

IN THE HIGH COURT OF THE FIJI ISLANDS
CRIMINAL JURISDICTION
AT SUVA

CRIMINAL CASE NO: HAC 097 OF 2008

THE STATE
V
NEREO CAKAUTINI

Ms N. Ratakele for the State

Mr. Tevita Fa for the Accused

Date of Sentence: 13 February 2009

SENTENCE

1. Nereo Cakautini you were charged with the following offence:

Statement of Offence

Act With Intent to Cause Grievous Harm: contrary to section
224(a) of the Penal Code cap 17

Particulars of Offence

Nereo Cakautini on 1st day of May 2007 at Lomanikoro Village,
Rewa in the Central Division with intent to do grievous harm to
Wame Bolakoro unlawfully wounded the said Wame Bolakoro with
a cane knife.

2. You had initially pleaded not guilty after the charge was read to you and you advised that you understood it.
3. The trial began with the State calling its first 4 witnesses, who were all cross examined by your counsel. The trial adjourned after day one of the hearing. Before the next witness was called the next day and before the assessors were asked to come into the court, your counsel Mr. Tevita Fa indicated to the court that you may consider changing your plea if a brief adjournment of approximately 30 minutes was granted to discuss a few matters with the State counsel.
4. The court granted a 45 minutes adjournment and on resuming Mr. Fa advised the court that you would like to change your plea. The charges were put to you again and you advised the court that you understood it. You also advised that you now plead 'Guilty' to the charge. You were convicted as charged. The court adjourned to today for sentencing.
5. The court ordered that a Pre-Sentence Social Inquiry Report on the accused be prepared by the Department of Social Welfare to assist the court in its sentence determination.

Background Facts

6. From the sworn testimony of the three prosecution witnesses who gave evidence in court before the accused change his plea, the following facts were established. The accused lived in Lomanikoro, Rewa, a beautiful village beside the Rewa River. His wife and two children live with him there.
7. On 1st May 2007 at Lomanikoro Village, Rewa the accused Nereo Cakautini armed with a knife and spade entered a house belonging to his uncle without permission. His uncle lives next door to him in the same village. His cousin Sakiusa Koroicure [Sakiusa] also lived next to the accused house in the village. Sakiusa saw the accused enter his father's house and had done some damage to it. He confronted the accused as to who told him to enter his father's house and why is he causing damage to his father's house. The accused told Sakiusa not

to come towards him or he will die. A fight started between the accused and Sakiusa.

8. In the cause of that fight the accused ran after Sakiusa with a cane knife and a spade in his hands. The victim Wame Bolakoro who saw what was happening called out the accused's name in an effort to stop him. The accused then turned on Wame Bolakoro and chopped him with the cane knife inflicting a deep wound on his right shoulder and other injuries. The victim was conveyed to the Nausori Health Centre for medical examination and treatment and released.
9. One of the witness saw injuries on the arm and head of the accused and he opined that it may have been caused by his jumping the louver windows of Sakiusa's fathers house.

Mitigation

10. There were two witnesses called by the accused for purposes of sentencing. The first was Timothy Nobriega and the accused wife Lanieta Cakautini.
11. Timothy Nobriega came to Fiji from the USA and has assisted in the setting up of the Fiji Boxing Commission. He testified that he has known the accused since 1999 as his trainer. The accused is a professional boxer and they have a close professional working relationship. He considers the accused as having bright prospect as boxing trainer because of his interests in assisting young boxers. He observed that the problem only started after the accused moved to reside in his village. He believes that he can have a positive influence on the accused, as a mentor if he is given a non custodial sentence.
12. Lanieta Cakautini the wife of the accused testified on oath that on the day the offence was committed, he saw someone strike the accused with an axe and that he was injured from the fights he had with some villagers. Mr Fa submitted as a result of this evidence that the accused was in many respects, the victim of social circumstances in his own village. Whilst he admitted in causing serious injury to Wame Bolakoro, the accused was reacting to the animosity of the

situations that he faced when he returned to his village with his family to live.

Social Inquiry Report

13. The court had ordered that a pre-sentence Social Inquiry Report on the accused be prepared by the Social Welfare Officer at Nausori providing the court with personal, social and psychological evaluation of the accused person and his personal circumstances. I am grateful to Ms T.S. Lewanavanua from the Social Welfare Department in Suva, for her Report. The report makes the following findings:

- The accused early childhood was traumatized by the suicidal death of his father when he was 3 years old. The alleged cause of the suicide being the extra-marital affairs of his mother;
- The accused had some differences with other villagers regarding the leadership of their Mataqali, which he claims to be his but has been given to another person;
- At the time of the offence the accused was under the influence of alcohol and drugs. He regularly uses marijuana in the presence of his children;
- The accused was violent and abusive towards her wife Lanieta. Lanieta has since left him and is now living with another man;

14. I will consider the above in my sentence determination.

The sentence

15. Section 224(a) of the Penal Code Cap 17 states that any person who with intent to cause grievous harm, unlawfully wounds or does grievous harm to anyone by whatever means is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment.

16. The liable sentence referred to above indicates the seriousness of the offence for which the accused has been found guilty of. In terms of sentences that the court must consider, Madam Justice Shameem in State v Annamallay [2005] FJHC; HAC 004 of 2004 the tariff sentence ranges from suspended sentence where there are no or minimal injuries and where the parties have resolved their differences to 2½ years imprisonment where there was serious injury and the use of weapon was involved.
17. In State v Viliame Cavubati [2002] FJHC; HAA 080 of 2001S in that case the Court observed that:
- ‘ An offence of act with intent to cause grievous harm is a serious one which must almost always result in an immediate custodial sentence..’
18. In determining the appropriate starting point of the sentence, this court has considered the need for deterrence against persons who may be similarly inclined to commit this offence. The fact that the offence is serious enough to move Parliament to impose a liable penalty of 14 years imprisonment. I have also considered the recent trend of lawlessness in Fijian villages and apparent ease with which accused persons seem to think that taking the law into their own hands is the way to settle their grievance.
19. In the light of the above observation I choose 2 years imprisonment as the appropriate starting point of the sentence in this case.

Mitigation

20. I have considered the evidence of Mr Nobriega on behalf of the accused. I accept that the accused is a talented boxer and may be an excellent future trainer for trainers in Fiji in the sport of boxing. I have also taken on board the fact that some degree of the accused inexcusable behavior may be due to the early childhood factors identified in the Social Inquiry Report which are beyond his control.
21. I accept that the accused may have found himself in circumstances that made him feel unwanted in his won village and this made him prone to be on the offensive in his defense of what he considers to be

his entitlement. I take this as a mitigating factor in the accused sentence determination.

22. For the mitigating factors, I would discount the sentence by 9 months to 15 months imprisonment.

Aggravating factors

23. On the facts of this case the following factors I consider aggravates the sentencing:

- i) The use of knife and spade in the attack on the victim of the assault;
- ii) The lack of remorse or acceptance by the accused that what he did was wrong in law;
- iii) The need to refer any matters of dispute to be dealt with by any village mechanism in place for such dispute resolution or to the police and not to take the law into their own hands;

24. For the aggravating factors, I would increase the sentence by 6 months imprisonment to 21 months imprisonment.

Guilty Plea

25. The must also take into consideration the fact that accused did plead guilty, not at the first opportunity by sometime after 3 prosecution witnesses have been examined. Some allowance must be made for the change in plea. I would further discount the term of imprisonment by 3 months for the guilty plea. This will leave a sentence of 18 months imprisonment.

Suspension or not

26. Under section 29(1) of the Penal Code Cap 17, I may consider suspending a sentence of imprisonment if I pass sentence of

imprisonment of not more than 2 years. In this instance the sentence is 18 months imprisonment.

27. On the basis of DPP v Jotame Pita (1974) 20 FLR 5, there must exist special circumstances to justify the suspension a term of imprisonment passed by a court. At page 7, Grant CJ said:

‘..there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence’ Or there may be other cogent reasons such as the extreme youth of the offender or age of the offender or the circumstances of the offence.’

28. The above statement of the law was followed in DPP v Saviriano Radovu (1996) 42 FLR 76 and more recently by this court in State v Baukeilagi [2007] FJHC ; HAA 086/07S.

29. In State v Maladroka [2006] FJHC ; HAC 003/06S the suspension of the sentence passed was ordered by the court because the accused demonstrated extreme remorse for his action and demonstrated this by performing traditional forgiveness rituals to the close relatives of the deceased, which the latter accepted.

30. I have reviewed the circumstances of the case and the accused. I have considered Mr Fa’s sustained submission for the accused to be given another suspended sentence. I have concluded that there are no special circumstances that would justify the suspension of the term of imprisonment in this case.

31. The sentence passed in this case will not be suspended.

32. In conclusion the sentence passed by this court on you Nereo Cakautini is 18 months imprisonment effective from 23 December 2008.

Activation of existing suspended sentence

33. On 3 December 2007, the accused was sentence to 9 months imprisonment suspended for 24 months after being found guilty on one count of Act with Intent To Cause Grievous Harm contrary to section 224 (a) of the Penal Code Cap 17. He is now convicted of an identical offence that was committed on 1 May 2007 and the sentence was also passed with the operation period of the suspension.
34. The court invited submission from Mr Fa on the issue of whether the suspended sentence of 12 months imprisonment passed by a court on this accused on 3 December 2007 be activated by this court or not. I am satisfied that this court being the High Court has jurisdiction to activate the suspended sentence under section 30 of the Penal Code cap 17. I have also considered Mr Fa's submission on behalf of the accused.
35. I conclude that the interest of justice in this case and being mindful of the totality principle of sentencing, the suspended sentence of 12 months will be activated and that the accused shall serve 6 months of the 12 months imprisonment sentence. That sentence is to run concurrent to the sentence in this case effective from today.

ORDERS

36. I make the following orders:
- i) The accused Nereo Cakautini is sentenced to 18 months imprisonment effective from 23 December 2008 in this case;
 - ii) The suspended sentence of Nereo Cakautini of 12 months imprisonment for 2 years from 3 December 2007 in Nausori Magistrate Criminal Case No: 711 of 2007 is hereby activated pursuant to the powers under

section 30(1)(b) of the Penal Code Cap 17, with a reduced term of 6 months imprisonment effective from today.

Isikeli Mataitoga

JUDGE

At Suva

13 February 2009.