

**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION  
NUKU'ALOFA REGISTRY**

**AM 24 of 2020**

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**BETWEEN: FANGATAPU NGAVISI**

**- Appellant**

**AND : REX**

**- Respondent**

**BEFORE HON. JUSTICE NIU**

**Counsel : Mr. S. Fili for appellant.  
Ms. H. Aleamotu'a for respondent.**

**Hearing : 9 September 2020**

**Ruling : 16 September 2020**

**RULING**

**Background**

[1] The appellant killed the respondent's pregnant sow by stabbing it with a hoe and hitting it with a cane knife. The respondent complained to the police and the police charged the appellant with killing the sow under S.182 of the Criminal Offences Act.

[2] When the case was called before the Magistrate, this is what is shown in the transcript:

Ct : (Reads the charge to accused) you plead not guilty or guilty?

Acc : Not guilty. I ask to explain to you.

Ct : According to the summons, you are charged that you killed the pig, but you deny that you killed the pig, is that right?

Acc : I did kill it, but there was a reason why I killed it.

Ct : Because you have no legal counsel, I will assist you. You have pleaded not guilty, which means you deny the charge. There are several things which one must comply with before the law allows one to kill an animal. You have pleaded not guilty although you killed the pig. But it is up to you, you have the right to plead not guilty if you say you had a lawful reason.

Acc : Please your Worship, the reason I plead not guilty is because the pig damaged my crops.

Ct : You are charged that you killed the pig, and although you have a reason for killing the animal, the pig. I am only clarifying the law to you because you have no legal counsel to help you. Anyhow, Prosecutor, now that the accused has pleaded not guilty, give me a date when this trial can be held.

Acc : Your Worship, please I will change and plead guilty.

Ct : Yes, that can be done. The plea of the accused is changed to guilty plea. Prosecutor?

Pros : May it please Your Worship, this happened on 11 July this year, the complainant, Vaiouni Tu'i'onetoa heard that her pig was killed by the accused. It was being hit with a knife and stabbed several times with a hoe causing several injuries which

caused its death. He has a record. What reasonable decision you make will satisfy the prosecution.

Ct : Did you inform the complainant of the damage caused by the pig to your crops?

Acc : Yes I did inform her.

Ct : And what did she say about it?

Acc : She only said yes.

Pros : Your Worship, the complainant is here and she wants to say something.

Ct : Vaiouni Tu'í'onetoa, is there anything you wish to say?

Compl: Yes, Your Worship, it was only once that the accused came and told me that my sow had damaged his crops. And after that he then went and did this to my sow. And it would have been alright if he had killed it on his plantation I would not have been hurt and come and complain. But the reason I have come and complain was because my sow was taken and killed on another allotment, stabbed with a hoe and caused injuries to it. The sow was a pet we raised and i went and spoke to him and he said we come to this place (here). But I say Your Worship that I forgive him because I am a religious woman. If when I had gone and spoken to him he had apologised everything would have been alright, but he did not give in or to lower himself. But I leave it to you, Your Worship, to do as you please.

Ct : Thank you. Fangatapu, is there anything you wish to say before I sentence you?

Acc : Your Worship, I apologise to you and also to the complainant for what happened. The only reason I killed this sow was because it damaged my crops which are what my family and I depend upon for our subsistence.

Ct : What work do you do Fangatapu?

Acc : go to the bush (tax allotment)

Ct : Do you have a source of revenue?

Acc : From marketing my crops.

Ct : Prosecutor, does the accused have a record?

Pros : Yes, Your Worship.

Ct : Which is case no. 60/2010 where you were convicted of manslaughter on 23 April 2011 and you were sentenced to 6 years imprisonment. Which finished in 2015 and you have remained without offence until the killing of this pig. The maximum penalty for killing an animal is 3 years imprisonment. I can impose the prison sentence or the fine or both. It is clear from what happened that you have an anger tendency. It is shown by the way you killed the pig, you stabbed it with a hoe and hit it with a cane knife. I will not sentence you to prison but I think that it will be helpful to you if you take a course in anger management with the Salvation Army. My concern is because you already have a record for manslaughter, and now there is the killing of the pig by stabbing it with a hoe. It is necessary that something be done about your anger tendency and angry outbursts. This is your sentence:

Order: You are sentenced to 6 months imprisonment but which is fully suspended for 2 years on the following conditions:

- (a) Complete the Anger Management Course of the Salvation Army;
- (b) Pay compensation of \$1,300 to Vaiouni Tu'i'onetoa for the value of her pig which you killed, by paying \$100 in every week to the Court until the whole \$1300 is paid in full;
- (c) You are not to commit another offence within the 2 years of suspension of your sentence."

[3] On 5 August 2020, the appellant filed his appeal against:

- (a) his conviction, and
- (b) the order for compensation.

It sets out in detail the grounds of the appeal.

### **The hearing**

[4] The main ground of the appeal is the claim by the appellant that his killing of the respondent's pig was lawful. He bases that claim on the provisions, of the **District (Animal Enclosure) Regulations 2009**. Those regulations were published in the Tonga Government Gazette Supplement Extraordinary no. 8 of Monday 6 July 2009. They provide, as relevant, as follows:

#### **Government Act**

(Section 26)

#### **Districts (Animal Enclosure) Regulations 2009**

IN EXERCISE of the powers conferred by section 26 of the Government Act (Cap 3) the District Officers with the sanction of the

Cabinet and confirmed by the signature of the Prime Minister, makes the following regulations:

...

2. In these Regulations –  
'animal' means pig, goat, horse or cow;
3. These Regulations shall apply to all residents of the Districts listed in the Schedule.
4. (1) Every animal owner in the Districts shall –
  - (i) keep the animal in a secure enclosure;
  - (ii) secure such animal in an appropriate manner; and
  - (iii) ensure that the animal has sufficient food and water.(2) Where an animal is secured in an enclosure, such enclosure shall be kept clean to the satisfaction of the District Officer.
5. Any animal owner who:
  - (a) fails to provide a secure enclosure for such animal, and
  - (b) such animal is found on a public way or place commits an offence.
6. The owner or occupier of any cultivated land or of any enclosed land may shoot or kill any animal found trespassing and damaging such land provided the owner or occupier shall:
  - (a) notify the owner of the animal, if known, or
  - (b) if the owner of the animal is not known after reasonable attempts to find him or does not claim the same within one hour after the animal is killed, the carcass may be

disposed of in a manner determined by the owner or occupier.

7. Any person who fails to comply with these Regulations shall upon conviction be subject to the penalties provided by S: 26 of the Government Act.

Hon. D. Feleti V. Sevele  
Prime Minister"

[5] The Schedule lists 7 districts in Tongatapu, the 7<sup>th</sup> of which is the district of the appellant and of the complainant – Lapaha District.

[6] Section 26 of the Government Act provides as follows:

"26. It shall be lawful for any District Officer to make regulation for the governing of his village plantations and other necessary matters relating to the welfare of the people of his village provided that such regulations shall not become law until sanctioned by the Cabinet and confirmed by the signature of the Prime Minister and it shall be lawful for the District Officer to enforce those regulations in his town and whoever shall infringe any regulation so confirmed shall on conviction be liable to a fine not exceeding \$100 and may be ordered by the Court within such time as the Court may order to carry out the regulation which he has so infringed. Should he fail to carry out the order of the Court he may again be charged before the Court and on conviction he shall be liable to a fine not exceeding \$200 or in default of payment to imprisonment for a period not exceeding 6 months."

[7] Mr. Fili for the appellant referred to the above quoted Regulation 6 and says that the appellant did have lawful justification for killing the Complainant's pig because the pig had trespassed and damaged the

land upon or in which his crops were growing. He was the owner of the crops and occupier of the land. Mr. Fili said that the appellant did not notify the complainant to come and get her pig and that she did come and take it and made use of the whole of the carcass of the pig.

[8] Mr. Fili handed up a valuation of the crops of the appellant which were damaged by the pig of the complainant on 11 July 2020. It came to a total of \$2,973.50.

[9] In response to the ground of appeal of the appellant, Ms. Aleamotu'a says that the Magistrate was correct because the appellant did knowingly change his plea of not guilty and pleaded guilty instead. She says that the question for decision in this appeal is whether or not there was, or there is, a miscarriage of justice, and she referred to the decision of the Court of Appeal in *Filimone v R* [2004] Tonga LR 183 where the accused in that case had pleaded guilty to 4 counts (conspiracy to commit theft, abetment to theft, receiving stolen property and obtaining by false pretenses). He was sentenced to 18 months imprisonment altogether to be served in addition to and after he had served 18 months imprisonment which was in suspension and which suspension he breached when he committed these 4 offences. He appealed that his guilty pleas be changed so that he could plead not guilty because he had no legal counsel and advice at the time. His appeal was dismissed because he had understood all that he was charged with and he gave frank and detailed account of his involvement with the others in the offences, and more importantly he was no stranger to the Court and criminal trials.

[10] Ms. Aleamotu'a says that the appellant in the present case freely and knowingly changed his plea from not guilty to guilty and that he was no stranger to the Court because he had been tried and convicted in 2011 of manslaughter. She accordingly submitted that there was no merit to the appellant's appeal and that it be dismissed.

### **“Intentionally and unlawfully kills”**

[11] She however fails to comment on the regulation 6 of the District (Animal Enclosure) Regulations 2009. I must refer to it because that is the ground of the appeal. That is why I have quoted it in full.

[12] S.182 of the Criminal Offences Act under which the appellant was charged and is convicted, provides:

“182. Every person who intentionally and unlawfully kills, maims or wounds any cattle shall be liable to imprisonment for any period not exceeding 3 years.”

The critical words in those provisions are “intentionally and unlawfully”. If the prosecution cannot prove either of those two requirements, then no offence is committed under S. 182.

[13] It is clear and I accept that at the time of the killing of the pig, there was and there still is Regulation 6 which gives lawful justification to the owner or occupier of land to shoot or kill any animal (include a pig) found trespassing and damaging such land. And it is clear that neither the police who prosecuted the appellant nor the Magistrate was aware of that Regulation. And even the appellant did not know of it, but I do not blame him for not knowing it because he was just a lay person. I believe the police have the responsibility and obligation to know the laws which apply to people in the villages they look after. If they were aware of this law, they would not have prosecuted the appellant. And if the Magistrate was aware of it, as she ought to, she would not have accepted the change of plea and to have the charge dismissed or proceed with the trial to see if the prosecution would prove unlawfulness of the killing of the pig.

### **No assessment of loss**

[14] I also consider that the Magistrate ought to have considered that there was no evidence provided as to the value of \$1300 claimed for

the death of the pig, especially as the complainant was able to have and made use of the carcass of the pig. At the same time, the appellant also claimed that his crops were damaged by the complainant's pig. There should have been proper evidence and consideration of the question of compensation to be ordered under S.25 of the Criminal Offence, such that it would have been more appropriate that the matter be resolved by way of a civil action between the complainant and the appellant. As it was there was no proper basis to make the order for compensation of the sum of \$1,300.

#### **No dispute of damage to crops**

- [15] There was no dispute by the complainant that her pig had damaged the appellant's crops. She admitted to the Magistrate that the appellant had complained to her about the damage which her pig had caused to his crops.

#### **Validity of the regulation**

- [16] There was no argument by the respondent that the regulations were invalid. I consider that they were properly made in pursuance of powers conferred under section 26 of the Government Act. They have been properly promulgated by publication in the Government Gazette Supplement Extraordinary according to the provisions of S.10 of the Interpretation Act.

#### **Conclusion**

- [17] I therefore come to the conclusion that there was a miscarriage of justice. The conviction of the appellant was unlawful because he had lawful authority under regulation 6 to kill the pig which damaged the land on which his crops were growing. He was the occupier of that land by virtue of his crops thereon. Because his conviction was wrong,

the order for compensation based on that conviction cannot be sustained.

**Orders**

[18] Accordingly, I order as follows:

- (a) The appeal of the appellant is upheld.
- (b) The conviction and sentence of the appellant are quashed.
- (c) The order for compensation is also quashed.
- (d) The costs of the appellant in this appeal which I assess in the sum of \$500 shall be paid by the respondent.



*[Handwritten signature]*

Niu J

**J U D G E**

**NUKU'ALOFA: 16 September 2020**