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

CR 123 of 2018

**BETWEEN:**                      **REX**

**Prosecution**

**AND:**                              **EMILIO TO'A**

**Accused**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:**      **Mr T 'Aho and Miss E Liu for the Prosecution**  
                     **Mr S Tu'utafaiva for the Accused**

**Date of Hearing:**      **14 June 2019**  
**Date of Decision:**      **14 June 2019**

**SENTENCING REMARKS**

- [1]      On 6 May 2019, Mr To'a appeared for trial by jury on a charge of murder with alternative counts of manslaughter (contrary to ss. 85, 86(1)(a) and 87(1)(b) of the Criminal Offences Act) and causing grievous bodily harm. He pleaded not guilty to all of the charges.
  
- [2]      On 13 May 2019, and during the trial, Mr To'a sought leave to vacate his not guilty plea to the charge of manslaughter. He was re-arraigned and entered a

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guilty plea to the charge of manslaughter. This was accepted by the prosecution and the other charges were withdrawn.

[3] The particulars in the indictment relating to the charge of manslaughter read:

‘Emilio To’a of Fangaloto, on or about 4 March 2018 at Fangaloto, you did cause the death of Siaso Tupa when you unlawfully stabbed his body with a knife repeatedly, causing serious injuries to his body which caused his death.

[4] Mr. To’a appears for sentence today. The maximum penalty for manslaughter in this case is 25 years imprisonment pursuant to s. 93 of the Criminal Offences Act.

### **The facts**

[5] Mr To’a changed his plea at a late stage of his trial, after the evidence had been given. Neither Counsel has addressed me extensively on the facts but I have had the benefit of hearing and seeing the witnesses give their evidence (including Mr To’a) and set out the relevant facts below.

[6] On the morning of 4 March 2018, Mr To’a took part in a drinking party at a house at Fangaloto, where his friend, by the name of Le’o, was living. At the drinking party were Le’o, Mr Tupa (the deceased), ‘Ana Tonga (Mr Tupa’s girlfriend), Latai Sia and Mr To’a. They drank more than three bottles of liquor. Both Mr To’a and Mr Tupa were intoxicated.

[7] Latai Sia left the house, taking with him what remained of a fourth bottle of liquor, bringing an end to the drinking party. Mr Tupa and ‘Ana Tonga went outside through a door from the kitchen. Mr To’a was in the kitchen and heard Mr Tupa threaten to beat ‘Ana Tonga. Mr Tupa pushed her face with his hand and she fell backwards. Mr To’a, who had seen Mr Tupa beat ‘Ana Tonga before, intervened to protect her. ‘Ana Tonga escaped out a back door, climbed over the fence and went to her cousin’s house. She was clearly afraid of Mr Tupa.

[8] Mr Tupa and Mr To’a argued and Mr Tupa wanted to fight. Mr Tupa grabbed a piece of timber. Mr To’a took two knives from the kitchen hoping to scare-off

Mr Tupa. Each told the other to put down their weapons. Mr Tupa did put down the timber, but Mr To'a threw down only one knife.

[9] At this point the evidence was unclear. Mr To'a said that Mr Tupa started to attack him but was held back and that one Paula Tonga led him to the road. Mr Tupa followed him out to the road. There was some evidence also that Mr Tupa tried to get himself a machete from a nearby house but, in any event, he did not get one. I am satisfied that on the road both Mr Tupa and Mr To'a challenged each other to fight. I accept that Mr Tupa made the first attack on Mr To'a.

[10] The two men fought and were initially trading blows. Mr To'a punched in a right hand overarm style and the knife he was holding wounded Mr Tupa. Mr To'a then tackled Mr Tupa to the ground and was on top of him and inflicted further stab wounds. The fight ended when Paula Tonga pulled Mr To'a off Mr Tupa. Mr Tupa ran off. As Paula Tonga led Mr To'a home, they passed Mr Tupa lying on the ground. There were some women already there but Mr To'a did not render any assistance.

[11] Medical evidence was given that Mr Tupa had five significant stab wounds but that three of his wounds were of particular significance. He had deep wounds to his left shoulder, his sternum and, to the left side of his back. Of these, the last two penetrated the lungs causing excessive blood loss and death. Either wound would have resulted in Mr Tupa's death.

#### **The material before me**

[12] I have been provided with:

- (a) A pre-sentence report, along with references for Mr. To'a;
- (b) Submissions from the prosecution; and
- (c) A victim impact assessment.

[13] I also heard oral submissions from Mr 'Aho and from Mr. Tu'utafaiva.

*Pre-sentence report*

- [14] Mr. To'a is 21 years-old and the eldest of four children. He was born in Ha'apai but customarily adopted at an early age by his paternal grandparents and raised at Fangaloto. He had a good upbringing, did well at school and has no previous convictions. He is presently enrolled at the theological college. He has the support of his family. I accept that he is deeply remorseful for what has occurred and an apology has been made to Mr Tupa's family in the traditional manner and accepted. References have been provide, attesting to Mr To'a's good character.

*Victim impact report*

- [15] The Attorney General's Office spoke to Mr Tupa's mother, who lives in Niuatoputapu. The victim impact report describes the close bond that Mr Tupa had with his mother who, not surprisingly has found it difficult to deal with the shock of his death. She says Mr Tupa is greatly missed by her and also by his siblings. After Mr Tupa's funeral, Mr To'a's family had provided gifts and sought forgiveness and she has accepted the apology. She is mindful that whilst her son has gone, Mr To'a is still a young man and was a friend of her son.

**The submissions**

- [16] In written submissions, the prosecution referred me to a number of authorities, namely, *Tu'itavake v R* [2005] Tonga LR 348, *R v Hafoka* (Unreported, Supreme Court, CR 123 of 2018, 27 June 2017, Cato J) and *R v Kaufusi* (Unreported, Supreme Court, CR 108 of 2018, 21 January 2019, Paulsen LCJ), for guidance as to the appropriate sentence.

- [17] The case law affirms the sanctity of human life as a fundamental value of society and requires that the taking of life be met with appropriate condemnation.

- [18] In *Tu'itavake* the Court of Appeal, at [18], noted that in cases where an accused is acquitted of murder but convicted of manslaughter the verdict might be reached on the basis that the accused was provoked or lacked murderous intent, and the trial judge should determine at sentencing which is the more likely explanation for the jury's verdict and give reasons. The existence of provocation was a significant factor in this case as initially Mr To'a sought to protect 'Ana Tonga from Mr Tupa and this led to the challenges to fight and eventually to the attack on Mr To'a. I treat this case as one where the acceptance of the plea of guilty to manslaughter was based on provocation.
- [19] The prosecution refers to the use of a knife as an aggravating feature. I accept that a high starting point for sentencing purposes is called for where knives and other weapons are used during the commission of an offence and death results. Deterrence and the protection of society are important sentencing principles here. I was also referred to the sentencing ranges set out in *Tu'itavake* but these ranges are guides only and the Court noted that as the circumstances under which the offence of manslaughter may be committed vary so greatly there can be no tariff, and in each case 'the task of the Judge is to determine the true culpability of the offender in the particular circumstances of the case'.
- [20] The prosecution originally submitted that this case falls into category [4] in *Tu'itavake* and that the appropriate starting point is 10-12 years imprisonment. However, before me, Mr 'Aho accepted that this is too high and submitted that 8-8 ½ years is the appropriate starting point. Mr Tu'utafaiva argued that the appropriate starting point was 7 years imprisonment.
- [21] The decisions of the courts distinguish between cases where the offender carries a weapon with the possibility of violence being anticipated; cases where the offender has the knife in his possession for legitimate reasons unconnected with the offending, and; cases where the weapon is presented by the deceased. This case falls into the first and most serious category, although I do not regard Mr To'a as criminally culpable as, say, the accused in *Hafoka* where it was the

accused who made the attack upon the deceased with a knife he was carrying in his pocket. It is true that Mr To'a carried the knife anticipating violence, but I have found that he did not initiate the attack that lead to its use.

[23] In *Hafoka* Cato J adopted a starting point for sentencing purposes of 8 years and in *Kaufusi* I adopted a starting point of 7 years. Notwithstanding Mr Tu'utafaiva's submissions to the contrary, I consider Mr Toa's offending is more serious than in *Kaufusi* because in that case it was the deceased who had presented the weapon (scissors) and Mr Kaufusi rendered assistance to the deceased in an effort to save his life. However, as I have said, I do not regard Mr To'a's offending is a serious as in *Hafoka* where the accused initiated the attack. This case falls between *Kaufusi* and *Hafoka* and I adopt a starting point of 7 ½ years imprisonment.

[24] Mr To'a is entitled to credit for his previous record and that he co-operated with the Police. For these factors I discount his sentence by 9 months. In addition, he is remorseful and has made peace with Mr Tupa's family and, in Tongan custom, gifts have been provided. I discount the sentence by a further 6 months to reflect these matters.

[25] The prosecution accepts that Mr To'a is entitled to credit for his guilty plea. I am advised that the prosecution had offered to accept a guilty plea on the charge of manslaughter before trial but Mr To'a only changed his plea once the evidence was heard. I give him credit for his guilty plea but, of course, less credit than he would have received had he pleaded guilty at an earlier stage. Mr 'Aho submits that the credit should be not more than 12 ½ percent. I am prepared to accept that suggestion, although I consider it a generous allowance. I discount the sentence by further 9 months. The sentence that I arrive at is therefore 5 years and 6 months imprisonment.

[26] It is accepted that it is appropriate to suspend some portion of the sentence (*R v Mo'unga* [1998] Tonga LR 154). Mr To'a's rehabilitation prospects are very good. As noted, he is a first-time offender, has acknowledged his offending,

is remorseful and has a supportive family. He is enrolled in theological college and it is to be hoped and expected that on his release from Prison he will make a useful contribution to society. Looking at the authorities, and maintaining consistency with them, I consider it appropriate to suspend the last 2 years of his sentence, subject to conditions.

### Result

- [27] On the one count of manslaughter Mr. To'a is convicted and sentenced to 5 years and 6 months imprisonment. The sentence is backdated to 14 December 2018 to take account of time already served in prison.
- [28] I suspend the final two years of his sentence on the following conditions:
- (a) Mr To'a is not to commit any offences punishable by imprisonment during the period of his suspension;
  - (b) He is placed on probation for the period of his suspension to live where directed by his Probation Officer;
  - (c) He is not to use alcohol or drugs during the period of his suspension;
- [29] Mr. To'a is warned that should he fail to comply with any of these conditions during his suspension he may be required to serve out the balance of his sentence.



NUKU'ALOFA: 14 June 2019

A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen  
LORD CHIEF JUSTICE