

28/06/17

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

**CR 123 of 2015**

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**BETWEEN: R E X - Prosecution**

**AND: TEVITA HALALIMA HAFOKA - Defendant**

**BEFORE THE HON. JUSTICE CATO**

Mr Lutui for the Crown

The prisoner unrepresented

**SENTENCE**

[1] The prisoner, Tevita Hafoka, entered a late plea of guilty on the 24th April 2017 to one count of manslaughter contrary to sections 85, 86(1) (a) and (2), 92 and 93 of the Criminal Offences Act. He had originally pleaded not guilty on the 15th July 2015 to a count of murder under section 85, which required the Crown to prove that on the 11th July 2015 at Nuku'alofa, he did intend to cause injury to the deceased Sioeli Finau when he stabbed him with a knife, he knew that injury was likely to cause his death, and he was reckless whether death ensued or not. The Crown accepted the plea of manslaughter in discharge of the indictment for murder.

[2] The prisoner had elected trial by Jury and had maintained this plea up until the date of his trial. He originally had a fixture for trial when he was represented by counsel for the 14th

November, 2016, but trial dates were vacated with a final date to commence on the 24th April 2017. On the 21st April, having been given bail, he failed to appear and a warrant to arrest was issued with the direction his trial was to proceed on the 24th April 2017. He was arrested and came before the Court, unrepresented, his counsel having been given leave to withdraw at the earlier hearing, after he had not appeared and had failed to meet his commitment to counsel.

[3] On the 24th April 2016, he appeared before the Court for a trial by jury, and pleaded guilty to manslaughter. I considered for sentencing purposes that the lateness of this plea should reduce the discount for the guilty plea on the ground that it was entered well over a year after his initial plea and on the point of trial. However, the file records that, on the 13th November 2015 when he first appeared before this Court after committal, the proceedings were adjourned to the 6th November 2015 to enable the defence to discuss with the Crown the issue of plea. I am reluctant therefore to diminish the discount because it would appear that the prisoner had initiated plea discussions at a very early date which for some reason had not resulted in a plea being entered earlier.

[4] The agreed facts record that the prisoner, who is about 27 years old and the deceased who was 23 at the time of his death were involved in an incident on the 11th July 2015. The prisoner had been at a bar in Nuku'alofa with his wife and wife's sister. The bar closed at 11.30 and the accused, his wife and sister left the bar and proceeded to the Nukualofa town square whilst the deceased with friends visited a coffee bar nearby. A short while later, the deceased, who was intoxicated, walked over to the accused's wife and asked her for sex. This angered her and she swore at the deceased. He slapped her on the face. The accused saw the deceased slap his wife and he returned to the area. He

attacked the deceased and they commenced to fight. The deceased then ran away and called out to the accused from a nearby to fight with him. The accused ran to him and took out a small knife from a pocket in his pants and stabbed the deceased in the left side of the abdomen. The deceased fell to the ground and the accused, having thrown the knife away, went back to his wife. The deceased was rushed to hospital by the police but he was declared dead on arrival. The medical report states that the deceased had died of cardiorespiratory arrest secondary to haemorrhage from the stab wound. The accused was co-operative with police and admitted to the offending.

[5] I asked Mr Lutui who appeared for the Crown on what basis the manslaughter plea had been accepted. It seemed to me there were two possible bases, and that was provocation or doubt as to murderous intent. Indeed, in *R v Tui'tavake* [2005] Tonga LR 348, at page 352, the Court of Appeal observed that where a verdict of manslaughter could be the result of provocation or lack of murderous intent, the trial judge should determine which is the more likely explanation for the Jury's verdict and give reasons for his decision.

[6] In this case, Mr Lutui appeared to indicate that the plea had been accepted on the ground of provocation. On provocation, it is important to note that the definition of what can constitute extreme provocation under section 89, includes a violent assault committed in the view or presence of the accused person upon his wife. Although it seems that the retaliation with the knife occurred sometime after the assault by the deceased, and may have at trial given rise to serious questions as to whether there had been a loss of self control or an excessive reaction I am content to treat the case as one where acceptance of the plea was based on provocation, although it would not have surprised

me if the plea had been based on an absence of murderous intent, in the circumstances.

[7] That brings me to a consideration of the prisoner's circumstances for sentencing purposes. The probation report indicates that he is married with one young child and is the sole breadwinner, working in a construction company as a builder. He seems not to have had much education leaving in the fifth form at school and then becoming involved in drugs and alcohol with his peers. He has a unimpressive criminal list of convictions commencing in 2005 with housebreaking and theft; more thefts in 2008 for which he was sentenced to 18 months imprisonment being suspended; unlawful assembly, riot and destroying a building for which he was sentenced to two years imprisonment; grievous bodily harm for which he was sentence to four years and six months imprisonment; escaping from lawful custody; trespass and drunkenness. Significantly, the probation report notes that the prisoner had said he had taken the knife to help with cookery at a family funeral prior to going drinking with his wife and a relative, later. The prosecution did not seek to contradict this assertion and I will sentence him on the basis that he had not carried the knife out with an intention to use it in a fight, a finding which in Tui'tavake the Court considered significant, on sentence.

[8] The Crown in a sentencing submission that Mr Lutui did not prepare submitted that the case fell into para 4 of the sentencing ranges referred to in Tui'tavake. Relevantly, as to provocation these appear as;

[3] 7 years for moderate provocation and sudden retaliation

- [4] 5 years for a high degree of provocation, sudden retaliation, strong mitigation.
- [5] 3 years or less for the highest degree of provocation – violent attack, even terror, evoking extreme passion.

These sentencing ranges were derived from a study of the British Sentencing Advisory Panel's, consultation paper on Sentencing of Manslaughter by Reason of Provocation. This had been considered by the New Zealand Court of Appeal in *R v Edwards* (NZCA 371/04 13th April 2005), and by the Court of Appeal in Tonga in *Tu'itavake*. It is to be noted that for the worst cases of violence and provocation where firearms were used the range was said to be 12 years and 10 -12 years where a knife was carried and used with great brutality. These were sentences where provocation had been returned after successful defences.

[9] The ranges referred to are guides only, and an actual sentence is fact specific. The Court of Appeal elsewhere in its judgment emphasised that there was no set tariff. In each case, the task of the sentencing Judge was to determine the true culpability of the offender in the particular circumstances of the case. The Court emphasised the sanctity of human life and that the taking of life should be met with appropriate condemnation. However, the Court observed that the sentence imposed should bear relation to the circumstances of the particular offence and the particular offending.

[10] I indicated to Mr Lutui that I was rather concerned that there was such a time lapse between the provocations and here the retaliation that is the retaliation could not be said to be immediate or sudden loss of self- control. I also note that the kind of assault referred to under section 89 as extreme provocation was one that was described as a violent assault.

There was violence here, but to my mind one that was at the lower level being a slap only to the face of the prisoner's wife. Nor was this, like Tu'itavake, where the prisoner had used a knife in response to a very violent assault. I mooted that for sentencing purposes here the starting point should be around 8 years with which Mr Lutui did not disagree. Over the weekend, I have reflected on this and also the ranges referred to by the British Sentencing Advisory Panel. I concluded that in the circumstances that an appropriate starting point before mitigation would be 8 years to reflect the fact that the prisoner had used a knife and caused death in circumstances where the assault on his wife had involved a slap only and the retaliation was not one that involved, in my view, an obvious sudden loss of self-control.

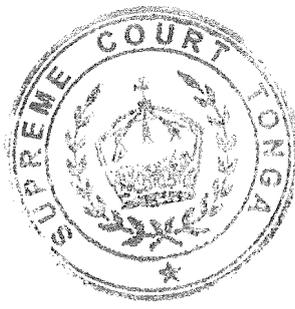
[11] From this will be deducted 18 months for his guilty plea and a further six months for his expression of remorse and apology and some reparation he made I am told to the family in the form of mats. I understand the apology was accepted. The accused expressed contrition in the remarks he made on sentence and asked for mercy pointing out that he was the bread winner for his family that included a baby. Family considerations ordinarily do not play a significant role in sentencing but they may be a factor affecting the length of suspension because family considerations may play an important role in rehabilitation. I consider an appropriate sentence for manslaughter in this case is five year and nine months imprisonment taking into account also his family circumstances. I record that had he plea been based on lack of murderous intent even taking into account the initial provocation, a somewhat higher starting point may have been justified. From this is to be deducted any time spent in custody on remand.

[12] I consider that, although he has a poor record, the prisoner may be maturing with his reasonably recently acquired marital status and child, and appreciates their need for support. Although he has a poor record, with his family support in mind, I consider he should be given a further chance to rehabilitate himself and by cooperating with the police and pleading guilty he has justified some of the criteria of Mo'unga. There was also provocation that motivated his actions. His wife was in Court to give him some support. He stated that he had given up alcohol and deeply regretted what he had done. I propose to suspend the final two years of his sentence on the following conditions;

- a. He commits no offences punishable by imprisonment for the period of his suspension;
- b. He is placed on probation for the period of his suspension;
- c. He is to live where directed by his probation officer;
- d. He is to undergo the following courses under the direction of probation;
  - i. A course on drug and alcohol abuse under the direction also of the Salvation Army;
  - ii. An anger management course.
- e. He is not to consume alcohol or drugs during his suspension.

[13] He is warned that a failure to abide by any of these conditions may see him returned to prison to serve the period of his suspension in custody.

**DATED: 27 JUNE 2017**



A handwritten signature in cursive script, appearing to read "Cato", is written in black ink.

**C. B. Cato**

**JUDGE**