

REX
-v-
SIOELI TAPUELUELU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
The Defendant failed to appear and was sentenced in absentia.
Date: 26 August 2021

The charges

1. On 11 March 2021, the Defendant pleaded not guilty to one count of manslaughter.
2. On 19 July 2021, the day of his trial, the Defendant changed his plea to guilty.

The offending

3. On the evening of 8 March 2020, the Defendant and one, Harilal Vamanrav, were at the residence of Semisi Tapueluelu, where the Defendant lived, for a drink up with others. Around midnight, Harilal went to the kitchen to prepare food. The Defendant followed him. They were then heard arguing about a t-shirt. Harilal was facing the stove cooking with his back to the Defendant. Without warning, the Defendant then punched Harilal to the back of his head causing Harilal to fall to the floor in a sitting position. The Defendant then took a wok frying pan and hit Harilal on the head with it. The Defendant then punched and kicked Harilal's head while he was on the floor. As Harilal was trying to shield himself with his hands, the Defendant picked up a small steel stove and hit Harilal with it. Semisi tried to intervene but the Defendant hit him causing him to fall to the ground. Semisi then got up and ran out of the house while the Defendant continued to assault Harilal.
4. Semisi went to his neighbour, a police officer, and told him of the assault. The officer called for assistance and walked towards Semisi's house. He intercepted the Defendant on the driveway. When the officer asked the Defendant what had happened, the Defendant said that some boys had attacked him. The officer then asked the Defendant about Harilal. The Defendant said that Harilal was inside the house, passed out drunk after the Defendant had punched him. The officer then went inside the house where he found Harilal unconscious and unresponsive but still breathing.
5. Other police officers arrived and rushed Harilal to the hospital where he was

treated for head injuries. He died the next day. An autopsy revealed the cause of death as severe swelling of the brain caused by blunt force trauma.

6. When he was arrested, the Defendant chose to remain silent and said that he would only speak in Court.

Crown's submissions

7. The Crown submits the following as aggravating features of the offending:
- (a) the defendant used a wok, small stove top and his fists as weapons;
 - (b) the victim offered little to no provocation before the Defendant assaulted him and continued to do so while he was on the ground;
 - (c) the Defendant had been drinking that night;
 - (d) this was a callous and senseless crime caused by the Defendant's uncontrollable anger over something as trivial as a t-shirt;
 - (e) the Defendant did not assist in taking the victim to hospital; and
 - (f) the Defendant has previous convictions both in Tonga and New Zealand, including:
 - (i) 2003 – Tonga – wilful damage – 4 months imprisonment suspended for 12 months;
 - (ii) 2007 – New Zealand – fighting in a public place – fined;
 - (iii) 2007 – New Zealand – assault person with blunt instrument – community work;
 - (iv) 2015 – New Zealand – wounding with intent to cause grievous bodily harm – 4 years imprisonment;

(in February 2019, the Defendant was deported to Tonga) and

 - (v) 2020 – Tonga – possession of illicit drugs – 9 months imprisonment backdated to the date he was remanded in custody.
8. The Crown submits that the only mitigating factor is the Defendant's late guilty plea.
9. The Crown referred to the following comparable sentences:
- (a) *Tu'itavake* [2005] Tonga LR 384 – where the Court of Appeal referred to the following guidelines for sentences for manslaughter involving varying degrees of provocation and retaliation:

	Case features	Sentencing range
[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

- (b) *Maile* [2021] TOSC 119 – after the drunk, elderly deceased man tried to hug the young Defendant from behind three times, which the Defendant was able to just shrug off, the Defendant turned and punched the deceased once in the face causing him to fall backwards, hitting his head on the road, which resulted in his death. A jury found the Defendant guilty of manslaughter. A starting point of 10 years' imprisonment was set. On account of the Defendant's reasonably good previous record, remorse and restitution offered by his family, the starting point was reduced by 2 years, resulting in a sentence of 8 years' imprisonment. The final two years were suspended on conditions.
- (c) *Helu* [2015] TOSC 56 – the Defendant found the victim inside his vehicle trying to steal the radio and speakers. The Defendant punched the victim and held on to him while he drove 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) *Kalavi* [2015] Tonga LR 542 – the Defendant robbed a Chinese shop. He struck the owner's head multiple times with a piece of wood and fled. The victim was later found by his relatives on his bed. He was taken to hospital but died from severe head injury. The Defendant pleaded guilty to manslaughter. A starting point of 14 years' imprisonment was imposed. Cato J ordered that the Defendant serve a further 8 years and 3 months of that sentence consecutively to a sentence of 5 years 9 months he received the year before for armed robbery and breach of a suspended sentence, making an overall combined sentence of 14 years.
- (e) *Nisa* [2015] Tonga LR 245 – the Defendant, who was 16 years of age at the time of the offending, stabbed the deceased with a knife which caused severe injuries to his arm and left lung resulting in his death. The Crown accepted a plea of guilty to manslaughter in discharge of the indictment for murder. A starting point of 9 years' imprisonment was set, which was reduced to 6 years due to the Defendant's youth and high level of provocation. For his lack of previous convictions, early guilty plea and apology offered to the deceased's family, the sentence was further reduced to 3½ years imprisonment, backdated to the date he was remanded in custody. The final 3 years were suspended.

- (f) *To'a* [2019] TOSC 28 – during a fight in which the victim was initially armed with a piece of wood, the 21-year-old Defendant stabbed the victim repeatedly with a knife causing serious injuries which resulted in his death. The Defendant was charged with murder and alternative counts. During his trial, he pleaded guilty to manslaughter. A starting point of 7½ years imprisonment was set. For his guilty plea, previous good record, co-operation with Police, remorse and apology offered to the deceased's family, Paulsen LCJ reduced the starting point to 5 ½ years imprisonment. The final 2 years were suspended on conditions.
- (g) *Kofutu'a* [2010] Tonga LR 120 – the appellant assaulted the deceased repeatedly because he was angry, which resulted in her death. He was convicted of manslaughter after trial and sentenced to 15 years' imprisonment without suspension. The Court of Appeal reduced the sentence to 13 years with the final 3 years suspended.
- (h) *Latu* CR 20/17 – the Defendant, who was high on methamphetamines, got into a fight with his brother, during which, the Defendant squeezed his brother's scrotum for a long period of time before releasing it. His brother walked away, collapsed and eventually died. The Defendant pleaded guilty to manslaughter. In what his Honour described as a 'unique case', Cato J sentenced the Defendant to 4 years' imprisonment with the final 12 month suspended on conditions.

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

- (a) a starting point of 12 years' imprisonment;
- (b) a further 12 months for the use of multiple weapons;
- (c) another 12 months for the surprise attack on the deceased;
- (d) reduced by 16.67% or 2 years for mitigation;
- (e) resulting in a sentence of "10 years" [sic] imprisonment;¹ and
- (f) no suspension.

No presentence report

11. Upon his re-arraignment on 19 July 2021, the Defendant was directed to attend the probation office within 48 hours to arrange an interview for the preparation of his presentence report. That report was directed to be filed by 16 August 2021. On that date, the Senior Probation Officer advised the court that the Defendant had not attended their office as directed, that despite several attempts to telephone and locate the Defendant, the probation office had not been able to contact him, and therefore, had been unable to prepare a report.

¹ The Crown's submitted sentencing formula contained arithmetic errors. From a posited total starting point of 14 years, a reduction for mitigation of 16.67% (or 1/6th) equals 11 years 8 months. Conversely, 2 years off 14 years equals 12 years (not 10 years).

12. As stated in *R v Latuselu* [2021] TOSC 19:

“5. The provision of a pre-sentence report, particularly for a Defendant who is not legally represented, is offered to the Defendant as an opportunity to be heard and to assist the Court in gaining a better understanding of the Defendant’s personal circumstances insofar as they may be relevant to the task of weighing competing considerations in order to arrive at an appropriate sentence which strikes the right balance between the objectives of sentencing, such as punishment, denunciation, protection of the community, rehabilitation and specific and general deterrence. ...

6. However, if, for whatever reason, a Defendant chooses not to avail him or herself of that opportunity, that is a matter for that Defendant. Such a response also provides some insight into the Defendant’s attitude towards the offending. Ultimately, and in the absence of exceptional circumstances, the lack of a pre-sentence report will not prevent or delay the Court performing its role in imposing an appropriate sentence, whether or not the Defendant wishes to be heard through a pre-sentence report.”

Starting point

13. The maximum statutory penalty for manslaughter (other than by negligence) is 25 years’ imprisonment.

14. In *Helu*, *ibid*, Cato J observed that:²

“[3] Manslaughter varies greatly based as it is on death by an unlawful act and accordingly, the sentences imposed, ... 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 ... ”

15. Unlike cases such as *Maile*, *Helu* and *Nisa*, *ibid*, and others in which the considerations in *Tu’itavake*, *ibid*, or similar, have been applied, I do not consider the instant case to have involved any relevant provocation by the victim prior to the Defendant’s assault on him. Any argument about a t-shirt, without any other physical threat or altercation, cannot possibly factor in diminishing the culpability of what the Defendant did to the victim here.

16. I consider the facts of this case to be more closely aligned with the decisions of *Kalavi* and *Kofutu’a* referred to above. Some guidance is also derived from the sentence in *R v Nai* [2020] TOSC 87, where *Nai* and others, after being acquitted of murder, were sentenced for manslaughter. The offending involved a series of assaults over a period of under 3 minutes as the fight moved from inside a Bar to the road area outside where the victim was, among other things, stomped on repeatedly and suffered serious head injuries from which he later died in hospital. For *Nai*, the worst of the perpetrators, Cato J imposed a starting point of 14 ½

² Referred to in *Maile* at [32].

years.

17. Those cases also reflect the “fine line” referred to in *Kalavi* between murder and manslaughter. It is not known in this case whether consideration was given to s 87(1)(b) of the Act and whether a case was open that the Defendant intended to cause the victim any bodily injury which the Defendant knew was likely to cause death and was reckless as to whether death ensued or not. The facts certainly support the question being asked. In my view, the Defendant is fortunate not to have been charged with murder. In any event, and as in *Kalavi*, “this plainly is a very serious case of manslaughter”.
18. In assessing the overall seriousness of the offending, I take into account the following:
 - (a) the lack of any relevant provocation by the younger victim who was 27 years of age;
 - (b) the Defendant’s gutless act of cowardice in initiating the assault by punching the victim in the back of his head when he was not looking;
 - (c) the Defendant’s savage and sustained attack delivering multiple blows to the victim’s head;
 - (d) the Defendant continued to beat the victim when he was on the ground and relatively defenceless;
 - (e) the use of the wok and stove as weapons;
 - (f) the Defendant lied to the police about what had happened; and
 - (g) the Defendant did not assist in getting the victim to hospital.
19. I also take into account the Defendant’s previous convictions for violence in New Zealand. In *Rex v 'Unga*,³ Cato J did likewise after referring to *Veen v The Queen (No 2)*,⁴ in which the plurality of the High Court opined:

“... the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences;..... The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing disobedience to the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender, and other offenders from further offences of like kind. ...”

³ [2015] TOSC 51 at [16]

⁴ (1987-88) 164 CLR 465, at 477

20. According to the summary of facts provided by New Zealand Police, the Defendant's last crime there, which resulted in him being deported to Tonga, initially involved a minor road rage incident with the victim. However, instead of leaving it at that, the Defendant and his associate followed the victim for 1.5 kms to a petrol station where they then ambushed him. The Defendant punched the victim repeatedly while his accomplice struck the victim repeatedly with a hammer. As a result, the victim suffered multiple fractures and was hospitalised for 5 days.
21. Therefore, in my view, the instant offending cannot be regarded as an 'uncharacteristic aberration'. Rather, the Defendant's criminal history demonstrates that he has manifested a 'continuing disobedience to the law' and a 'dangerous propensity' for violence.
22. Further, and regrettably, this case is yet another chilling illustration of the observation in *Maile* that:⁵

"... In Tonga, there is a ... propensity among some, 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."

23. For those reasons and having regard to the grave seriousness and abject brutality of the offending, the applicable comparable sentences and other principles referred to above, I consider the appropriate starting point to be 14 years' imprisonment.

Mitigation

24. For the Defendant's late guilty plea, I reduce the starting point by 2 years.⁶ There are no other mitigatory factors, such as remorse, to warrant any further discount.
25. The sentence, therefore, is 12 years imprisonment.

Suspension

26. The Defendant does not meet any of the considerations for suspension discussed in *Mo'unga* [1998] Tonga LR 154 at 157. At 37 years of age, he is not young. He has a significant criminal history including convictions for violence, and since being deported to Tonga, a conviction for possession of drugs for which he was imprisoned, and now, manslaughter. There is no identifiable diminution of culpability because his initiation of the attack on the unwitting victim from behind shows a degree of premeditation and, as explained above, there was no relevant

⁵ [49]

⁶ Equivalent to 14.28%. Compare *Moala* [2021] TOSC 86 – 12.5% and *Poteki* [2021] TOSC 133 – 10%

provocation. Finally, the Defendant did not co-operate with the authorities and, in fact, lied to them when first asked about what had happened.

27. In my view, the Defendant's history and senseless outburst of violence in this case, resulting in the death of an innocent young man, make him a serious danger to society, which this Court must strive to protect. There is nothing in the material before the Court to indicate that the Defendant would be likely to take the opportunity offered by a partially suspended sentence to rehabilitate.
28. For those reasons, I do not consider it appropriate to suspend any part of the sentence.

Result

29. The Defendant is convicted of manslaughter and sentenced to 12 years' imprisonment.
30. The Defendant is to be given credit for any time served while remanded in custody for this matter.
31. A warrant is to be issued for the arrest of the Defendant. His sentence will begin on the date of his arrest, whereupon he is to be taken directly to Hu'atolitoli Prison to serve his sentence.

NUKU'ALOFA
26 August 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE