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

CR 11 of 2021

REX

-v-

SIOSAIA TU MAILE

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr J. Fifita for the Prosecution
Mr S. Tu'utafaiva for the Defendant
Date: 29 July 2021

The charges

1. On 18 February 2021, the Defendant pleaded not guilty to manslaughter; alternatively, grievous bodily harm. He elected trial by judge and jury.

2. On 24 June 2021, at the conclusion of his trial, the Defendant was found guilty of manslaughter.

The offending

3. Tuipulotu Afiulo Cook, also known as Ned Cook, was 67 years of age. He resided in Ma'ufanga.

4. On or about 15 May 2020, around 3 pm, Ned finished up his volunteer work at the local Catholic Church and headed to the Billfish Bar and Restaurant for a drink.

5. One of the Crown witnesses, who lives on 'Itafua'atonua Street, between Salote and Vuna Roads, testified that between 8 and 9 pm, she heard Ned, who she knew, out on the street in front of her house arguing with a 'boy'. After a while, they walked off towards Vuna Road. She noticed the boy was limping.

6. The Defendant, who also lived in Ma'ufanga, gave evidence that around 9 PM, he walked from his home up to the Davina House building to purchase alcohol from Lion Liquor. The store was closed. He then sat on the seaward side of Vuna Road. That, he said, was when he saw Ned, whom he did not know, swaying in front of the same closed liquor store. As the Defendant crossed Vuna Road, Ned staggered across the road towards him. According to the Defendant, Ned was obviously intoxicated and, by his facial expression, appeared angry. As Ned came closer, he stretched out his arms as if to grab hold of the Defendant. The Defendant walked around Ned and continued to the other side of Vuna Road and then down onto the right side of 'Itafua'atonua Street toward Salote Road.

7. Ned followed the Defendant, a few metres behind, and on the left side of the street.

8. A security guard from the Davina, who was sitting in her car in the rear carpark, saw Ned, who she also described as being obviously 'too drunk', approach the Defendant from behind on three occasions with his arms outstretched as if he was trying to hug him. As he touched the Defendant, Ned was heard to say words to the effect "why are you being like this". The guard described Ned as trying to calm the Defendant. On each occasion, the Defendant angrily shrugged off Ned's approach and told him to stop annoying him and to go away.

9. The Defendant gave evidence that after the third approach, Ned threw punches to the back of the Defendant's head, with one connecting causing the Defendant to fall halfway to the ground. He said he then got up, turned towards Ned and punched him once in the face. Not one of the three Crown witnesses who witnessed the punch, and the events immediately preceding it, corroborated the Defendant's claim of self-defence. Clearly, the jury rejected it too. Those Crown eye witnesses all recounted the Defendant deliberately moving from one side of the road to the other to punch Ned. One, who was working at a hair salon on the corner of the Davina building and who had been walking behind the two, described the Defendant punching Ned without any provocation on Ned's part. Kepueli, the one who lived closest to where the assault occurred said that the punch was so forceful that he saw Ned's whole body lifted about six inches off the ground. So too, another, who was a lifetime friend of the Defendant, described how he heard the punch from more than a hundred metres away.

10. The punch evidently rendered Ned unconscious before he hit the ground. Witnesses described how he fell without ever trying to break his fall. The back of his head hit the road. His arms were outstretched beside his body. Blood trickled onto the road.

11. According to the Crown eye witnesses, the Defendant then ran off down the street. The Defendant said he walked away, with a limp, due to a previous nail injury. Kepueli called out to him to stop. The Defendant threatened Kepueli, yelling "do you want to fight as well? I'll beat you too".

12. Several bystanders gathered and attended to Ned. He was eventually taken to the hospital and, at approximately 4 a.m., he was admitted to the surgical ward with severe head injuries and suspected aspiration pneumonia. A number of CT scans over the next day or so showed several fractures, progressive subdural haemorrhaging and intracerebral bleeding with a marked shift of the midline structure to the right due to the bleed and brain oedema which placed pressure on the brain's heart and breathing centres. His condition deteriorated rapidly and at 7 a.m. on 17 May 2021, Ned passed away.

13. On 22 May 2020, an autopsy was conducted in New Zealand. Dr Simon Stables opined the cause of death as the result of blunt force head injuries, consisting of one or more blows to the face causing Ned to fall and impact the back of his head. That impact caused a number of injuries including a skull fracture which in turn led to the acute bleeding, swelling and displacement of the brain.

14. Upon his arrest, the Defendant chose to remain silent.

Crown's submissions

15. The Crown submitted the following as aggravating features of the offending:

    (a) the Defendant maintained his not guilty plea and was convicted after trial;

    (b) the Defendant's actions were unprovoked and unjustified;

    (c) the Deceased was defenceless;

    (d) the Defendant's punch was with great force;

    (e) the Defendant ran off when the Deceased fell down;

    (f) from a cultural perspective, because of the difference in their ages, the Defendant's action is considered disrespectful and shameful; and

    (g) the Defendant did not co-operate with the Police.

16. The Crown submitted the following as mitigating factors:

    (a) the Defendant's age;

    (b) that he is a first time offender;

    (c) that he is a candidate for rehabilitation;

    (d) the Defendant only punched the Deceased once; and

    (e) no weapon was used.

17. The Crown referred to the following comparable sentences:

    (a) *Vi* [2005] TOSC 12 – the Defendant, who was a police officer at the time, slapped the victim's face causing him to fall and hit his head on the road, which resulted in his death. The Defendant was sentenced to 3 years' imprisonment with the final 2 years suspended for a period of 2 years.

    (b) *Tapueluelu* [2017] TOSC 34 – the Defendant pleaded guilty to manslaughter where he punched the victim who eventually fell to the ground causing serious injuries to his spine which resulted in his death. A starting point of 3 years and 6 months' imprisonment was set, which was reduced to 1 year and 9 months for mitigation, fully suspended.

    (c) *Helu* [2015] TOSC 56 – the Defendant had been drinking with his brothers and later went to a bar in town. He found the victim inside his vehicle trying to steal its radio and speakers. The Defendant punched the victim and held on to him while driving to another area. He then pulled the victim out of the vehicle and punched and kicked him repeatedly while he was on the ground. The victim later died in hospital from his injuries. The Defendant pleaded guilty to manslaughter. A starting point of 13 years' imprisonment was set, reduced by 3½ years for mitigation with the final 2 years suspended on conditions.

    (d) *Garth* [2017] NSWDC 471 – the Defendant was convicted of assault occasioning death, which under the NSW *Crimes Act*, also carries a maximum penalty of 25 years imprisonment. The Defendant and victim

attended a birthday party. Both had been drinking. A disagreement broke out. The victim intervened and approached the Defendant in an attempt to calm him down. The Defendant punched the victim on the side of his face causing him to fall down and resulting in his death. The Defendant was sentenced to 10 years and 3 months' imprisonment with a non-parole period of 8 years and 3 months.

18. Here, the Crown submits the following sentence formulation:

    (a) a starting point of 9 years' imprisonment;

    (b) reduced by 2 years for mitigation; and

    (c) the final 3 years suspended on conditions.

Defence submissions

19. On 27 July 2021, Mr Tu'utafaiva filed a single page submission advising that he had not had any contract with the Defendant since the verdict and directions for sentencing. Notwithstanding, he submitted that "the Crown's position on sentencing is reasonable".

Presentence report

20. The Defendant is 20 years of age. He is the fourth of six children. He grew up in a stable and religious environment. His mother described him as a good boy growing up. However, that changed in 2013 with the passing of his father with whom the Defendant had been very close. The loss affected the Defendant deeply. He shut himself off from those who supported him, became uncontrollable, engaged in truancy, and became susceptible to negative peer pressure. As a result, his mother had no choice but to send him and his brothers to live with their maternal grandparents in the hope that their grandfather might be a father figure for the Defendant and his brothers. Two months later, the Defendant called his mother and said that he wished to return to his father's family as they made him feel close to his father.

21. Notwithstanding those problems, the Defendant completed five years elementary education at Tailulu College and a further two years at Tupou Technical College. He has been employed as a carpenter, earning $150 per week.

22. In relation to the offending, and notwithstanding the jury's verdict, the Defendant maintained his account to the probation officer of self-defence. Tellingly, however, a number of features of his version recorded by the officer differed from his evidence at trial. For instance, he said that when he first encountered Ned on Vuna Road, Ned "started throwing punches that only end [sic] up in the air"; that as they both walked down 'Itafua'atonua Street, Ned was "continuously throwing punches"; and that after he punched Ned, he "quickly ran off with the thought that [Ned] might follow" him.

23. Notwithstanding those discrepancies, the Defendant is reported to have expressed remorse for what he did and has acknowledged that "it was his fault and he should be held accountable for what he did".

24. The Defendant's mother told the probation officer that she and her extended family "went with Tongan artefacts, $2,000 and using Tonga traditional way of begging for forgiveness (Hu Louifi – wearing green 'ifi' leaves around their necks and waists)" to show their "shame, penitence and guilt". It is not clear whether the Defendant himself also participated in those demonstrations of remorse and attempted restitution. Given that Ned's widow and other family members reside in New Zealand, it is also not clear to whom the Defendant's mother and other family members expressed their remorse or to whom they gave any gifts.

25. There were also discrepancies in the Defendant's criminal history. Contrary to the Crown's submissions, the presentence report referred to the Defendant having two Magistrates Court convictions in 2019 and one in 2021.[1] Details were not provided. The court computer management system reveals that the earlier offences were for housebreaking and theft for which the Defendant was convicted and ordered to pay compensation and perform community service. He failed to complete the latter. The more recent conviction was for drunkenness for which he was fined.

26. The report attached two letters of support, including from the Ma'ufanga town officer, which I have considered.

27. The probation officer concluded that the offending was not premeditated and described the Defendant as "just a young boy in the wrong place at the wrong time" and recommended partial suspension.

Victim impact statements

28. The Crown provided statements from Ned's widow and grandson in New Zealand. She told of how Ned spent most of his life in New Zealand, working to improve the lives of vulnerable youth, addicts, those with mental health issues and offenders. Upon his retirement, Ned wanted to 'give back' to his homeland of Tonga. And so, in a bitter twist of irony, he returned and committed himself to helping those in need here.

29. Tragically, Ned's death closely followed the passing of his daughter in January 2020 after a long battle with cancer. His passing was followed shortly after by his widow suffering a heart attack, the pain of which prevented her from being able to cry for her lost husband. Her grief and pain continue, with the rest of her life now only a shadow of what it was meant to be.

30. Despite the natural depiction of sorrow and loss and acceptance of the punishment which must be meted, both statements were remarkably tempered by forgiveness and hope for the Defendant's rehabilitation and future life.

Starting point

31. Section 93 of the *Criminal Offences Act* imposes a maximum penalty for

[1] CR 587/2018, CR 588/2018 and CR 387/2021.

manslaughter (other than by negligence) of 25 years imprisonment.

32. In *Helu*, ibid, Cato J observed:

> *"[3] Manslaughter varies greatly based as it is on death by an unlawful act and accordingly, the sentences imposed, the maximum being 25 years imprisonment, also vary considerably...*
>
> *[4] The killing of a human being is the most important sentencing consideration here. The Court must impose a sentence which properly reflects the circumstances and the action of the prisoner in killing the deceased. The law denounces the death of this young man as a consequence of this kind of conduct. Deterrence is also another consideration so that other members of the community are deterred from effecting retribution for unlawful acts, and adopting vigilante reprisal...*
>
> *[5] ... In* Patric Unga, *CR84/2014, 5th November 2015 which the Crown cited in its memorandum in this case, several of the leading cases on manslaughter sentences were considered. In summary, where there is provocation and there has been a seriously violent response, an appropriate starting point is 10 to 12 years; less, where the provocation may be said to be considerable and the response involves lesser violence. Where there is no provocation and serious violence results in death, starting points may exceed 12 years...."*

33. In cases involving provocation, the ranges of circumstances and corresponding starting points, referred to by Cato J, were discussed by the Court of Appeal in *Tu'itavake v Rex* [2005] TOCA 11. There, the Court observed:

> *"[12] Sentencing in cases of provocation presents special problems to a sentencing Judge. As in all cases of manslaughter there can be no set tariff. In each case the task of the Judge is to determine the true culpability of the offender in the particular circumstances of the case.*
>
> *[13] Appellate Courts in this and other countries have affirmed that sanctity of life is a fundamental value and society demands that the taking of life be met with the appropriate condemnation. But that still requires that the sentence imposed be related to the circumstances of the particular offence and the particular offender.*
>
> *[14] An appellate Court must also bear in mind that the sentencing Judge, who has had the advantage of hearing the evidence, has a broad discretion as to the appropriate sentence."*

34. The Court went on to refer,[2] with apparent approval, to the New Zealand Court of Appeal's decision in *R v Edwards* (CA 371/04; 13 April 2005). There, the Court discussed and referred to a 'Consultation Paper on Sentencing of Manslaughter by Reason of Provocation' by the British Sentencing Advisory Panel published in March 2004 in which the panel considered in detail some 42 cases between July 2000 and June 2003 where juries had returned convictions for manslaughter on the grounds of provocation and also reviewed appellate authorities. The panel concluded by summarising the following sentencing ranges (after a contested trial) to the extent that they may exist:

	Case features	**Sentencing range**

[2] [19]

[1]	Firearm carried and used after retaliation	12 years
[2]	Knife carried and used or great brutality	10 to 12 years
[3]	Moderate provocation and sudden retaliation	7 years
[4]	A high degree of provocation, sudden retaliation, strong mitigation	5 years
[5]	The highest degree of provocation including violent attack, even terror, evoking extreme passion	3 years or less

35. I have also carefully considered the full text of the comparable sentences provided by the Crown. Somewhat quizzically, the results in *Vi* and *Tapueluelu* bear little resemblance to the Crown's submitted sentence formulation here, and therefore, require closer consideration.

36. In *Vi*, the verdict was delivered in Ha'apai on 10 June 2015, the same day the Court of Appeal delivered its judgment in *Tu'itavake*. Sentencing took place on 17 June 2015. The Crown here provided the one-page order issued by Webster CJ in which his Honour referred to having heard counsel and having read the probation service report issued that day. He then simply stated that "for the reasons given in full in court" the defendant there was sentenced to 3 years' imprisonment with the final 2 years suspended for 2 years. No other record of the reasons given in court is available for present consideration. It is likely his Honour did not have the benefit of the decision in *Tu'itavake* when he prepared the sentence in *Vi*. The reasons for verdict reveal a number of features which distinguish that case from the present. For instance, Vi was a Police officer. He was not working at the time, although the judge considered that pursuant to s 20(b) of the *Police Act*, Vi was always deemed to be on duty. Vi had told the deceased, who was a habitual drunkard, to stop yelling. The deceased refused and Vi slapped him once across the face. Webster CJ was unable to accept that the slap fell within the ambit of Vi's duty. The deceased fell to the ground suffering a severe head injury. Vi assisted in rushing the deceased to the hospital in Ha'apai. However, he died some three months later from a number of medical complications stemming from the injury. Beyond that, little is known of the reasons for the judge's formulation of the sentence. In my view, and with respect to Webster CJ, for any case involving culpable homicide, for which the statutory maximum is 25 years imprisonment, the sentence in Vi was very low.

37. In *Tapueluelu*, the similarly low sentence was partly attributable to the defendant's early guilty plea. Further, the defendant there, who was 28 years of age, was initially involved in breaking up a fight. The 18-year-old deceased and his friend walked towards the defendant, asked who he was and commenced to swear at him. The defendant then punched the deceased twice, after which the deceased turned and walked about five metres before collapsing to the ground, chin first on the pavement. The defendant ran to the victim's aid and, with friends, took him to hospital, where he died on arrival. According to the post mortem, the deceased suffered a cervical spinal injury which affected his ability to breath resulting in his death. The defendant co-operated with police, admitted the offending and had no previous convictions. Cato J recorded his concern as to the

evidence on causation. The defendant told the probation officer that he hit the deceased twice in the chest. The amended summary of facts referred to the defendant punching the deceased's head but which he blocked. There was also no evidence of the force of the punches. His Honour described the case as "not a typical case of a person receiving a blow to the head and falling immediately to the ground sustaining a fatal *contrecoup* injury often referred to as a 'one punch' death". The defendant's counsel candidly told the judge that he had advised his client not to plead guilty but he insisted on doing so. The Prosecutor confirmed that the Crown was not able to say that there had been any contact with the deceased's head. Cato J proceeded on the basis that, by his guilty plea, the defendant had accepted that his assault was causative of the deceased falling to the ground and sustaining the serious injury that led to his death. He was sentenced on that basis.

38. Towards the other end of the spectrum, *Helu* involved sustained and serious brutality without provocation and may therefore also be distinguished from the present case.

39. The facts in *Garth* are closer to the instant although there are also obvious distinguishing features in a NSW decision based on different statutory provisions and a different sentencing regime which includes the setting of a non-parole period. The differential between that period and the head sentence does not necessarily equate, and is philosophically different, to periods of suspension as applied in Tonga. Notwithstanding, the description by Townsden DCJ in that case of the offending "being well below the mid-range, but not at the lowest end" is instructive here.

40. In *Kofutu'a v Rex* [2010] TOCA 16, the Court of Appeal reiterated that there can be no fixed penalty for manslaughter because the circumstances vary enormously from those cases where what occurred was little more than an accident to those that are close to murder. There, the victim was a 32-year-old woman who was said to be 'mentally slow'. Over a period of three or four years prior to the events that led to her death, she had sexual intercourse with the appellant on about five occasions. On the night of the offence, the 19-year-old appellant and his friends were drinking when the victim arrived and sat with them. She did not drink. The appellant and his friends ran out of cigarettes and the victim said she had some at home. The appellant and the deceased left to get the cigarettes. When they were outside, they had sexual intercourse. After that, and on their way to get the cigarettes, the victim told the appellant that she had lied and in fact had no cigarettes. The appellant then punched her on the chest and chin causing her to fall to the ground. She stood up and the appellant punched her again on her chest and again she fell down. Again, the victim stood up and the appellant punched her again on her stomach and repeatedly on her chin. While he was doing this, he held her up and told her not to lie to him again and not to follow him or come to his home. In his sentencing remarks, the judge added that the appellant also bashed the victim against the bathroom door or wall on six occasions.

41. The victim, who was apparently able to walk home, was later taken to hospital where she died. A post mortem showed the cause of death as a subdural hematoma on her brain. The Court of Appeal agreed with the sentencing judge that the attack was brutal and prolonged, where there was no provocation but also no premeditation. The Court agreed that those features fell closest within category 2 of those discussed in *Tu'itavake*, where it was suggested that a 10-12 year sentence was appropriate in a case where great brutality was used on the victim, although those categories applied to cases where a jury had returned convictions for manslaughter on the ground of provocation. Because there was no provocation, the Court considered that a starting point higher than 12 years was appropriate. After taking into account a number of mitigating factors such as the appellant's youth, his remorse, apology and restitution to the deceased's family, his co-operation with police and admission to the attack on the victim, the Court re-set the appropriate sentence at 13 years imprisonment, with the final 3 years suspended for that period.

42. Another example of a much more serious case, illustrative of towards the upper end of the 'yardstick' by which sentences are to be measured under the statutory ceiling of 25 years, is to be found in *Vaomotou v Rex* [2014] TOCA 11. There, the prisoner stabbed his sleeping wife 23 times. The Court of Appeal repeated the cautions in *Tu'itavake* and held[3] that the combination of such extreme violence and absence of provocation at the time of the attack required a starting point of 14 years imprisonment.

43. In the present case, I disregard the Defendant's evidence at trial, which he maintained to the probation officer, that the deceased punched him in the back of the head, prior to the Defendant landing the fatal blow. In returning a verdict of guilty to manslaughter, the jury rejected that part of the Defendant's version. He must also therefore be sentenced on that basis.

44. This was not a case where the Defendant was charged with murder and to which the jury returned a verdict of manslaughter by reason of provocation. However, there was clear evidence of Ned's attempts on three occasions to hug or grab the Defendant, which the Defendant shrugged off each time. In determining the seriousness of the offending, I am prepared to consider those actions as a very minor degree of provocation. That is because of the undisputed evidence that Ned was drunkenly swaying and was heard by the security guard to be trying to calm the Defendant down. In my view, those approaches by Ned did not involve any aggression or physical threat of harm, nor did they warrant retaliation by the Defendant in punching Ned as he did. It was entirely open to the Defendant to continue to walk away. He chose not to. The most likely interpretation of his actions is that he was angry and annoyed by Ned's approaches and decided to end them with violence.

45. And so, in that split second of senseless brutality, one life was ended and the liberty of another must now be severely curtailed.

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[3] [7], referring to *Tu'itavake*.

46. Therefore, in assessing the overall seriousness of the offending, and in order to distinguish this case from the facts in *Vi* and *Tapueluelu*, I take into account the following:

    (a) Ned was almost 50 years older than the Defendant;

    (b) Ned was shorter and overweight compared to the Defendant's taller and stronger athletic build;

    (c) Ned was demonstrably affected by alcohol whereas there was, and has been, no suggestion that the Defendant was affected by any substances;

    (d) as a result, Ned was in no real condition to do the Defendant any physical harm nor capable of defending himself, whereas the Defendant had every ability to avoid Ned's approaches without harming him;

    (e) the very minor degree of provocation by the deceased as discussed above;

    (f) it was entirely open to the Defendant to distance himself further or move away from Ned to prevent any further attempts by Ned to hug him;

    (g) instead, the Defendant responded with anger and violence;

    (h) even though the Defendant only threw one punch (and there was no weapon involved), the force of that punch, as described by the eyewitnesses, which lifted Ned's whole body off the ground and could be heard from more than a hundred metres away, and the damage it did to his face before his head hit the ground, can only be described as brutal;

    (i) while the Defendant's actions cannot be regarded as a sudden retaliation, the attack was not sustained and there was no evidence of premeditation;

    (j) the Defendant abandoned Ned, did not assist in getting him to the hospital and then threatened Kepueli with more violence; and

    (k) his assertions to the probation officer of remorse and acceptance of responsibility for his actions are inconsistent with him maintaining to the same officer that he acted in self-defence.

47. I do not agree with the Crown's submission that the Defendant's not guilty plea at trial should be viewed as a circumstance of aggravation. His claim of self-defence was rejected by the jury. As a result, he has deprived himself of the not insignificant discount which would have been available had he pleaded guilty at the earliest opportunity.

48. In *Garth*, Townsden DCJ noted, in relation to the principles of specific and general deterrence, that:[4]

> *"... Regrettably, it is now notorious ... that a single punch can not only cause catastrophic injuries but also death. For offences of this kind, the community has the rightful expectation that judicial officers will impose meaningful penalties."*

49. With respect, I agree. In Tonga, there is a particular propensity among some,

[4] Per Hoeben CJ in *Pattalis v R* [2013] NSWCCA 171 at [23].

particularly males, in the community, to resort to violence to address any annoyance, no matter how small and regardless of whether alcohol, kava or illicit drugs are involved. This case, and others like it, must serve to dispel any belief that such behaviour is acceptable (save in cases of genuine self-defence) as grossly erroneous and as a message that such conduct will be met by the Courts with condign punishment. When such behaviour results in the tragic and needless destruction of human life, severe sentences must be imposed in order to denounce, punish and provide specific and general deterrence.

50. Having regard to all the considerations set out in this section of these remarks, I consider the appropriate starting point to be 10 years' imprisonment.

Mitigation

51. For the Defendant's relatively and relevantly good previous record, apparent remorse and restitution offered by his family, I reduce the starting point by 2 years, resulting in a sentence of 8 years' imprisonment.

52. It may be noted that that term fits conformably between the second and third categories referred to in *Tu'itavake* (on the bases found above of a minor degree of provocation met with moderate brutality) and is relatively consistent with the sentence in *Garth*.

Suspension

53. Consideration of the factors discussed in *Mo'unga* [1998] Tonga LR 154 at 157 favour some suspension. The Defendant is young. Although he does not have an unblemished record, he does not have any previous convictions for violence. The material presented in his favour suggests that he is likely to take the opportunity offered by the sentence to rehabilitate himself. Despite the gravity of the offence, there is some diminution of culpability through lack of premeditation and a very minor degree of provocation. Even though those factors have already been taken into account above in mitigation, I consider it appropriate to take them into account again in considering suspension because "suspension does not involve a reduction in the term of imprisonment but merely a suspension of part which can be activated should the prisoner reoffend": *Kofutu'a v Rex*, ibid.

54. Against those positive features, the Defendant did not co-operate with the police and his expressions of remorse may be viewed as equivocal. The variances between his evidence at trial and his more recent account to the probation officer by which he seems to have tried to exaggerate the extent of Ned's asserted aggression towards him prior to him punching Ned, have not assisted his cause on sentence and have only served to cast doubt on the genuineness of his remorse.

55. The considerations in *Mo'unga* were not intended to be exhaustive or comprehensive.[5] The Court is also obliged to have regard to the interests of the Defendant and the interests of the wider community in his rehabilitation: *Rex v Tau'alupe* [2018] TOCA 3 at [15]. That consideration takes on an added

[5] *Kofutu'a v Rex*, ibid.

dimension when dealing with young offenders: *R v Uasi* [2021] TOSC 66 at [18]. As recognised in *Mo'unga*, young offenders have a greater capacity for rehabilitation. However, the Court must also have regard to the need for effective deterrence: *Rex v Misinale* [1999] TOCA 12.

56. Weighing all those considerations in the balance, I consider it appropriate, in this case, to order that the final 2 years of the sentence be suspended for 2 years on conditions as set out below.

57. For completeness, I record that I have not been able to agree with the Crown's submitted sentence formulation, which would have resulted in a net sentence to be served of less than 4 years (assuming some remissions). That, in my view, would not be regarded by fair-minded members of the community, having regard to all the circumstances of the case, as a 'meaningful penalty' for killing a man.

58. In the result, and subject to compliance with the conditions to be applied and any remissions granted within prison, the Defendant will be required to serve 6 years' imprisonment.

Result

59. The Defendant is convicted of manslaughter and is sentenced to 8 years' imprisonment.

60. The final 2 years of the sentence is to be suspended for a period of 2 years from the date of the Defendant's release from prison, on condition that during the said period of suspension, the Defendant is to:

    (a) not commit any offence punishable by imprisonment;

    (b) be placed on probation;

    (c) report to the probation office within 48 hours of his release from prison and as required by his probation officer thereafter; and

    (d) reside where directed by his probation officer.

61. Failure to comply with the above conditions may result in the suspension being rescinded, in which case, the Defendant will be required to serve the balance of his sentence.

NUKU'ALOFA
29 July 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE