

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

AC 16 of 2018  
[CR 97 of 2018]

---

BETWEEN : SIOKATAME TUPOU

- Appellant

AND : REX

- Respondent

Coram : Handley J  
Blanchard J  
Randerson J

Counsel : Mr. D. Corbett for Appellant  
Mr. 'A. Kefu SC and Mr. T. 'Aho for Respondent

Hearing : 11 April 2019

Date of Judgment : 17 April 2019

## JUDGMENT OF THE COURT

- [1] Mr. Tupou appeals against a sentence of 6 years imprisonment in relation to an incident on 23 December 2017 in which he attacked two men with a machete causing very serious injury to one of them (Simote) and less serious injury to the other (Siuu).
- [2] Mr. Tupou pleaded guilty in the Supreme Court to one count of grievous bodily harm and one of causing serious bodily harm. When Cato J sentenced Mr. Tupou he also ordered the last 2 years of the 6 year term be suspended.
- [3] Mr. Corbett advances the appeal on the basis that there was a degree of provocation by the victims that Mr. Tupou's then counsel did not raise at sentencing. He submits that the sentence should have been reduced by 12 to 18 months and that the period of the suspension should have been longer.

### **Summary of Facts**

- [4] Mr. Tupou was 21 at the time of the offending and had been drinking alcohol with a group of young men including the two victims. At one point there was an argument between Mr. Tupou and Simote and they had a fight. Simote apologised and Mr. Tupou accepted the apology.
- [5] Mr. Tupou then went to his home, obtained a machete, and returned to the place where the victims and others were still drinking. Counsel agreed this process would have taken about 10 minutes. Mr. Tupou then carried out a sustained attack on Siuu, attempting to strike him on 5 occasions with the machete and then once more after he fell. The appellant then chased after Simote and hit him repeatedly about the head with the machete after he fell. When Simote got up and tried to run away, Mr. Tupou chased and caught him. He continued hitting the victim with the machete. The attack only stopped when Mr. Tupou's younger brother took the machete away from him.

[6] Siua sustained multiple lacerations to his left arm, forearm and hand. Fortunately these have now healed with no long term complications. The injuries to Simote were serious. He received multiple lacerations to his left arm, forearm and hand, an open fracture to the ulnar bone and cuts to the ulnar nerve and artery and cut tendons on three fingers. These injuries required two major operations and more surgery may be needed. He is most likely to have a degree of permanent chronic arthritis and limited movement of the left wrist and two of his fingers.

## **Discussion**

[7] We are satisfied that the sentence was within the available range and that the evidence of provocation relied upon does not suggest the sentence ought to be interfered with.

[8] Essentially, Mr. Tupou's affidavit in support of his application for leave to appeal states that he had been drinking with a group of young men. During the course of the evening, one of the victims slapped him hard on the back without any reason. He says that shortly after the other victim punched him in the face causing a bloody nose and a loose tooth.

[9] We accept Mr. Kefu S.C's submission that little weight should be given to this evidence. It was not mentioned in the summary of facts to which Mr. Tupou pleaded guilty nor in the pre-sentence report. His account has not been tested. Even if true, the assaults said to have been made on Mr. Tupou did not justify him in returning to his home to obtain the machete and then locating the victims and attacking them with the machete. As Mr. Kefu rightly said, Mr. Tupou's attack on the victims was not an immediate response to the alleged provocation but followed some time later after he had gone home to arm himself with a lethal weapon. He then carried out a sustained and deliberate attack on the two victims. As the Judge said, the fact that Mr. Tupou was drunk is no excuse.

- [10] In his sentencing remarks, Cato J observed that a machete is an inherently dangerous weapon, particularly in the hands of a drunken offender. We agree and note that the starting points of 6½ years on the first count and 4 years on the second were within range for this offending given the use of a weapon, the serious injuries inflicted particularly on Simote and the sustained nature of the attack.
- [11] The Crown relied at sentencing on *R v Mafi* (CR32/2013) in which the prisoner was convicted after trial on one count of causing grievous bodily harm. This involved an attack on the victim with a machete resulting in a head wound and a disrupted artery. Although the victim lost a lot of blood and was treated at hospital, it appears he made a full recovery. Cato J adopted a starting point of 6½ years imprisonment, noting it would have been higher if there had been serious permanent injury.
- [12] Mr. Corbett pointed to the end sentence in *Mafi* of 3 years imprisonment fully suspended but we are satisfied there were exceptional mitigating circumstances relating to the advancing age and poor health of the offender which have no parallel to the present case. The Crown's reliance on the 6½ year starting point for a machete attack on a single victim was justified.
- [13] Mr. Corbett also referred us to *R v Mohokoi* (2008) TLR 111 in which the offender pleaded guilty to an alternative charge of causing grievous bodily harm after originally being charged with manslaughter. The offender struck the victim on the head with a torch resulting in a depressed fracture of the right side of the skull. The victim died 6 days later. Andrew J imposed a sentence in the Supreme Court of 18 months imprisonment with the final 6 months being suspended.
- [14] Mr. Corbett submitted the culpability of Mr. Mohokoi was more serious than that of Mr. Tupou, yet a shorter sentence was imposed. The sentence appears to have been lenient but the present case involved a much more lethal weapon, two victims, and repeated blows over a sustained period.

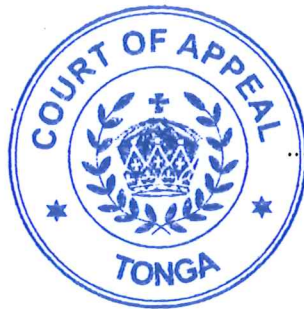
- [15] Counsel also referred to *R v Langi* CR 171/2008 in which Ford CJ re-sentenced an offender on charges of causing grievous bodily harm and attempted robbery. A victim had been shot with a rifle and seriously injured while attempting to escape. A final sentence of 6 years imprisonment was imposed on the grievous bodily harm charge but the case is of little assistance since the Court did not identify a starting point nor how the final sentence was arrived at.
- [16] We are satisfied that the sentencing Judge's composition of the overall effective sentence was appropriate. After allowing for mitigating factors (guilty plea, youth, clean record, remorse and supporting testimonials) the Judge:
- (a) Imposed sentences of 5 years and 3 years respectively on the two counts;
  - (b) Ordered that only 1 year on the second count was to be served cumulatively on the first; and
  - (c) Ordered that the final two years of the resulting 6 years sentence be suspended on conditions that are not challenged on appeal.
- [17] Mr. Corbett submitted that the sentence should have been suspended for a longer period relying on the factors identified in *Mo'unga v R* (1998) TLR 154.
- [18] Given the seriousness of the offending, we are not persuaded that the sentence should have been suspended for a longer period. The factors identified in *Mo'unga v R* are reflected in the discounts allowed by the Judge in fixing the length of the sentence and in the partial suspension ordered. Offenders inflicting serious injury with a weapon must ordinarily expect to serve a term of imprisonment. That is particularly so given the prevalence and availability of machetes.
- [19] We mention a final point. Mr. Corbett was critical of trial counsel for not raising at sentencing the issue of the alleged prior assaults by the victims. We wish to make it clear that if allegations of this kind are made it is necessary for the appellant to provide a written waiver of legal professional privilege in advance of the hearing in

this Court so as to enable the lawyer to answer any such allegations. That did not happen and we disregard the allegations accordingly.

[20] The appeal is dismissed.



.....  
**Handley J**



.....  
**Blanchard J**



.....  
**Randerson J**