

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 180 of 2020

STATE

V

KISO SALAWAQA

Counsel : Ms. Wakesa Elo for the State
Ms. Lice Manulevu with Ms. Ruci Nabainivalu for the Accused

Sentence Hearing : 21 October 2020

Sentence : 5 November 2020

SENTENCE

- [1] Kiso Salawaqa, as per the Information filed by the Director of Public Prosecutions (DPP) you were charged with the following offence:

FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255 (a) of the Crimes Act 2009.

Particulars of Offence

KISA SALAWAQA, on the 23rd day of May 2020, at Salia Village, Nayau, Lau, in the Eastern Division, with intent to cause grievous harm to JOSAIA VATANIYARAGI (Jnr), unlawfully wounded the said JOSAIA VATANIYARAGI (Jnr), by hitting him twice with a cane knife.

- [2] This matter was first called before the High Court on 29 June 2020. On the said day, the State filed the Disclosures relevant to the case and moved for time to file Information.
- [3] The State filed the Information on 14 July 2020. However, the Information was served on the defence only on 3 August 2020.
- [4] When the matter came up before me on 17 August 2020, you were ready to take your plea. You pleaded guilty to the one count in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your plea.
- [5] Thereafter, on 14 September 2020, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you on 6 October 2020 and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the charge in the Information, and found the charge proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the charge of Act with Intent to Cause Grievous Harm.
- [6] I now proceed to pass sentence on you.
- [7] The Summary of Facts filed by the State was as follows:

"The Complainant is Josaia Vataniyaragi Jnr (PW1) 24 years, unemployed of Salia Village, Nayau, Lau. The accused is Kiso Salawaqa (Accused) 19 years, unemployed of Salia Village, Nayau, Lau.

At around 8.00 pm on 23/05/20, PW1 headed to Metuisela Jiko's (PW2) house for some yaqona. After a while, PW1 left with PW2 to a bush near their farm to drink some homebrew. The two men began drinking together with other men of the village including the accused himself. During this drinking session, an argument erupted between the accused and some of the men as they were making their way down to the village.

PW1 and Sitl (Tui Mabu) stayed behind and continued drinking.

All of a sudden, the accused swung a knife towards PW1 and it hit his middle finger. The accused swung again for the second time and the same hit PW1's thigh. Tui Mabu intervened and managed to calm the accused before they all headed to the village.

The matter was reported to the Police and PW1 was medically examined where the following injuries were noted:-

D (12) Specific Medical Findings

(a) There is a 3cm incision on his right distal third (3rd) finger;

(b) There is a 5cm incision on the right thigh.

D (14) Professional Opinion:

There is an incision (3cm) noted on his right 3rd digit cutting through his fingernail and a 5cm incision on his right thigh.

A copy of the same is attached herewith.

The accused was later caution interviewed where he admitted to swinging a knife twice on PW1 because he was angry about what had apparently happened to his uncle Toro, who had also been drinking that particular night. (Q/A 10 – 26 – copy is attached).

He was then charged with 1 count of Act with Intent to Cause Grievous Harm contrary to Section 255 of the Crimes Act 2009.

The Accused is a first offender (Copy of PC is attached herewith)."

- [8] Kiso Salawaqa you have admitted to the above Summary of Facts and taken full responsibility for you actions.
- [9] Section 4 (1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the purposes for which sentencing may be imposed by a Court; and sets out the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [10] In terms of Section 255 (a) of the Crimes Act No. 44 of 2009 (Crimes Act) "A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

(a) Unlawfully wounds or does any grievous harm to any person by any means....."

The prescribed penalty for this offence is imprisonment for life.

- [11] The offence of Act with Intent to Cause Grievous Harm also existed under the Penal Code (Section 224 of the Penal Code), with the same prescribed penalty of life imprisonment.
- [12] In *State v. Maba Mokubula* [2003] FJHC 164; HAA 52J.2003S (23 December 2003); Her Ladyship Madam Justice N. Shameem said:

"On the basis of these authorities, the tariff for sentences under section 224 of the Penal Code, is between 6 months imprisonment to 5 years imprisonment. In a case of an attack by a weapon, the starting point should

range from 2 years imprisonment to 5 years, depending on the nature of the weapon.

Aggravating factors would be:

1. Seriousness of the injuries;
2. Evidence of premeditation or planning;
3. Length and nature of the attack;
4. Special vulnerability of the victim;

Mitigating factors would be:

1. Previous good character;
2. Guilty plea;
3. Provocation by the victim;
4. Apology, reparation or compensation.

In general terms, the more serious and permanent the injuries, the higher the sentence should be. As a matter of principle, a suspended sentence is not appropriate for a case of act with intent to cause grievous harm....."

- [13] His Lordship Justice Madigan in **State v. Emosi Taku Tuigulagula** [2011] FJHC 163; HAC 31.2010 (15 March 2011); stated thus:

*"The maximum penalty for this offence is life imprisonment and the Court of Appeal has said in **Shaukat Ali** (1976) 22 FLR 87 that for this offence a custodial sentence is inevitable. The offence is akin to section 224 of the old Penal Code and so the authorities pertaining to that section are relevant. In the case of **Mokubula** (2003) FJHC 164, Shameem J set out several cases of assault intending to cause grievous bodily harm and came to the conclusion that the then prevailing "tariff" was between 6 months imprisonment to 5 years imprisonment, but stressing that where a weapon was used the starting point should be 2 years."*

- [14] However, in the above case, Justice Madigan sentenced the accused, who pleaded guilty for striking his wife with a cane knife, severing her fingers in both hands, excluding the thumbs, and also injuring the head, to 6 years imprisonment.

- [15] In **State v. Asesela Rabia** [2012] FJHC 877; HAC074.2011 (22 February 2012); the Fiji High Court followed the tariff that had been adopted in **Mokubula and Tuigulagula** (*supra*).

- [16] In **State v. Seremaia Nalulu & 4 others** [2013] FJHC 358; HAC 155.2010 (23 July 2013); His Lordship Justice Paul Madigan, while adopting the above tariff held as follows:

"The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the

*accepted tariff being between 6 months and 5 years (as set by Shameem J in **Mokubula** (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In **Tuigulagula** HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order."*

[17] In **State v. Taniela Vakalaca** [2018] FJHC 455; HAC027.2018 (31 May 2018); His Lordship Justice Goundar held:

*"The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (**State v Mokubula** [2003] FJHC 164; HAA0052J.2003S (23 December 2003)). Further, the offence may be aggravated by the seriousness of the injuries, premeditation or planning, length and nature of the attack and vulnerability of the victim....."*

[18] In **Vosa v. State** [2019] FJCA 89; AAU0084.2015 (6 June 2019); the Fiji Court of Appeal while making reference to the tariff range and the sentences imposed in the above mentioned cases said that they provide some form of guidance in sentencing offenders for the offence of Act with Intent to Cause Grievous Harm, subject of course to the different aggravating and mitigating circumstances prevalent in those cases.

[19] This Court adopted the said tariff in the following cases:

1. **State v. Jese Mateavula Toma** [2019] FJHC 648; HAC79.2018 (28 June 2019);
2. **State v. Emosi Banuve** [2019] FJHC 1022; HAC88.2019 (24 October 2019);
3. **State v. Isoa Boseyaco** [2019] FJHC 1037; HAC48.2018 (30 October 2019);
4. **State v. Jonacani Salabula** [2020] FJHC 47; HAC406.2018 (6 February 2020); and
5. **State v. Etasa Digo** [2020] FJHC 514; HAC107.2020 (7 July 2020).

[20] Having regard to the above authorities, and since you had used a weapon, namely a knife, to attack the complainant, I consider the tariff for the offence of Act with Intent to Cause Grievous Harm in the instant case to be between 2 years to 5 years imprisonment.

[21] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

- [22] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years imprisonment for the charge of Act with Intent to Cause Grievous Harm.
- [23] The aggravating factors in this case are as follows:
- (i) The frequent prevalence of offences of this nature in our society today.
 - (ii) The attack on the complainant was entirely unprovoked.
 - (iii) Two cut injuries were caused to the complainant as a result of your actions. The Medical Examination Report of the complainant confirms that he sustained a 3cm incision on his right distal or third (3rd) finger cutting through his finger nail and a 5cm incision on his right thigh.
- [24] The mitigating factors in this case are as follows:
- (i) You are a first offender. The State has confirmed that there are no previous convictions or pending cases against you.
 - (ii) That you cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
 - (iii) You have submitted that you are truly remorseful of your actions and have sought forgiveness from this Court.
 - (iv) That you have sought forgiveness from the complainant immediately after the incident. The complainant has accepted your apology as is reflected in his statement made to the police.
 - (v) That you entered a guilty plea at a very early stage in these proceedings.
- [25] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence is 5 years imprisonment.
- [26] I accept that you are a person of previous good character and that you have fully cooperated with the Police in this matter. I also accept your remorse as genuine and also

the fact that you have sought forgiveness from the complainant immediately after the incident. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence is 3 years imprisonment.

[27] I accept that you entered a guilty plea at a very early stage in these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of one year. Now your sentence is 2 years imprisonment.

[28] Accordingly, I sentence you to a term of 2 years imprisonment for the charge of Act with Intent to Cause Grievous Harm.

[29] The next issue for consideration is whether your sentence should be suspended.

[30] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[31] Kiso Salawaqa you are 18 years of age (Your date of birth is 14 November 2001). You are said to be residing at Salia Village, Nayau in Lau, with your parents and your paternal grandparents. You are said to be helping your parents and grandparents back in the village, as your younger sister is a student at the Ballantine Memorial School.

[32] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

[33] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[34] I have considered the following circumstances:

- You are a young offender;
- You have been of previous good character;
- You have fully cooperated with the Police;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have sought forgiveness from this Court;
- You have sought forgiveness from the complainant immediately after the incident. The complainant has accepted your apology as is reflected in his statement made to the police;
- You have assured Court that you will not re-offend and that you are willing to reform if given another opportunity;
- You entered a guilty plea at a very early stage in these proceedings;

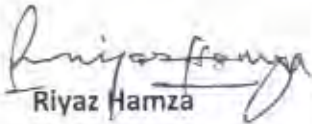
Considering all these factors I deem it appropriate to suspend your sentence. It is my opinion that the chances for your rehabilitation is high.

[35] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentence for a period of 5 years.

[36] In the result, Kiso Salawaqa your final sentence of 2 years imprisonment, is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

[37] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 5th Day of November 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.