

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

CR 181 of 2019

**BETWEEN:**

**R E X**

**-Prosecution**

**AND:**

**'EVONA 'AKAU**

**-Accused**

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**VERDICT**

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**BEFORE:** JUSTICE CATO

**Counsel:** Ms. H. Aleamotu'a for the Prosecution  
Mr. S. Fili for the Accused

**Date of Verdict:** 4 May 2020

1. The accused, 'Evona 'Akau, stood indicted on one count of permitting a ship to proceed to sea carrying excess passengers than as stated in the Survey Certificate contrary to section 122(1) (a) and 2(b) of the Shipping Act.
2. The particulars were that, on the 9<sup>th</sup> January 2019 at 'Ohonua, 'Eua, he did act as the Master of the vessel MV 'Onemato, permit the MV 'Onemato to proceed to sea carrying 365 passengers which was in excess of the permitted passengers (150) stated in the Survey Certificate.

3. I heard three days of evidence commencing on the 27th April, 2020 and, after hearing submissions from both counsel, Mr Fili for the accused and Ms Aleamotu'a for the Prosecution, I reserved my verdict until today.
4. The evidence was in a narrow compass. The accused, I am satisfied, beyond a reasonable doubt acted as the Master of the ship 'Onemato taking the vessel back from Eua to Tongatapu on the 9<sup>th</sup> January 2019. He did not deny this when he gave evidence, and a concession had been made by Mr Fili earlier in the Prosecution case to the effect that he had taken over as Master from the earlier captain. He was qualified to be a Master holding a level 5 qualification, and on the voyage to Eua from Tongatapu earlier in the day had been first mate to the Captain, a Mr Sione Pateta.
5. Mr Sione Pateta gave evidence that he had a disagreement with a manager from Nuku'alofa and as a consequence had informed the manager that he would be leaving the ship at Eua. He did so after the voyage to Eua had been completed on the 9<sup>th</sup> January 2019. I am satisfied that, although the return trip was to commence about 2.45pm that day, it did not do so for several hours. Evidence was given concerning various reasons for the delay, a faulty ramp, other mechanism, and a delay whilst a suitably qualified first mate was found on Eua to accompany the accused on the voyage back to Nuku'alofa. I am satisfied that the vessel did have a full crew as required under the terms of its Safe Crewing certificate when it set out for Nuku'alofa sometime after 6pm arriving at about 9.30 pm. There is no complaint concerning the way in which the ship was sailed or any aspect aside from the fact that it was carrying a much greater number of passengers than its Certificate of Survey allowed. This survey provided that the number of passengers to be carried was 150 – Eua (day time only).
6. I heard from a Mr Senituli Lavaka, who was the Ports Authority Officer, who had been present at the Fua Wharf in Nuku'alofa when the ship arrived. He said that he observed that the ship which he could see clearly because there was light on the ship as it approached the wharf had a lot of passengers on board. He observed that there were people on

containers. He said he did not know that the captain was not on board although he knew there had been an argument. He said that he had worked in the Ports Authority for a long time as a checker which involved checking numbers of passengers prior to departure clearance and other relevant documentation. He saw that there was an excessive number of passengers on the vessel so he counted them. I am satisfied that he did this in a deliberate and careful way. A defence witness, who had travelled on that voyage, confirmed that counting had taken place, as he left the ship. I am satisfied that Mr Lavaka faithfully recorded the number present and made a note in his diary which was produced in evidence to the effect that the vessel arrived at 9.30pm with, as he noted, 356 passengers on board. I accept his evidence that 356 passengers were on board that evening and that this was greatly in excess of the survey maximum allowed of 150, in daylight conditions. It seems that, after he had counted the passengers, he found out that the accused was the Master of the ship and had replaced the former captain. He informed the accused that he would report the matter. The accused was reported to have informed him that the Marine officer at Eua, who was involved with departures, had allowed him to take the amount of passengers he did.

7. During the course of the trial, a document (exhibit 2) was produced by consent. This was a vessel time sheet and had been made out by a Mr Semisi Napa'a who was the officer employed by the Marine department to oversee departures from Eua. He performed a similar role as Mr Lavaka did for the Ports Authority when ships departed from Nuku'alofa. Mr Napa'a had since died.
  
8. I am very suspicious about the veracity of the contents of Ex 2. First it states that the ship left at 14.45 hours and ended at 18.30 hours. These times may well have been the intended times for departure and termination of the voyage but the evidence reveals that the ship left several hours later arriving in Nuku'alofa. Much more concerning, however, is the assertion that the ship was carrying 150 passengers when Mr Lavaka, whose evidence I accept, said that it was carrying greatly in excess of this number. I view the 150 as a convenient number stated by Mr Napa'a to falsely mask the true position that it was carrying a far greater number of passengers, and indeed, well beyond the number permitted

by the Survey. I am also concerned that the accused's name 'Evona (Vuna) appears to have been crossed out and substituted by the name Olive. It was common ground, at the trial, that Olive did not join this company and travel on that ship until after this date. I conclude with little difficulty that this document is false and that Mr Napa'a did not act honestly when signing this document purporting to be a clearance from Eua at a time stated to be 18.20 hours. Further, and, in my view significantly, although he signed the document as the supervisor, the accused, who was the Master and effectively captain of the vessel, did not do so. It seems to have been intended that the document be signed also by the accused because the time of apparent departure and date are also inserted beside the vacant place for his signature, being 18.20. I am satisfied that this omission must have been deliberate because it was contrary to practice for the Master not to sign.

9. Mr Sione Pateta gave evidence that exhibit 2 was a time sheet that was co-signed by the Master and the Marine and Ports officer at Eua prior to the ship departing. He stated that it was the responsibility of the Master to make sure that details in the form were correct prior to a ship departing. He said that, if the number of passengers exceed the permitted amount, it should not depart and the final decision was with the Master.
10. Although Mr Fili, in his submissions, tried to persuade me that the Marine officer, in this case Mr Napa'a, was the person responsible for clearing departure and that the fact that he had done so absolved the accused from his responsibility as Master of the ship so that he could not be responsible for ferrying an excessive number of passengers to Eua, I do not accept this submission. I accept that Mr Pateta gave honest and reliable evidence that the practice was to require the Master to satisfy himself that the information in the form was accurate. I consider that this must be so because there would be no other purpose for the Master to have to sign the document but to confirm the information contained within it. I also, having considered the Shipping Act and in particular sections 122 (1) and 2 (b), which plainly prohibit the Master proceeding to sea;

“carrying passengers in excess of the number stated on its safety or survey certificate as being the maximum number of passengers that the ship may carry.”

11. I consider the responsibility of ensuring the number of passengers does not exceed the survey number permissible is placed squarely on the master (section 122(b)) and owner (section 122(2a)) and both commit offences for breaching the survey allowance. Forfeiture of the ship to the Crown is also available as a penalty signifying the importance of compliance with these provisions.
12. The accused gave evidence and admitted that he took over from Sione Pateta and was qualified to do so because he had the required qualification of master class 5. He had been first mate on voyages taken with Captain Pateta, and also had acted as captain on occasions before Captain Pateta took over this position. I have no doubt that the accused was a very experienced seaman and would have known full well the importance of the requirements of exhibit 2, the time sheet and that he was required to also sign it listing the number of passengers before leaving Eua. That he did not do so, I infer can only have been because he was reluctant to sign a document which he knew was inaccurate. He said, in evidence, when asked whether he could see into the area where passengers were seated that he could. I reject any assertion by him that he did not know there were on board an excessive number of persons. It was his obligation to satisfy himself as to the number of passengers on board before he left Eua, and the fact he may have been under pressure, as Mr Fili suggested, made no difference.
13. I consider that section 122 which carried with it significant penalties and consequences including forfeiture of the boat to the Crown requires mens rea to be proven by the Prosecution beyond a reasonable doubt. This requires me to be satisfied beyond a reasonable doubt that the accused knew that he was carrying passengers in excess of the maximum number allowed under the survey, and, knowing this, travelled with excess passengers on board. In this case, the number was so greatly in excess that I consider beyond any reasonable doubt that he must have known that he was carrying an excessive number of passengers, and proceeded to sail the ship as Master regardless of this fact. I do not accept that he can rely on the false assertion contained in the time sheet by the late Marine officer Napa'a, or any assertion of a lawful number of passengers by him. I

consider the fact he did not sign the time sheet (exhibit 2) as he must have known, as an experienced officer of this ship that he should do, was because he knew that that the information contained within it as to the number of passengers was untrue. Accordingly I reject his evidence beyond any reasonable doubt that he did not know that an excess of passengers were being unlawfully carried on the ship Accordingly I find being the Master of the ship he permitted it to proceed to sea carrying an excessive number of passengers contrary to sections 122 and section 2(b) of the Shipping Act. I find him guilty of this offence, and he is convicted.

14. I order a probation report. Prior to sentencing, I ask to be appraised of full details concerning the ownership of the vessel, said to be the Eua Sea Transportation Council Cooperative Society Ltd its constitution, membership, officers and financial position. I note that its business licence was cancelled on the 1<sup>st</sup> April 2019, having reapplied for a licence in the name of Eua Ferry Service Management Board on the 1<sup>st</sup> October 2018.
  
15. I am advised that the Crown was unable to locate any of this kind of material from the Register and this is concerning. The excess of passengers was so great on this voyage in waters acknowledged to be dangerous at times and at night that I am very concerned at the safety of this operation, and the management of it. The fact I know so little about the ownership and the circumstances of this offending concerns me as to the integrity and security of this operation. I am considering forfeiture of the vessel to the Crown and require full submissions on whether forfeiture is a mandatory provision, and if not arguments for and against forfeiture. I would invite the Director for Public Prosecutions to appear on sentence so important is this issue in the public interest and for the people of Eua who depend on the ferry.

NUKU'ALOFA: 4 May 2020



*[Handwritten signature]*

Cato J  
JUDGE