

**IN THE SUPREME COURT OF TONGA**

**CR 01/2012**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

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**REX**

**V**

**LOITI TONE**

**BEFORE HON. JUSTICE CATO**

**COUNSEL Ms. 'Atiola and Ms. Kautoke for the Crown**

**The prisoner in person**

**SENTENCING**

Mr Tone pleaded guilty to one count of causing grievous bodily harm to one Fietoutai Penitani on the 30<sup>th</sup> August, 2011. The allegation in the indictment is that he kicked the victim in the head several times causing injury to his face.

The prisoner appeared in person. I had read to him and translated to him the summary of facts, the probation report and the victim impact statement. He only had one objection to make to the summary of fact and that is that the victim came to him. He did not go to the victim. He suggested that there had been some kind of scuffle, but I indicated to him even if there was this gave him no excuse for what followed. He did not make any further objection to the contents of the probation report or the victim impact except to question the

amount of damage to the mouth area. It is plain there was extensive injury from the medical reports I have read.

It is plain that the prisoner from the summary of facts and also from answers given when I questioned him about the matter and from his record of interview was very intoxicated on the night in question. He had been drinking alcohol on his admission heavily. He was plainly very drunk but that does not provide any excuse.

There does not seem to have been any provocation at all for what was a senseless, brutish attack on a man of 50 years old. The prisoner aged 30 grabbed the victim who had walked outside a kava club where he had been drinking and shoved him to the ground. He kicked the victim's face and right arm on several occasions, with such force that it caused the victim serious damage and blindness to his eye and the loss of a number of teeth. His actions were inexplicable and indefensible. The prisoner before me said he was wearing running shoes.

In the victim statement, the victim described being totally blinded in one eye and losing six of his lower front teeth. He also described a numbness of his arm caused by trying to protect his head. He said he could not do the same work as before.

He said he was still trying to cope with his situation and pull himself together. It had affected his life and he had wanted to commit suicide. He said he had a problem with eating and now he could not chew. All he could eat was soft food and mostly in a form of liquid.

He said he was very upset because the prisoner had never visited him in hospital for several months. He had been taken to hospital by bystanders, his sister and brother in law, after the incident had been stopped. He says he did not receive an apology from the prisoner for what he had done for him. He said he was trying his best to cope with his handicap and recover.

The probation officer who prepared the report confirmed he had seen the injuries and could see how it had affected the victim.

The prisoner who represented himself confirmed essentially the summary of facts, and the record of interview in which he could proffer little explanation for his actions apart from the fact he was drunk. I explained to him that this could not be regarded as a mitigating factor.

The Crown presented comparables one being Azuelo Cr 361/2007 where Justice Schuster sentenced the prisoner to 6 years imprisonment for stabbing a man twice. He had to have a blood transfusion but survived. There were no permanent injuries I was told. Clearly, that was a serious incident and it seemed to have occurred without provocation the prisoner being in an angry mood because his wife was out with others consuming alcohol. Schuster J had considered an appropriate starting point was 8 years. It is not immediately clear why the sentence was reduced to 6 years after a defended hearing, or what the subjective factors were in that case.

Another case of Justice Schuster's cited to me was Hafoka CR 264/2008. This was an attack by the prisoner and one of his friends on a man who had passed out who they had met by chance in a street. They rifled through his clothing and after he had been aroused he was punched in the mouth by one of the men, and the prisoner hit him with a rock repeatedly on his forehead. It seems the essence of the grievous bodily harm was a broken finger caused by the victim trying to defend himself from the attack with the rock. He was sentenced 3 years imprisonment, but Schuster J also activated a one and half year suspended sentence making an overall sentence of 4 and half years imprisonment.

I also have regard to R v Mohokoi [2009]Tongan LR 111. This was a case of a largely unprovoked attack on a man by the prisoner, who had been drinking heavily, with a torch. The victim sustained a fracture to the head from which some 6 days later it seems he died. The prisoner pleaded guilty to one count of causing grievous bodily harm an alternative charge to manslaughter and

was sentenced to 18 months imprisonment after a guilty plea the head sentence being two years.

Plainly, the starting point for this offending varies considerably.

It has been said in modern English authority that an attacker who uses shod feet and kicks his victim is as much using a weapon as someone who has an object in his hand Attorney General's reference No 44 of 1994 (1995) 16 Cr App R 865. Also Attorney - General's Reference no 99 of 2005 (2006) 2 Cr App 505 A number of English cases on stomping and kicking involve heavy penalties ranging from 5 - 7 years and higher. See Banks on sentence, 2010, 5<sup>th</sup> ed, at pp 838-839. However, it is important to bear in mind that the maximum sentence in those cases is life imprisonment and also that the prosecution in England must prove a specific intent to cause serious harm. That is not the case here. Here the maximum penalty is ten years imprisonment.

The Crown here in her helpful submission suggested a head sentence of 7 years would be in order.

I adjourned the sentence having heard submissions from the Crown and hearing also from the prisoner whom I asked a number of questions of so I could reflect on the matter.

The serious aspect of this case is first that the attack involved kicking which as the authorities in England say can be the equivalent of a weapon. It is important for Tongan men to appreciate this, and to know if they kick victims particularly to the head they risk serious penalties. There was no provocation here. It was a cowardly and drunken act for which there can be no justification. The consequences to the victim are extremely sad and significant both physically and mentally. He was a fifty year man brutally beaten up by a much younger man with his remaining life being very severely compromised.

I have thought long and hard about the head sentence and I consider that taking into account the serious nature of the injuries a maximum sentence of five years is in order. That is a condign sentence.

In my view, a deterrent sentence is called for in a case where injuries of this kind are caused by the use of a weapon and I regard kicking a man to the head as falling within this category. Kicking a man in the head as experience has often shown can have disastrous and often life threatening or not uncommonly fatal consequences. As well, the serious nature of the injuries requires me to impose a head sentence in of this order. It is also appropriate to denounce or condemn this kind of senseless drunken brutality which has had such serious consequences. All too often it seems the consumption of intoxicants leads to severe consequences. People who otherwise might behave quite rationally act in aberrant way, as was the case here and later come to regret their actions when they sober up in the cold light of day. By then it is too late. The damage has been done and sometimes as here cannot be reversed.

Taking into account, the subjective factors and the probation report, I give the prisoner substantial credit however for his guilty plea which at least excused the victim from giving evidence. He appears to have largely confessed his actions to the police, although limiting his involvement then to punching, and after initially pleading not guilty changed his plea more recently. He has been unrepresented so I give him substantial credit. He did not in any material way object to the version of events as set out in the summary of facts.

He is also a first offender aged 30. That is worthy of some consideration by way of mitigation also.

I also accept that although he did not visit the victim in hospital he says because he was frightened of the actions the victim's family might take after his arrest he did later apologise after he was arrested. He expressed his contrition for the offending. I accept that he is remorseful as well he should be. He however seems to accept, as he should, responsibility for the serious injuries caused by his actions. He is entitled to some credit for that.

Taking all these factors into account, I allow the prisoner 18 months credit or discount. That means the sentence of imprisonment will be three and half years.

I now turn to the issue of whether I should order the prisoner's sentence to be suspended in whole or in part. I consider having heard from him and his acceptance of responsibility that he is worthy of some part of his sentence being suspended. He is a first offender, and having heard from him I believe his contrition or remorse is genuine. I apply the principles of Tukuafu, and Petersen, on the issue of rehabilitation, but considering the very serious nature of his offending and the public interest, I do not consider I can allow him any more than 6 months of suspension meaning that he will serve a sentence of three years of imprisonment. I do this on the basis that he is to remain of good behavior for a further period of one year from the date of his release.

That means that if the prisoner commits any crime punishable by imprisonment during that 12 month period he may be ordered to serve the balance of his sentence as well as being sentenced for any further crime.

He eaks a living out of the bush and has no savings. His family and two children who live with his former wife will not have the advantage of his support such as it may have been after he separated. That is a consequence of his offending. He has let them down also.

Had he any savings of note, I would have made a compensation order in favour of the victim. That is not realistic, however in his circumstances.

Had the terms of suspension been any longer I might have been inclined to order that he also attend the Salvation Army course of treatment for drug and alcohol addiction because it is plain that he was affected by drinking far too much alcohol on the night in question. It made him very aggressive, for some reason, and senseless in his actions. However, I hope whilst he is in prison for a reasonably long period he realizes the serious consequences of where too much drinking has led him, and makes up mind not to drink to excess again. If

he does and he behaves like this again, the consequences for him could be even more serious than they are today.

**THE ORDERS OF THE COURT ARE THESE;**

1. You are sentenced to a term of three and half years imprisonment commencing from the date when you first taken into custody and not admitted to bail.
2. Of that term of three and a half years imprisonment the last six months is to be suspended so long as you are of good behavior for 12 months and commit no further crimes punishable by imprisonment during that time.

**DATE: 21 MAY 2012**

**J U D G E**