the 3<sup>rd</sup> June 2015 to probation for two years with the requirement to attend courses on alcohol and drug addiction, pay compensation of \$200.00 and to live at home. Neither has any conviction for violence.

[5] Both have families. In Mr Ngaue's case, his wife wrote a letter to the Court indicating that a lengthy sentence of imprisonment would impose hardship on her young family and her, as it is likely to do and also for Mr Tupou's family. Mr Ngaue expresses his concern also that his imprisonment will mean that he is unable to protect her from his criminal associates and he fears harm may come to her. Both men had ordinary educations and had limited employment. In Mr Ngaue's case, there were references of support from a town Clerk and his Bishop. Although their imprisonment will result in hardship to their families there is only limited mitigation that can be afforded to the prisoners on this account, particularly where, as here, objectively their criminality is so serious. (*R v Vake* [2012] TOCA 7 AC of 2012 (12 October, 2012) at para 20 referring to *R v Motulalo* [1998] Tonga LR 154) I give such consideration to mitigation as I can limited though it is, to 9 months imprisonment. Accordingly, the sentence I impose for the robbery in relation to both prisoners is 7 years and 9 months imprisonment. These sentences are backdated to the date of their remand in custody for sentence.

[6] I do not consider that either of these men can be said to fulfil the *Mo'unga* [1998] Tonga LR 154 criteria for suspension of any part of their sentences and the facts objectively, particularly the abandonment of the victim and their indifference to his well-being, after so seriously assaulting him, is such that I do not consider it is in the public interest to suspend any part of their sentences. It is only belatedly that they have accepted their guilt, it seems. I did not detect any contrition for their actions. In their police statements, they expressed remorse yet protested their innocence at trial. They are not young offenders but adults and are not first offenders, either. I found each of them cynical in their defences and I am not confident that either of them will strive to be rehabilitated; that is I do not feel at all confident, in *Mo'unga* terms, that they are "likely" to take the opportunity to rehabilitate themselves. Nor do I think they could

be said to have co-operated with authorities. For these reasons, I reject Mr Corbett's argument for suspension of a part of their sentences.

[7] On the offence of causing serious harm, the maximum sentence being 5 years, I consider the injuries suffered by the victim were serious and it was apparent during the trial that he had suffered significantly from the ordeal which is only to be expected. This was sustained joint violence on an innocent member of the public going about his daily work. I sentence both prisoners to 4 years imprisonment to be served concurrently with the sentences on the robbery.

[8] As to the simple arson charge, the maximum sentence is three years. I sentence both prisoners to two years imprisonment for their wanton and senseless destruction of the victim's motor vehicle worth about \$16,000 which no doubt he used in the course of his garden business. Those sentences also are to be served concurrently with the robbery sentence.

[9] They are convicted on all charges.



A handwritten signature in black ink, appearing to read "C. B. Cato".

C. B. Cato

**ACTING CHIEF JUSTICE**

**DATED : 30 OCTOBER 2015**