

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

ATTORNEY GENERAL'S OFFICE	
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CR 128 of 2021

REX

-v-

'INOKE SILONGO F. TONGA

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC

Appearances: Mr T. 'Aho for the Prosecution

Ms L. Tonga for the Defendant

Date: 11 October 2021

The charge

1. The Defendant appears this day to be sentenced for murder.

The offending

2. Polikalepo Kefu, also known as 'Poli', was 41 years of age. He resided in Lapaha. He was a son, a brother and a father. Poli was best known as a prominent human rights activist and advocate for the LGBTQI community in Tonga and across the Pacific. He served as president of the Tonga Leiti's Association, chairman of the Pacific Protection Gender Inclusion Network and as Communications Officer for the Tonga Red Cross Society. He was highly regarded both here and overseas for his selfless and tireless work for the rights of those with diverse sexual orientation, gender identity and expression. Poli dedicated his life to the safety of others.¹
3. On the evening of 30 April 2021, Poli met up with work colleagues for drinks at the Reload Bar. At approximately 11 PM, he left the bar and went to his vehicle.
4. Fe'ofa'aki Kali saw Poli and asked him for a ride to Tatakamotonga. The Defendant also got into the vehicle. When they reached 'Kapo's' residence in

¹ www.rnz.co.nz/international/pacific-news/441661/;
www.theguardian.com/world/2021/may/03/;
www.abc.net.au/radio-australia/programs/pacificbeat/.

Tatakamotonga, Fe'ofa'aki and the Defendant got out of the vehicle. Fe'ofa'aki joined the kava drinkers there while the Defendant got back into the vehicle with Poli.

5. Around 1 AM, the Defendant appeared at the residence of 'Ofeina and Petelo Save in Tatakamotonga. He told them that he had been drinking with some girls at the beach, that they had lost their car keys and that they needed something with which to start their car. The Defendant then left with a small black handled kitchen knife.
6. At approximately 2 AM, the Defendant returned to the Save residence, this time, in Poli's vehicle. He spent the rest of the night there and, in the morning, went to his sister's house in Halaleva.
7. That morning, residents of Tatakamotonga found Poli's body at Fuifa beach and the police were called.
8. Subsequent medical examinations found that Poli had died within the preceding 24 hours and that he had suffered a range of injuries including:
 - (a) his entire face was swollen and discoloured with a purplish hue;
 - (b) wounds to the left side of his head and lower lip;
 - (c) bilateral temporal area haemorrhages;
 - (d) an incised wound on his forehead that extended down to the nasal area;
 - (e) a puncture wound on the back of his right ear;
 - (f) the right side of his face and skull vault was caved in with loss of architecture and fractures of the occipital bone; and
 - (g) as a result of multiple facial fractures, his right eyeball and part of the sphenoid bone (right orbital cavity of the skull) were missing, thereby exposing the brain tissue.
9. The cause of death was determined as severe head injury secondary to repeated blunt force trauma.
10. Police from Mu'a conducted a search for the Defendant. They went to his sister's residence at Halaleva where they found Poli's vehicle.
11. In the evening, Ruben Suli returned to his home in 'Utulau and found the Defendant there. They went for a drive, during which, the Defendant confessed to Ruben that he had killed Poli. Ruben then drove the Defendant to the Nuku'alofa police station. The Defendant admitted to police that he had killed Poli.
12. On 6 May 2021, during further questioning, the Defendant gave police the following account. On the night in question, he went with Poli to buy a bottle of

spirits. However, Poli drove to the beach, where he made sexual advances towards the Defendant. The Defendant became angry and so he strangled Poli for about 12 minutes before slamming him on the road. He heard Poli gasping for air, so the Defendant strangled him again for about another five minutes. The Defendant then picked up a large rock, with both hands, and bashed Poli's face with it more than 30 times. The Defendant then rested for a couple of minutes before dragging Poli's body to the water line, hoping it would be washed out to sea.

13. The Defendant was shown and he confirmed the knife, the rocks he used to hit Poli and his belongings. He admitted that he intended to beat Poli to death. He was then charged with murder; alternatively, manslaughter. He again admitted the offending and expressed his apologies to Poli's family for what he had done.
14. The matter first came before this Court on 27 July 2021. Ms Tonga, who has acted for the Defendant since the Magistrates Court committal proceedings, sought an order for the Defendant to be mentally assessed before being required to enter a plea. The Crown did not oppose the request. Accordingly, an order was made pursuant to s 53 of the *Mental Health Act* for Dr Mapa Puloka to assess the Defendant and report on the Defendant's sanity or otherwise at the time of the offending for the purposes of determining his ability to stand trial and any potential defence under s 17 of the *Criminal Offences Act*.

Mental health assessment

15. On 24 August 2021, Dr Puloka reported that the Defendant:
 - (a) started abusing alcohol, smoking cannabis and sniffing benzene and glue from the age of 13;
 - (b) does not suffer from any psychiatric disorder;
 - (c) does suffer from mental and behavioural disorders due his addiction to, and chronic use of, methamphetamines, since 2017;
 - (d) took his last 'heavy dose' of methamphetamine between 9 and 10 pm on the night in question, which, according to the medical literature, can last for 8 to 24 hours;
 - (e) lied to police when he told them he did not take methamphetamines that night;
 - (f) did not lose contact with reality (i.e. no psychotic break) during the offending but his chronic consumption of methamphetamines "led to his thinking of the unthinkable by killing" Poli; and
 - (g) knew the nature of what he was doing and that it was wrong.

16. For those reasons, Dr Puloka opined that it was 'very unlikely' that the Defendant was criminally insane at the time of the offending and that he was fit to stand trial.
17. Further, in his report, Dr Puloka referred to the Defendant denying Ruben Suli's statement regarding the Defendant's motive for killing Poli. As a result, Dr Puloka contacted Ruben who confirmed that the Defendant told him he "had other reasons" for killing Poli including his "wish to own (steal)" Poli's car and wallet.
18. On 2 September 2021, the Defendant was arraigned and, with the benefit of legal advice, pleaded guilty to murder.

Crown's submissions

19. The Crown submits the following as aggravating features of the offending:
 - (a) the seriousness of the offending;
 - (b) the manner in which the murder was carried out;
 - (c) a human life has been lost; and
 - (d) the effect on the deceased's adopted children and family.
20. The Crown submitted the following as mitigating features:
 - (a) some level of provocation (sexual advances) by the deceased;
 - (b) no previous convictions; and
 - (c) early guilty plea.
21. The Crown referred to the following comparable sentences:
 - (a) ***Vola*** [2005] Tonga LR 404 – the Defendant and the victim were fighting. As the victim was getting the better of him, the Defendant called out and another came to his aid. The Defendant then hit the victim with an iron bar repeatedly until he died. A jury found the Defendant guilty of murder. Webster CJ considered that:
 - (i) the murder was not pre-meditated;
 - (ii) there was some degree of provocation by the deceased;
 - (iii) although the murder was horrible, it did not involve extreme brutality, nor exceptional depravity;
 - (iv) the Defendant was motivated to change;
 - (v) the Defendant did not have any previous convictions in Tonga;
 - (vi) the Defendant had demonstrated remorse and concern by offering a customary apology which was accepted by the deceased's family;
 - (vii) the deceased's family had forgiven the Defendant and pleaded for

mercy and leniency so that the Defendant could change and give his life to God; and

(viii) the Defendant had co-operated with the authorities throughout.

For those reasons, Webster CJ sentenced the Defendant to life imprisonment. His Honour also recommended that the Defendant take courses in alcohol awareness and anger management and, that if doing so prevented further violence, the Defendant should be considered for parole or release on licence after serving 15 years.

- (b) **'Ake** [2006] TOSC 3 – the Defendant hit the victim with an iron rod twice on the head causing his death. The jury rejected a defence of extreme provocation and found the Defendant guilty of murder. For many of the same reasons observed in *Vola*, Webster CJ sentenced 'Ake to life imprisonment. His Honour also recommended that 'Ake take courses in alcohol awareness and that if his conduct in prison remained good, and he avoided further violence, he should be considered for parole or release on licence after serving 10 to 15 years.
- (c) **Tu'itufu** (unreported, SC, CR 127/2018) – the Defendant found his de-facto wife swimming with other boys. As she was leaving, he struck her with a machete repeatedly to her head, neck and upper limbs. The Defendant sought to rely on extreme provocation because, he said, the deceased had aborted their child and he was angry with her. The jury rejected that defence and found the Defendant guilty of murder. The Defendant had no previous convictions. Cato J described the offender's 'savage attack upon an unfortunate woman, as almost indescribable, an inhuman act, and one that was cowardly and most extremely un-Tongan'. In sentencing the Defendant to life imprisonment, Cato J noted that but for the Defendant's youth, he would have been sentenced him to death.
- (d) **Muli** (unreported, SC, CR 102/2018) – the Defendant and his friend went to a plantation belonging to the two victims. The Defendant punched the male victim on the mouth and grabbed a machete and tried to strike him but missed. The male victim tried to run away. The Defendant then struck the male victim on the head with the machete and used scissors to stab his neck and other parts of his body. Even when the male victim was on the ground, the Defendant kept hitting him with the machete. The Defendant then hit the female victim with the scissors and machete. When she fell, he continued to hit her with the machete until both victims were confirmed dead by the Defendant's co-accused. The Defendant was found guilty by a jury of murder. In sentencing the Defendant to life imprisonment, Cato J noted

that the Defendant was only 17 years of age, had no previous convictions and 'did not take a weapon with him'.

22. The Crown provided very helpful and informative submissions in relation to the death penalty in Tonga and how sentences of life imprisonment are managed within the prison system, including periodic reviews for possible release on licence and/or Royal pardons. Those issues will be considered further below.
23. It was submitted that the practice of the Supreme Court in sentencing for murder cases has developed in more recent times, as reflected in the sentences by Cato J above, such that immediate sentences of life imprisonment are imposed with no written reasons for the sentence and no recommendations in relation to any possible early release.
24. In this case, the Crown left the choice of penalty to the discretion of the Court with the following observations:
 - (a) as stated by Webster CJ in *Vola* and *'Ake*, there are only two alternative sentences for murder - death or life imprisonment;
 - (b) even though the Defendants in *Vola* and *'Ake* were indicted on the less culpable form of murder,² both decisions provide guidance and assistance in sentencing for murder;
 - (c) the Defendant here intended to cause the deceased's death,³ which is of comparable seriousness to the cases of *Tu'itufu* and *Muli*;
 - (d) the seriousness of the offending here is marked by the prolonged and repeated nature of the attacks and extensive injuries inflicted on the victim;
 - (e) the offending has had, and continues to have, 'dire effects' on the deceased's family;
 - (f) the Defendant is of mature age; and
 - (g) the Defendant's early guilty plea is an indication of remorse.

Victim impact report

25. The Crown interviewed Poli's younger sister, Temaleti Mahu'inga, and his two customarily adopted sons, Courtney and Sione.
26. Temaleti described how Poli always played the role of both mother and father to her, her younger siblings and their older disabled brother. They all still feel emotionally overwhelmed, and greatly impacted, by his unexpected passing. She

² s 87(1)(b) of the *Criminal Offences Act*, where the offender intended to cause to the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not.

³ Per s 87(1)(a).

described Poli as:

- (a) the one who always had a good job and upon whom she and her siblings relied to take care of the family and church obligations;
 - (b) a loving and giving person who always assisted financially in family matters; and
 - (c) the one who took care of their older disabled brother, who has now been left to the care of her and her sister who is married with seven children.
27. Courtney is now 18 years of age. At the time of Poli's death, Courtney was employed as a construction worker. He now no longer works. Temaleti said that Courtney was so miserable that at one time he mentioned wanting to end his own life. She and her siblings were able to counsel him and encourage him to find better ways of coping with Poli's death.
28. Sione is 16 years of age and was enrolled at Tupou College Toloa, although he has not returned to school since June after the midyear exams. He said he still feels sad but intends to return to school next year. Temaleti said that Sione was emotionally and psychologically affected by Polly's death and still feels very uncertain.

Presentence report

29. The presentence report provided the following information.
30. The Defendant is 27 years of age. He is the eldest of two children. He grew up in a broken family. His father left when he was very young which eventually led to his parents' divorce. His father remarried and migrated to New Zealand but provided financial assistance to support him and his brother. The absence of a father figure in his life affected the Defendant growing up.
31. As noted by Dr Puloka, the Defendant began drinking alcohol at a young age. He is described as a quiet person, but when intoxicated, becomes talkative and expresses his frustrations. His half-sister and the relevant town officer described the Defendant as "a good person" who is only aggressive when intoxicated and/or under the influence of drugs. His half-sister also described the offending as "out of character".
32. The Defendant is not married nor does he have any children.
33. The Defendant was employed at a local bakery in Neiafu, Vava'u, but was dismissed due to his substance abuse. He later travelled to New Zealand for fruit-picking and was again dismissed for drinking "home-brew" at the worksite. He reapplied again to travel but was unsuccessful. He received a certificate in 2020 for a technical program he completed. In the same year, he was employed by a

construction company but was dismissed as a result of his substance abuse.

34. In relation to the offending, the Defendant told the probation officer that on the night in question:
- (a) he had been drinking and smoking methamphetamines at the bar;
 - (b) he had never met Poli until that night;
 - (c) Poli invited him to a drinking party;
 - (d) he got into Poli's vehicle because he wanted to drink;
 - (e) they stopped at Poli's workplace and he followed Poli to the garage, where Poli started kissing the Defendant and touching his penis, but the Defendant stopped Poli and went back to the vehicle;
 - (f) they then drove off to Tatakamotonga and Poli asked him again to go with him drinking;
 - (g) another passenger got out and the Defendant and Poli drove off;
 - (h) when they arrived at the drinking area, the Defendant got out to urinate;
 - (i) Poli started kissing him and touching his penis again;
 - (j) when the Defendant rejected his advances, Poli slapped the Defendant for "denying him the pleasure"; and
 - (k) as a result, the Defendant became angry, which led to the offending.
35. The Defendant told the probation officer that, at one point while remanded in custody, he considered taking his own life. He said that he has learned that alcohol and drugs have affected him and he is now committed to sobriety and rehabilitating himself.
36. The Defendant's mother told the probation officer that she and her extended family "gifted about \$4,000 plus traditional possessions to the Deceased's sisters" as the Tongan traditional way of begging for forgiveness. His mother and family also attended the funeral to express their shame and guilt.
37. In his concluding remarks, the probation officer:
- (a) assessed the Defendant's risk of reoffending as "moderate";
 - (b) opined that the Defendant is genuinely remorseful and needs access to rehabilitation services whilst in prison; and
 - (c) recommended that the Defendant be sentenced to life imprisonment but with access to counselling and courses on alcohol and drug abuse and anger management to help the Defendant cope with his emotional problems.

Defence submissions

38. Ms Tonga urged the Court to exercise its discretion by sparing the Defendant's life. To that end, and in addition to what has already been addressed above in the pre-sentence report, Ms Tonga submitted, in summary, that:
- (a) at 12 years of age, the Defendant finally came to terms with his father leaving;
 - (b) however, his resentment towards his father led him to drugs despite his mother's efforts and prayers for him;
 - (c) the Defendant "*knew there is God, but he doubted and distrusted God. It was during his time in the cell, that he had the opportunity to regularly read the Bible early every morning. One night he had a dream that the Bible was open with a burning candle, and he felt being loved by God. That ... (was) proof to him that God is real and loves him. He then felt peace in life and has the heart and courage to maintain his guilty plea which he did on arraignment*";
 - (d) although it is no excuse or justification, "*the Defendant is one of those who could not withstand any sexual behaviour towards him by a male person. He tried to stop the deceased, but the deceased was strong against him which resulted in his tearing the defendant's pants...*";
 - (e) the customary apology by the Defendant's family was accepted by the deceased's family, during which, the latter's talking chief revealed that the Defendant and the deceased were blood related;
 - (f) the Defendant acknowledges the pain he has caused to the family of the deceased and to his own; and
 - (g) the Defendant could be rehabilitated to "*become a better and new person*".

Death or life imprisonment?

39. Clause 18 of the Constitution provides, among other things, that all people have the right to expect that the Government will protect their life. Clause 14, on the other hand, provides, among other things, that a person's life shall not be taken except according to law.
40. Sections 44 (treason) and 91 (murder) of the *Criminal Offences Act*, enacted almost a century ago,⁴ are laws which permit the State to take the life of a subject.
41. Section 91(1) provides that any person, of 15 years or over, who commits murder, shall be sentenced to death or to imprisonment for life.

⁴ 1926

42. In a similar vein to the remarks of Webster CJ in *Volta*, debates about the propriety of the death penalty in a modern, civilised society (and perhaps even more so, in one firmly rooted in Christian values) are the province of Parliament, that body politic whose elected (or appointed) members are mandated to ensure that the laws of the land continue to reflect the needs, expectations and standards of the community they serve and to preserve the nation's standing within the international community.
43. The Courts' mandate, on the other hand, is to interpret and apply those laws, having regard to the relevant features of each particular case.
44. By the applicable law here, Parliament has seen fit to confer on the Court a discretion or choice as to which of the two otherwise mandatory⁵ sentences are to be imposed. That, like any, statutory discretion must be exercised judicially and in accordance with legal principle and not arbitrarily or capriciously.⁶
45. Therefore, it is incumbent on the Court, especially on very grave matters such as the present, to not only state the sentence it decides to impose, but also to explain the reasons for that decision.
46. The last executions in Tonga took place in 1982. Haloti Sole, Livingi Sole and Fili Esau were among a group of men driving to another village, drinking beer, singing and making noise. As they passed through Vaini, someone yelled at them to 'shut up.' The 19-year-old victim was one of those walking along the road. The driver stopped the van and the three Defendants got out and hacked the victim to death using an axe, a cane knife and a weeding hoe. A jury found them guilty of murder. Hill J sentenced them to death.⁷ Section 33(2) of the *Criminal Offences Act* provides that no sentence of death shall be carried out until the King with the consent of the Privy Council has assented to it. Subsection (3) enables the King with the consent of the Privy Council to commute a sentence of death to imprisonment for life. For the three Defendants, requests for clemency (commutation to a prison sentence) to His Majesty, King Tupou IV, by the then president of the Methodist Church and Catholic bishop, were in vain.⁸ As a result, and in accordance with subsection (1), they were taken to the place of execution and hanged by the neck until they were dead.
47. Prior to and since then, 140 countries around the world have abolished the death penalty by law or in practice. Tonga is generally regarded internationally as one of the latter. Of the Pacific Island countries, only Tonga and Papua New Guinea

⁵ *Rex v Ake* [2006] TOSC 3.

⁶ *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1.

⁷ United Press International Inc. archives, 1 August 1982. <https://www.upi.com/Archives/1982/08/01/>

⁸ "Islanders of the South" by Paul van der Grijp, 1993.

retain the death penalty.⁹

48. Neither s 91, nor any other provision of the *Criminal Offences Act*, provides any guidance on how the Court is to choose between death or life imprisonment.
49. Until 2005, the published judgments of this Court and the Court of Appeal did not include any which considered the question in any detail.
50. In *Vola*, which was then the first verdict for murder in Tongatapu in over 20 years, Webster CJ drew guidance from a number of decisions from overseas courts in which the death penalty had been more often considered.¹⁰ His Honour regarded those decisions as 'highly persuasive' and that it was right to adopt their reasoning. The principles which informed that approach and reasoning may be summarised as follows:
 - (a) The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy. As societies became more enlightened, they restricted the offences for which the penalty could be imposed.
 - (b) The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability, its rejection of rehabilitation of the convict as a basic purpose of criminal justice and in its absolute renunciation of all that is embodied in our concept of humanity.
 - (c) Every human being has the inherent right to life. That right must be protected by law. No one should be arbitrarily deprived of his/her life.
 - (d) In comparison to all other punishments, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.
 - (e) The State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.
 - (f) No one has yet suggested a rational basis that could differentiate the few who die from the many who go to prison.
 - (g) The Supreme Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature can be laid down.
 - (h) For persons convicted of murder, life imprisonment should be the rule and the death sentence the exception.

⁹ "The Death penalty in 2016: Facts and figures", Amnesty International, 10 September 2017.

¹⁰ *Bachan Singh v State of Punjab* [1980] 2 SCC 475, [1980] AIR 890; *Furman v State of Georgia* 408 US 238 (1972); *Harmelin v State of Michigan* 501 US 957 (1991); *Reyes v The Queen* [2002] 2 AC 235 (PC); *State v Makwanyane* 1995 (3) SA 391 (South Africa); *State v Nkwanyana* 1990 (4) SA 735 at 743E-745G.

- (i) Death should be reserved only to cases in which:
 - (i) the offending may be regarded as the 'rarest of rare', 'most heinous' or 'most exceptional';
 - (ii) the culpability assumes the proportion of 'extreme depravity';
 - (iii) on account of its design and the manner of execution, the offence and therefore, the offender, are a source of grave danger to society at large;
 - (iv) the alternative option is unquestionably foreclosed;
 - (v) there is no reasonable prospect of reformation; and
 - (vi) the object of punishment would not be properly achieved by any other sentence.
- (j) Even though it may be said that all murder is cruel, that does not mean that the State should respond to the murderer's cruelty with a deliberate and matching cruelty of its own, thereby implying that the punishment must not merely fit the crime, but repeat the crime.
- (k) In making the choice of punishment, the Court must pay due regard both to the crime and the criminal, and the relative weight to be given to the aggravating and mitigating factors of the particular case.
- (l) Aggravating circumstances must be of an abnormal or special degree. Examples include:
 - (i) previous planning;
 - (ii) extreme brutality;
 - (iii) exceptional depravity; or
 - (iv) the murder of a member of the armed forces, the Police or a public servant in the course of duty.
- (m) The scope and concept of mitigating factors must receive a liberal and expansive construction. Examples include:
 - (i) the offence being committed under the influence of extreme mental or emotional disturbance;
 - (ii) the young or old age of the offender;
 - (iii) the probability that the offender would not commit criminal acts of violence as would constitute a continuing threat to society;
 - (iv) the probability that the offender can be reformed and rehabilitated;

- (v) that in the facts and circumstances of the case, the offender believed he was morally justified in committing the offence;
- (vi) that the offender acted under the duress or domination of another; or
- (vii) that the condition of the offender showed that he was mentally defective and that that defect impaired his capacity to appreciate the criminality of his conduct.

51. In applying those principles to the instant case, I consider that the aggravating features of the offending here are capable of characterising it as a heinous crime of extreme brutality and depravity. Specifically:

- (a) the manner of the killing, by prolonged and repeated strangling and frenzied bashing of the victim's head numerous times with a large rock (it is not clear whether the knife was also used to cause any of the lacerations);
- (b) the extensive and horrific damage caused to the deceased's head (among some of the worst encountered by this Court where edged weapons are not involved); and
- (c) the callous attempt by the Defendant to dispose of the body into the ocean before making off with the victim's car,

place this crime towards the most serious end of the spectrum for offences of its kind, that is, approaching the 'rarest of the rare'.

52. In arriving at that characterisation, I have considered and compared the instant with the acts perpetrated in each of the cases referred to by the Crown. The subject offending is worse than that in *Vola* and significantly worse than in *'Ake*. In my view, it is on par with the offending in *Tu'itufu* and *Muli*. Even though those cases involved the use of machetes, here, the Defendant's exceptional and prolonged brutality, including the extraordinary number of blows with the rock, during which, he must have seen the damage he was inflicting but continued anyway, attracts the same epithets stated by Cato J in *Tu'itufu*, namely, an extremely cowardly and savage attack on an unfortunate man, involving almost indescribable and inhuman acts. It will be recalled that in *Tu'itufu*, the only reason Cato J did not impose the death penalty was because the Defendant was only 17 years of age. That saving feature does not apply here.

53. I turn now to consider the following countervailing factors in mitigation:

- (a) at 27, the Defendant is still relatively young;
- (b) he has no previous convictions;
- (c) he entered an early guilty plea to murder following a mental health assessment where he was determined legally competent to stand trial;

- (d) he has been addicted to substances since he was very young, following his father leaving the family;
 - (e) since 2017, he has been addicted to, and was a chronic user of, methamphetamines, which has resulted in mental and behavioural disorders;
 - (f) on the night in question, he was affected by alcohol and methamphetamines;¹¹
 - (g) he has demonstrated remorse and his family have provided an apology with customary reparations to Poli's family;
 - (h) Poli's family have accepted the apology and expressed their forgiveness;
 - (i) since being remanded in custody, free of drugs, the Defendant has shown some inclination towards, potential for, and signs of, rehabilitation; and
 - (j) even though the probation officer assessed the Defendant as posing a moderate risk of reoffending:
 - (i) that assessment necessarily assumes the possibility of continued use or return to methamphetamines; and
 - (ii) there is no evidence that, absent the influence of methamphetamines, the Defendant would commit further criminal acts of violence as would constitute a continuing threat to society;
54. I have intentionally left out of the above list any reference to the Defendant's claim of provocation by Poli through alleged sexual advances. If they occurred, they were obviously not considered by the Defendant or his counsel to be sufficient to mount a partial defence under s 88 of the *Criminal Offences Act*, which, if accepted, would have diminished his crime to manslaughter. However, I have reservations about whether they did occur, or in the manner suggested by the Defendant.
55. Firstly, the Defendant's accounts of what occurred in that regard when he was first interviewed by police, and more recently to the probation officer, were materially inconsistent as to what happened, where it happened and how many times it allegedly happened.
56. Secondly, if Poli did make advances, the Defendant was clearly capable of deterring him without causing injury or avoiding him by simply walking away.

¹¹ Even though self-induced intoxication is, in many cases, such as dangerous driving causing death, viewed as a circumstance of aggravation (*Rex v Lolohea* [2016] TOSC 32 at [16]; *Ikaohifo v R* [2021] TOCA 21), I consider the possibility of any resulting impaired judgment to be relevant in assessing culpability, such as whether there is premeditation or whether, but for the intoxication, the offending would have been entirely out of character (*R v Uasi* [2021] TOSC 66 at [17]).

There was no suggestion of Poli trying to force himself on the Defendant, nor of any injuries to the Defendant.

57. Thirdly, the Defendant's explanation that it was Poli's advances that caused him to become angry and react in the monstrous way that he did are almost impossible to accept. The level of unbridled violence that followed could not reasonably be explained by any need to prevent Poli from making advances. It in fact suggests a different motive, which brings me to the final reason.
58. Fourthly, as a result of Dr Puloka's reference in his report to the Defendant denying Ruben Suli's statement regarding the Defendant's motive for killing Poli, I requested from the Crown a copy of Ruben's statement. It confirmed, as Dr Puloka recounted, that the Defendant told Ruben that he also killed Poli in order to steal Poli's car and wallet. I am not aware of any reason to not accept Ruben's statement in that regard, or why he might make something like that up. It is also to be contrasted with the Defendant's previous inconsistent accounts. As such, I regard that motive as a very serious circumstance of aggravation.
59. It is also necessary to say something more about the role of methamphetamines in this case. Dr Puloka identified the Defendant as a long-term addict who, as a result, had developed mental and behavioural disorders. As alluded to by Dr Puloka, and as explained in publicly available medical literature,¹² people who use methamphetamines long term may exhibit symptoms including significant anxiety, confusion, insomnia, mood disturbances, and violent behavior.
60. Regrettably, the scourge of methamphetamines has been, and continues to be, felt in Tonga, with a sharp rise in cases involving the drug coming before the courts over the last two to three years. That has led this Court, on multiple occasions, to describing methamphetamines and other Class A drugs as not just drugs of dependence, but drugs 'of destruction, causing untold damage to countless individuals, their families and their communities'.¹³ Lamentably, the present case is now an apex illustration of the truth of those repeated cautions. Directly or indirectly, methamphetamines have robbed one innocent of his life and now threaten to end another.
61. After carefully weighing all the above factors, I am satisfied that:
 - (a) the instant offending, albeit involving extreme brutality, falls just short of the rarest of the rare case of its kind in Tonga;
 - (b) of the mitigating factors considered, the influence of long term

¹² U.S. Department of Health and Human Services, National Institute on Drug Abuse: www.drugabuse.gov/publications/research-reports/methamphetamine/

¹³ Most recently, see *R v Pouono* [2021] TOSC 106.

methamphetamine use and the Defendant's propensity for rehabilitation, take his case out of those for which the death penalty should be reserved; and

- (c) the objects of punishment as well as denunciation, community protection and deterrence can be achieved by the alternative penalty.

Whether to make any recommendations in relation to eligibility for release?

62. In its submissions, the Crown noted that 'life imprisonment' still bears the same meaning as when the *Criminal Offences Act* was first passed, that is, 'for the rest of a person's natural life'.

63. In 'Ake, Webster CJ observed that:

"... It may well be that in the present age and changing circumstances, many years after the Criminal Offences Act was passed by Parliament in 1924, a sentence of imprisonment for life is intolerably long and inappropriate and that the Court should be given some discretion to impose a lengthy, but lesser period of imprisonment. But such a change is a task for Parliament and not this Court, which would be exceeding its constitutional position if it made such a change in the law."

64. Nonetheless, in both *Vola* and 'Ake, Webster CJ recommended that the prisoners in those cases only be considered for parole or release on licence after they had served specified minimum terms or periods. Notably, in the more recent cases, *Cato J* did not do likewise.

65. The question arises whether any similar order or recommendation can or should be made in the present case. That involves consideration of the law in relation to Royal Pardons and the operation of the relevant statutory framework for early release from prison.

66. Section 24 of the *Criminal Offences Act* prescribes the types of punishment that may be inflicted for breaches of the Act. Naturally, they include imprisonment. However, the Act is entirely silent on whether a sentencing Court may order, or even recommend, a minimum term on a sentence of life imprisonment.

67. In *Talia'uli v Rex* [2010] TOCA 26, the Court of Appeal overturned a conviction of a father for the murder of his son for which the Defendant was sentenced to life imprisonment with a recommendation that he serve a minimum of 35 years before being considered for release on parole. Although it was unnecessary to consider the appeal against sentence, the Court noted that:

"... both counsel submitted that it was constitutionally unsound for a Judge to recommend the serving of a minimum term of imprisonment. This can be seen as an interference with the royal prerogative of the King to grant pardons. We are of the opinion that there is merit in this submission."

68. Prior to 2010, clause 37 of the Constitution¹⁴ enabled the King, with the consent of the Privy Council, to pardon any person who had been convicted of a breach of law, or to remit or mitigate any sentence, or any part of any sentence. Amendments in 2010¹⁵ removed the King's power to remit or mitigate sentences and limited it to granting Royal Pardons (except in cases of impeachment). The amendment was one of 82 recommendations made by the Constitutional and Electoral Commission in the second large-scale inquiry into political reform in Tonga in 2009. The Commission recommended, and it was accepted by the Government of the day, that the power to commute, remit or mitigate sentences were matters for prison administration and discipline.
69. In the English and British tradition, the royal prerogative of mercy is one of the historic royal prerogatives of the British monarch, by which he or she can grant pardons (informally known as a royal pardon) to convicted persons. The royal prerogative of mercy was originally used to permit the monarch to withdraw, or provide alternatives to, death sentences. It is now used to change any sentence or penalty.¹⁶ A royal pardon does not overturn a conviction.
70. Part III, Division 7 of the *Prisons Act* provides for remissions of sentences. Section 49 prescribes the criteria for eligibility for, and formulae by which the Commissioner may grant, remissions for male and female prisoners. The calculations within those formulae require a specified term of imprisonment.
71. Division 8 provides for discharge or release. Section 59 provides that a prisoner who is sentenced to imprisonment for 4 years or more, and who has served two-thirds of his sentence, may be granted a release on licence. Again, that calculation requires a definite term of imprisonment. A sentence of life imprisonment is not capable of such definition.
72. Subsection (2) provides, without reference to the term of the sentence, that a prisoner who has attained the age of 60 years may be granted release on licence.
73. Such releases are granted by Cabinet on the recommendation of the Commissioner. In considering whether to recommend a prisoner to Cabinet as being suitable for release on licence, the Commissioner is required to take into account:
- (a) whether the prisoner's release would pose a risk to the community (having regard to the considerations for same in s 55¹⁷);

¹⁴ As amended by Act 13 of 1966.

¹⁵ Section 9 of the *Act of Constitution of Tonga (Amendment) (No. 2) Act 2010*.

¹⁶ "The Governor-General - The Royal Prerogative of Mercy". *Te Kawana Tīanara o Aotearoa*. 17 June 2013.

¹⁷ (a) the possibility of the prisoner committing further offences; (b) the risk of harm to a member of the community and the degree of that risk; (c) the prisoner's criminal history; (d) whether the sentencing court

- (b) whether the prisoner has been of good conduct and industry;
 - (c) the prisoner's demeanour and attitude towards the offence for which the prisoner was imprisoned; and
 - (d) the prisoner's attitude towards crime generally.
74. Before granting a licence, Cabinet is to consider, among other things, the Commissioner's recommendation, any medical report as to the mental or physical condition of the prisoner and the effects of imprisonment on the prisoner's mental or physical condition. Cabinet may also revoke or alter a licence.
75. It will be observed from the above that of all prisoners who are sentenced to life imprisonment, only those who attain the age of 60 while in prison may avail themselves of the release provisions of s 59. What then of those younger prisoners, such as the Defendant here, who are also sentenced to life terms?
76. Section 130 of the Act permits the Minister, with the consent of Cabinet, to make, alter or revoke rules relating to the administration of prisons.
77. Rule 110 of the *Prison Rules*, which were enacted in 1947, provides, relevantly, that the case of every prisoner under a life sentence shall be submitted by the Gaoler for the consideration of His Majesty in Council on its merits at periods of 10, 15 and 20 years from the date of the sentence, or where the prisoner has attained or is believed to have attained the age of 60 years. In all such cases, His Majesty in Council may, in reviewing the sentence, take into consideration any medical report as to the mental and physical condition of the prisoner, and the effects of imprisonment on such mental or physical condition. For every prisoner under a life sentence or a term exceeding 4 years, the Gaoler shall report, every 4 years of the sentence, on the mental and physical condition of the prisoner (with particular reference to the effect of imprisonment upon his health), his demeanour and attitude towards his offence, and towards crime generally, his conduct and industry and any other matters which may have a material bearing upon his case.
78. From that, two observations may be made. Firstly, a prisoner sentenced to life must serve a minimum of 10 years before being eligible to be considered for review under rule 110. Secondly, if such a prisoner is not granted early release by and upon his/her 20-year review, he/she will not be released in accordance with rule 110 and his/her only other avenue for possible release will be when he/she attains 60 years of age pursuant to rule 110 or s 59(2).
79. While those observations may be clear enough, there is an obvious tension

made any remarks about the prisoner; (e) any medical reports relating to the prisoner; (f) any behavioural reports about the prisoner; or (g) anything else prescribed under a regulation.

between the removal of the King's Constitutional power to remit sentences on the one hand, and the procedure provided by rule 110 for His Majesty in Council to consider and 'review' sentences to which the rule applies, on the other.

80. It is also unclear as to what the periodic reviews under rule 110 entail, what is to be decided, how it is to be decided or how any decision is to be effected. It would appear, that despite the 2010 amendments to clause 37, the intention of the rule, without expressly stating it, is to permit His Majesty in Council to remit or mitigate sentences where a prisoner meets unspecified criteria¹⁸ for doing so. If that is the case, it may be explained by application of the broader British interpretation of a Royal Pardon. Section 128 of the *Prisons Act* provides, in short, that nothing in the Act limits or affects Royal Pardons. However, the rule does not specify whether any decision to remit or mitigate a life sentence is to take effect as a Royal Pardon or as an order for release on licence. If the latter, then there is no stated interconnection (if any) with s 59, which involves the Commissioner's recommendation to Cabinet and the latter's consent to a release on licence. That may well be because the rule 110 procedure is not limited to those prisoners who have attained 60 years of age, whereas in the case of life sentences, s 59 necessarily is.
81. To assist in better understanding how the statutory system for releases apparently works in practice, the Crown obtained the following information from the current Commissioner of Prisons, Mr Semisi Tapueluelu, and his 50 years of experience in the prison system:
- (a) A sentence of life imprisonment means imprisonment for the rest of a prisoner's natural life.
 - (b) There are currently 13 prisoners at Hu'atolitoi Prison serving life sentences, five of whom were sentenced prior to the 2010 amendment.
 - (c) The longest current serving life sentence prisoner is *Vola*, who was sentenced in 2005, with the second longest being *'Ake*, who was sentenced in 2006.
 - (d) Prisoners serving sentences of life imprisonment are eventually released on licence pursuant to s 59 of the *Prisons Act*.¹⁹
 - (e) For example, on 30 September 1968, Laki Haati Tu'ifua was sentenced to death for murder. The Court later changed the sentence to life imprisonment. On 22 September 1972, His Majesty Taufa'ahau Tupou IV remitted the sentence to 17 years imprisonment. In 1979, Tu'ifua was

¹⁸ Other than the "merits" of the case or the matters to be addressed in the Gaoler's four yearly reports.

¹⁹ Which, for the reasons explained in paragraph 71, is impossible to calculate for life sentences.

released on probation for 2 years. In 1981, he was discharged. He served a total of 11 years imprisonment.

- (f) Despite the 2010 Constitutional amendment discussed above, before a prisoner is recommended to be released, an application is made to His Majesty pursuant to clause 37 to remit or mitigate the sentence in whole or in part.
 - (g) The application to remit or mitigate a sentence has been aimed at addressing the issue of 'for how long a prisoner sentenced to life imprisonment should be released on licence,' as it was seen as impracticable to release a prisoner on licence for an indefinite time (i.e., for the rest of his natural life).
 - (h) Once His Majesty remits or mitigates a sentence, the Commissioner considers whether the prisoner has served two-thirds of his sentence before he makes a recommendation for the prisoner to be released on licence.²⁰
 - (i) The current practice is that an application to His Majesty to remit or mitigate a sentence is only made after a prisoner has served 10 years imprisonment. This is so even if the prisoner has turned 60 before he has served 10 years because the prisoner 'would still likely pose a risk to the community' (per ss 59(4)(a) of the Act).
 - (j) There has only been one prisoner sentenced to life who died in prison, due to illness.
 - (k) Some applications for remission or mitigation of a sentence have resulted in a full Royal Pardon.
 - (l) Except for those in 2015, all applications to the Monarch to remit or mitigate a sentence have been granted. The applications lodged in 2015 were returned because they did not follow the 'new requirements' under law (details of which were unknown to the Commissioner).
82. It seems to me that, despite Tonga not having a formal parole system such as that found in other jurisdictions in the region, the statutory regime in the *Prisons Act* and *Rules* is sufficiently clear, even though, according to the information from Commissioner Tapueluelu, it does not appear to have always been followed pursuant to its terms. The 2010 amendments to clause 37 of the Constitution did not affect the King's power to grant Royal Pardons. An historically broad interpretation of that prerogative includes remission or mitigation of sentences. The procedure for applications for early release of those serving life sentences,

²⁰ Which demonstrates the disconnect referred to in paragraph 80 above.

(including those prisoners who attain 60 years of age) and consideration of such applications, is provided for by rule 110. Although the nature and scope of the considerations referred to therein, and the manner in which any decision by His Majesty in Council to remit a life sentence are not well defined, it seems tolerably clear that it is intended that His Majesty in Council, in appropriate cases, can, and does, remit such sentences with the presumed result that those prisoners may be released either absolutely, or on licence, loosely in accordance with s 59 of the *Prisons Act*.

83. Accordingly, in my view, there is no requirement, and arguably no statutory power, for this Court to make any order or recommendation in relation to the Defendant's eligibility for release at any time during his sentence.

Result

84. The Defendant is convicted of murder and is sentenced to imprisonment for life.

NUKU'ALOFA
11 October 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE