

date because I wished to give further consideration to the matter before passing sentence.

[3] The agreed facts were;

1. The accused is 17 years old and is from the village of Hamula. He is a form 4 student at Beulah College.
2. On the evening of the 20th October, 2014, the deceased Matangi Fakava, was drinking alcohol with two friends named Sosefo Kaloni and Senoni Kaloni at Sosefo Kaloni's home.
3. The deceased became intoxicated and wanted to go for a walk so he and his two friends left Sosefo's house and went for a walk.
4. At approximately 8.00pm, they walked past the accused's residence. The deceased went inside the accused's house whilst his two friends continued walking to a third person's residence.
5. The accused was inside his house sleeping when he heard the deceased calling out his (the accused's) sister's name.
6. The accused went to his sister's room and saw the deceased rummaging through a suitcase of clothes that was inside the room.
7. The accused chased the deceased out of the house and the deceased left. The accused also walked to the road and met with the deceased's two friends.
8. Sosefo Kaloni invited the accused to join them in drinking alcohol. The accused went back to his house and put a kitchen knife in the back pocket of his trousers.
9. The accused then followed the deceased and his friends.

10. The deceased eventually noticed that the accused was following them and so he walked up to the accused and began assaulting him.

11. During the assault, the accused took his knife and stabbed the deceased on his left arm and shoulder. The knife cut into the body of the deceased severing a vein in the arm, and punctured his left lung.

12. The deceased threw the accused to the ground and continued to assault him, causing the accused to call the deceased's two friends to help him.

13. The two friends stepped in and tried to stop the deceased. The accused managed then to break free and run off.

14. The deceased was taken to hospital but was declared dead on arrival due to substantial loss of blood from the injuries he suffered from being stabbed by the accused.

15. The accused was later arrested and made a voluntary confession to police.

16. The accused is a first time offender.

[4] On hearing counsel, it was further accepted by the Crown that prior to taking up the knife; the accused had been subject to violence at the hands of the deceased, who was a strongly built young man of 19, and that, prior to the accused stabbing the deceased, that the deceased again had commenced an assault on him. Having seen the prisoner, I formed the view that he was a rather unsophisticated 16 year old and that the provocation he received could be described as significant, a view which the Crown shared.

- [5] It is necessary when pleas are entered for counsel to arrive if possible at an agreed summary of fact, as here or if not indicate the basis upon which there is disagreement so that a disputed facts hearing, if necessary, can be held. A failure to agree on the facts may lead to a sentence being adjourned. In this case, the Crown (Mr Kefu) who did not appear at this hearing, in his memorandum of submission on sentence accepted that there was a high degree of provocation given that the deceased had attacked the accused and had continued assaulting the accused whilst he was on the ground. I proceeded to sentence on this basis.
- [6] The Crown, on this occasion, represented by Mr 'Aho usefully advanced certain authorities relating to stabbings where death followed and manslaughter convictions had been entered. Tu'itavake v R [2005] Tonga LR 348, 392, para 200; R v Kaho [2005] CR 136/09; R v Fakauho [200] TLR 50. The maximum sentence for manslaughter in Tonga is 25 years imprisonment. Whilst the categories in Tu'itavake are of some assistance, every case varies on its facts and this is no exception. From these cases, however, I accept that a high starting point is called for where knives and other weapons are used during the commission of an offence and death results. Deterrence and the protection of society are important sentence principles in cases of this kind. A starting point, in my view, where a mature offender is involved and a knife was carried with the possibility of violence being anticipated, it being used when violence materialised to inflict lethal injuries in the case of an adult offender is 9 years imprisonment, and in some cases possibly higher.
- [7] However, there are very strong mitigating factors, as the Crown accepted, in its sentencing memorandum, in this case. At the time of the offending, the prisoner had been at home. He was aged 16 and in the fourth form and about to go back to boarding school. The deceased who, with friends, had been drinking chose

to enter the prisoner's house uninvited when he was asleep, and had rummaged around in his sister's belongings. He had been told to leave the house by the prisoner who awoke, and had been subsequently assaulted by the deceased. The deceased left the property and the prisoner was invited to join friends of the deceased drinking elsewhere. It was then that he foolishly went with them to drink, having placed a kitchen knife in his back pocket. Violence did ensue and it was initiated again by the deceased. It was during this skirmish that the prisoner produced the knife and with two firm downwards thrusts, it seems, penetrated the arm and shoulder and the lung causing the deceased to bleed extensively. He was dead shortly after on arrival at hospital.

[8] I consider, consistently, with the Crown's assertion that there was a high level of provocation in this case, and that the offender was young and in my view rather immature or unsophisticated that the starting point can be reduced to six years imprisonment, being the starting point for this case.

[9] I take into account further that the accused has no previous convictions and has pleaded guilty at a very early stage. He is said to have good prospects at school and obviously this year his education has been restricted. He intends to proceed on at school. It is said he misses his father who now resides in the United States. It seems his mother, who was in Court, shoulders responsibility for bringing up his large family of siblings with some assistance from relatives. The probation report spoke well of him and he is highly regarded at school and in the wider community. For these mitigating factors, his early plea and his good character I allow him a further two years by way of mitigation.

[10] Finally, it is of importance that not only at the request of the deceased's family, did he attend the deceased's body but he and his family in a formal ceremony offered apologies to the deceased's family and a cow and other items were given. I was informed that the deceased family asked that the prisoner be regarded as their own. I have no doubt that the prisoner has remorse and I am informed the family of the deceased has forgiven him his actions. In these circumstances, and also because an apology is an important aspect of Tonga culture, I allow a further six months by way of mitigation.

[11] The sentence I impose is one of three and half years imprisonment. This sentence is backdated to take into account the dates on which he was remanded in custody, which I am informed involved two periods from the 24th October 2014 - to the 30th January 2015, and then from the 5th March 2015 to the present, (a period of 7 months and 11 days to today's date). I consider that the prisoner is entitled to have the final three years of his sentence suspended because he is so obviously likely to be rehabilitated, is a first offender, only 16 and so as to pursue his education, on the following conditions;

- (1) He is not to commit any offences punishable by imprisonment for the period of his suspension;
- (2) He is placed on probation for 12 months to live where directed by his probation officer;
- (3) He is to undergo a Life skills course and a course against violence, under the direction of Probation.

[12] The effect of my sentence today is that he is eligible for immediate release. The Crown is to facilitate this together with

his defence counsel, Ms Tonga, with the prison authorities forthwith.

[13] Finally, I record that Mr Kefu, in his original memorandum, asserted that a starting point of three years or less given the mitigating factors was appropriate. I take Mr Kefu to mean an end or final sentence after mitigating factors, which is not greatly dissimilar from that which I have imposed. I pause simply to add that, in certain cases, particularly those which are unusual, I find it helpful that the Crown does indicate a period that it considers is appropriate, although this does not bind me to accept the level of sentence suggested.

NUKU'ALOFA: 5 JUNE 2015

