IN THE SUPREME COURT OF TONGA **CR.APP.847/99**
CRIMINAL APPEAL
NUKU'ALOFA REGISTRY

BETWEEN : ***SIONE FILO*** - ***Appellant;***

AND : ***REX*** - ***Respondent.***

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Tu'utafaiva for the Appellant
Mr Pouono for the Respondent

Date of Hearing: 29 September 1999.
Date of Judgment: 5 October 1999.

Judgment

The appellant appeared before the Magistrates' Court on 8 August 1999 and pleaded guilty to a charge of causing grievous harm, contrary to section 106 of the Criminal Offences Act.

The accused was not represented and the case was listed for preliminary inquiry. However, following a request by both the appellant and the prosecutor, the magistrate agreed to hear the matter summarily.

The brief facts were that the appellant and his brother had had an argument the previous night and the victim, who was a work mate of the brother, had helped to separate them. The argument was apparently settled and the victim slept the night at the brother's house. The following morning the appellant attacked him as he lay sleeping and, as a result, two of the victim's teeth were broken and his jaw fractured.

The charge had alleged the appellant had stabbed the victim in the face with a knife but the prosecutor, whilst outlining the facts, told the court that the appellant did not admit to using a knife. The magistrate then heard evidence from the doctor who described a cut on the left side that looked like it had been

caused by something sharp. The record shows that the magistrate was satisfied that the appellant had used a knife or sharp object and sentenced on that basis.

In such cases where the accused, although maintaining his plea of guilty, indicates he does not accept some detail of the charge, the magistrate should either accept his demur and sentence accordingly or try the issue and hear evidence of that aspect of the case from both sides.

However, no objection is raised to the course followed by the magistrate in this case and I do not interfere.

The court was told that the appellant had no previous convictions. He told the court that he was 46 years old, had four children between 11 and 22 years old and was a carpenter. He pointed out that he had been drunk at the time of the assault and that he had since apologised to the victim and his apology had been accepted.

The magistrate stated that he had accepted the appellant's remorse, allowed for the plea of guilty and the apology to the victim but pointed out that this was a serious offence particularly because a weapon had been used. He stated that the penalty would be a lesson to society and passed a sentence of two and a half years imprisonment.

The appellant appeals against that sentence. There are two main grounds, namely that a sentence of immediate imprisonment was not appropriate in this case and that such a sentence should not have been imposed on an unrepresented first offender without the assistance of a social enquiry report.

I agree with counsel that, in this case, the magistrate may have been wiser to seek a report before passing such a sentence. However, there is no obligation on the court to order such reports even for first offenders. Any one who assaults another and causes such injuries can expect to go to prison and suspended sentences in cases of violence of the degree used here are rarely appropriate. Thus, the magistrate no doubt felt it was better to pass sentence immediately rather than delay it for a report that was extremely unlikely to alter the sentence.

The record shows that the appellant, even though he was unrepresented, did give an account of his mitigating circumstances. I note that the points referred to by counsel at the hearing of the appeal had all been mentioned before the magistrate.

I do not think there would be any useful purpose served in delaying the case further for a report. Neither do I consider that it would be proper to suspend the sentence.

This court can only interfere with the sentence passed in the court below if it is manifestly excessive or wrong in principle or law. I have already accepted it is not wrong in principle and there is no challenge to its legality but I do consider the magistrate did not give sufficient credit to the appellant for his plea of guilty, his 45 years good character and the fact, which he expressly accepted, that the appellant's remorse was genuine.

The reference to the warning to society was also not appropriate in this case. There are many cases where the court can and should pass a sentence with the intention of deterring others from similar conduct but this should only be done where there is clear evidence that the particular type of offence is prevalent.

There is no doubt that this type of drunken attack is too common in Tonga among young men. However, this appellant was not in that age group and there was no suggestion that he was associating with such people. The case was very much a "one off' incident and, as such, did not deserve to receive the heavier penalty that is appropriate when a deterrent sentence is called for.

For these reasons, I allow the appeal, quash the sentence and substitute one of 18 months imprisonment.

NUKU'ALOFA: 5 October, 1999.

CHIEF JUSTICE