

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

• CR 181 of 2019

BETWEEN:

R E X

-Prosecution

AND:

'EVONA 'AKAU

-Accused

JUDGMENT ON SENTENCE

BEFORE: JUSTICE CATO

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

Date of Verdict: 12 June 2020

1. On the 4th May 2020, I convicted Mr 'Akau of 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. He comes before me for sentence today.
2. The facts are recorded in my written verdict. To summarise, •

12 JUN 2020



- i. I found the Crown case proven beyond any reasonable doubt that the MV 'Onemato was sailed on the 9th January 2019 from Eua to Tongatapu with 356 passengers on board when the permitted number was 150 passengers.
- ii. The Master and Captain of the vehicle at the time was the accused.
- iii. On the evidence I heard he had taken over the role of Captain it would seem at short notice when the previous Captain after a disagreement with management left the ship at Eua some hours before its eventual return voyage to Nuku'alofa. I have heard no evidence that, although suitably qualified as a Master and qualified to undertake the voyage under the Tongan Shipping Act, he had captained the vessel before although he had regularly sailed as Master this ferry between Nuku'alofa and Eua.
- iv. I have no doubt contrary to his evidence that he was aware that the vessel was carrying far in excess of the permissible number of passengers. I am satisfied that he representative of the Marine Department at Eua, a Mr Semisi Napa, who is now deceased inaccurately, indeed falsely filled out details of the vessel time sheet that was also required to be endorsed by the Master and captain of the vessel but was not endorse, to the effect that the ship was carrying only 150 passengers. I have discussed this disturbing aspect of the Practice of the Marine department at Eua in my verdict. I do not propose to go further.
- v. The vessel started its voyage later than intended and arrived about 9pm that is most of the voyage took place in darkness.
- vi. The Ports officer at Nuku'alofa a Mr Senituli Lavaka of the Nuku'alofa Ports authority saw clearly that the vessel was overloaded with passengers when it arrived and commenced a head count of passengers as they left. Plainly, he was concerned at what he saw when he described passengers sitting on containers and not in their rightfully allocated passenger position. I was informed by Mr Lutui, the Director of Prosecutions that it was not uncommon for the ferry to be overloaded as passengers came onto the ship anxious for passage from Eua. This

was, however, the first prosecution in Tonga for excess passenger breach of section 122(1) of the Shipping Act.

3. Mr 'Akau comes before me aged 55 with no previous convictions. He can quite accurately describe as "a man of the sea". I was well informed by a very detailed and well written probation report. He grew up in Ha'apai and has been a sea farer since going out fishing with his father as a boy. He became a ferry boat crewman as a secondary school student. He has worked in different shipping companies and ferryboats for many years. He succeeded in gaining a Ticket of Master class 5 (5 yearly renewable). He is a good family man earning a reasonable salary for his position as Master of this vessel. He is also described as a good man in the community, and plainly is a decent man of good reputation.
4. There is no criticism in this case of his technical competence as a Master to captain this vessel. Indeed, I take into account that he was thrust into the role of Captain when the former Captain left the ship at Eua, and there was plainly pressure exerted upon him to get the ship, although seriously overloaded, back to Nuku'alofa. As I have said, in the verdict however, section 122(b) of the Shipping Act places responsibility on him to ensure that the vessel does not exceed 150as provided for in the survey. He failed to do so.
5. Sections 122(1) and (2) of the Shipping Act exist to provide standards and protect those who use ferries and other vessels as a means of transport in Tonga. The view across the cobalt blue waters and the reef from Laulea Beach near Fatumu to the pastel grey island of Eua on a clear day in the distance is one of outstanding beauty, peace and tranquillity. It is also sometimes a deceptive stretch of water that can, like many waters in the Pacific, become suddenly very dangerous, and treacherous. This voyage was also at night, being later than intended. Mercifully, there was no tragedy here because, if a life had been lost

as could happen easily if the ferry rolled and a person with an insecure footing fell overboard, more serious charges could have been laid under the Criminal Offences Act involving possibly manslaughter by negligence.

6. The Shipping Act, section 122(2), provides penalties for proceeding to sea improperly which includes carrying passengers in excess of survey;
 - a. In the case of an owner, to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 5 years, or both;
 - b. In the case of a master to a fine not exceeding \$30,000 or to a terms of imprisonment not exceeding three years or both

And in either case the ship is subject to forfeiture to the Crown.

7. Mr Lutui candidly admitted that matters could have been handled better by the police who seemed to charge the wrong person as the owner of the vessel. This person was discharged shortly before trial. The owner is in fact the Eua Sea Transportation Council Co-operative Society Limited and it was not charged.
8. I was so concerned at the evidence I heard concerning boarding of the vessel, the false statements made by the Marine officer and the accused's decision to put to sea when there was an obvious very significant breach of survey requirements that I called for further details on the ownership of the vessel and the power I had it seemed to forfeit the vessel under section 122(2) of the Act. The Crown on sentence, as I had requested,

provided details of the Eua Sea Transportation Society which owns the MV 'Onemato and the MV Maui. I learned that both vessels had been provided as security for a substantial loan from the Tonga Development Bank. In these circumstances, forfeiture of the vessel would have been out of the question.

9. Mr Lutui in any event, explained to me that, whilst section 122 stated that the ship was subject to forfeiture to the Crown, the actual decision to forfeit under section 38 of the Shipping Act is the Minister's. He must follow the statutory procedure, and make application to the Supreme Court. After an order for forfeiture is made the ship may be sold and this may cause mortgages, charges, liens and other encumbrances of whatsoever nature to cease to attach to the ship, except those assumed by the purchaser with the consent of the holders. No application for forfeiture by the Minister has been made.

10. Had the owner been charged and convicted in this case, I would have imposed a heavy fine. Mr Lutui indicated to me as I have said that there appeared to have been laxity in the operation of this ferry. The standards of operation must be strictly adhered to, and it is incumbent upon the owner of the vessel as well as the Master of the vessel, Mr 'Akau, to enforce those standards set under the Shipping Act for public safety. I consider that Mr Akau was left in a difficult position when the previous captain left the ship at Eua, and he was left with a decision to leave a large numbers of would be passengers behind if he was to meet the terms of the survey which I suspect Management must have known. In my view, that and the fact that no harm came to anyone on this voyage means that an adequate starting point is two years imprisonment. I consider that this should be mitigated by six months to take into account his long and incident free marine history, his good character with no previous convictions, and the other positive factors about his character that feature in the probation report. I sentence him to 18 months imprisonment.

11. I fully suspend this sentence and order that he undertake 50 hours community work under the direction of a probation officer. I do not intend to impose a fine on him but as I have said the owner, if charged and convicted, could have expected to have been fined heavily for such a breach.

12. As a final aside, taking into account that Tonga, as have many other countries has experienced tragedy with unsafe vessels or practices, and also taking into account that the ferry is the Island's principal means of transport to and from Eua, it is incumbent upon the Eua Sea Transportation Council Cooperative Society Limited, as the owner, to take a much more robust role in the operation and management of their vessels to ensure public safety, than was the case here.

13. This together with the fact that, as I have found, he is a man of good character, an obviously competent seaman, and a first offender



C. B. Cato

J U D G E

NUKU'ALOFA: 12 June 2020