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IN THE SUPREME COURT OF TONGA **CR 84 of 2014**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **PATRIC 'UNGA** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Aho for the Prosecution
Mrs Taufateau for the Prisoner

SENTENCE

[1] The Prisoner, Patrick 'Unga, was convicted of manslaughter after a trial before Judge and Jury on the 19th June, 2015. Sentencing was delayed because I ordered further information be obtained from New Zealand as to a previous murder conviction and also that a report be obtained from Dr Puloka, a forensic psychiatrist, before his sentencing. The prisoner was transferred to the secure unit at Vaiola hospital for some months whilst Dr Puloka was able to examine him. A report was received, recently.

[2] He had been charged with murder under section 87(1) (b) of the Criminal Offences Act which provides that it is murder;

> "if the offender intended to cause the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensured or not. "

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The particulars relied on by the prosecution were;

> "On or about the 12th April 2014 at Nuku'alofa, he did cause the death of Sitanilei Sime when he intended to cause him bodily injury when he struck his head repeatedly with a metallic torch to his head, and he knew those injuries were likely to cause death and he was reckless as to whether those injuries would result in death or not."

[3] The evidence was in a very narrow compass. It was proven that early, in the morning of the 12th April 2014, the prisoner had been working as a night watchman for a business Dataline in the central area of Nuku'alofa. He had in the late evening gone outside to a park area known as Digicel Park around 2am where he had consumed some alcohol from a bottle of spirits he had. A group of youth approached him and asked to borrow his phone and he gave them it. He also shared some alcohol with them. Later, he asked for his phone back. It seems that, by this time, most of the youths had left aside from the deceased and possibly one other. He was not given back his phone which he had requested be returned. Instead, a fight broke out during which the prisoner used a large torch to hit the deceased about the head. The prisoner said, in his record of interview, that he hit the deceased twice on the head. Medical evidence from a pathologist suggested that there had been three or four blows to the back of the head causing a large comminuted depressed fracture of the left parietal bone and hemorrhage into the soft tissues of the scalp. There was a fracture of the sphenoid bone around the eye also at the base of the scalp. As a consequence, there was bleeding into the cranial cavity and the deceased, who had been taken to hospital, died soon after. The deceased remained where the fight had taken place until police arrived and later provided his version of events, in a record of interview.

[4] There was no eye witness account of how the fight commenced. A security officer, however, gave evidence that, later in the morning, he heard a scream for help and he took about 15 seconds to get to the area where the accused was hunched over the deceased who was lying sideways and he had a torch in his hand. He said that the accused was saying do not swear at me when I talk to you when he was beating him. He also said that from about the shoulder he brought the torch down on his head once or twice and another delivered another blow to the body. He told him to stop or he might die. He gave evidence of the deceased bleeding from the head and having trouble breathing.

[5] In his record of interview, the accused admitted his involvement. He said that he had got angry when his phone had not been returned to him by the youths who had wanted it they said to listen to music. He said he had consumed one 500 litre bottle of alcohol. He said two youths were left and, when he asked for his phone, the deceased lunged at him. He said he punched him on the mouth. He said he came at him again and he hit him with the torch on the head. The deceased was still trying to tackle him so he hit him with the torch and punched him until he fell to the ground. He said that he then sat down and had a rest. He did not touch the deceased again. He said he did not check on him. He said he was pissed off and angry. He said no one had tried to stop him whilst he was beating the man up. He said it had occurred around 3 or 4 am. He said that he did not care about the man afterwards anymore. After I beat him, he said that he sat down to catch his breath. He was sitting there for ten minutes until the police arrived. The deceased was no longer moving when the police arrived. He said he began to feel sorry for him and regretted getting angry. He said he wished he were still alive. When asked whilst he was angry and beating the guy,

what was he thinking?, he replied "I didn't know anymore, I was too angry." He said, however, that he was not angry any more after he beat the deceased with the torch. He admitted he did not care about him when he was angry. He said he was not sure whether the beating would cause him to die. He later said he deeply regretted what had happened. He said for the rest of his life he would keep away from committing the same crime in future.

[6] The Prisoner defended both murder and manslaughter charges. His defence, however, was principally aimed at resisting the murder verdict, namely whether in beating the deceased, he knew that death was a likely consequence. On this question, intoxication was raised and I gave a direction on this, although little was made of this by the defence and the accused did not given evidence. In my view, the jury resolved the matter by giving the prisoner the benefit of doubt on the central issue of whether, when he inflicted the lethal blows, the prisoner knew that death was a likely consequence. I, accordingly, proceed to sentence on the basis that, although he must have known that there was a serious risk that hitting a man with what was a large and rather heavy torch on two occasions could cause serious injury, he did not appreciate that his actions were likely to result death, as the Tongan legislation requires. In cases of this kind, there is a fine line between murder and manslaughter. Plainly, in cases of this kind involving blows with weapons to the head, a severe penalty is called for on a manslaughter conviction. The fact that the prisoner has caused the death of another by his unlawful act is the principal sentencing criterion.

[7] Manslaughter carries a maximum sentence of 25 years. As the cases have said manslaughter is a crime where the circumstances vary considerably, as do the sentences that have

been imposed. The principal cases cited to me by the Crown were Tu'tavake v R [2005] TLR 348 and Kofutu'a v R [2010] TLR 120 which involve very different factual situations from these. The guidelines from English sentencing practice referred to in Tu'tavake at p 352 would suggest that where there is some provocation but serious or great brutality a starting point would be between 10 and 12 years. Mr Kefu who did not appear on sentence, advanced a memorandum submitting a 14 year starting point was appropriate in this case. He seemed to have arrived at this conclusion from the case of Kofutu'a v R [2010] T LR 120 where the sentencing judge had imposed a starting point of 15 years for an unprovoked series of assaults (punching) of a woman with the assaults being in the area of the chest and stomach. Although not interfering with the starting point, the Court of Appeal reduced the sentence to 13 years because consideration had not been given to the fact that apology and some restitution had been given to the victim's family, and also because of his youth and co-operation with police in making his statement. The Court said that where serious brutality was involved without provocation a starting point could exceed 12 years.

[8] In this case, I consider there had been some provocation which resulted in the accused using the torch as a weapon, but it was moderate provocation. However, in my view hitting a man over the head with a heavy torch on at least two occasions is great brutality and I approach this sentencing on that basis. In R v Hala'ufia, CR 35 and 36 of 2013, I adopted a starting point of 13 years imprisonment where the prisoner, an inspector, had fractured the skull of the deceased and strangled him in custody. I took the view that the assault was aggravated by the fact that it took place in custody and the inspector was the officer in charge of the arrest. In the case of another officer, Maile, who

had shortly after stomped on his head rendering him unconscious as he was led to the cells, a starting point of 11 years was imposed. In that case, I rejected any claim to provocation because although the deceased had resisted police and been abusive, that was conduct police were trained and expected to be able to deal with without resorting to excessive violence.

[9] After the trial, I learned that the prisoner had been convicted of murder in New Zealand where he had lived and worked as an overstayer for some time in his early twenties. During this time, he killed his fiancée by hitting her over the head with a dumbbell which was nearby after she, so the prisoner considered, had suggested their relationship was over. He hit her over the head three times twice after she had fallen back into a nearby arm chair. He gave himself up to police shortly after. The relationship had involved previously serious incidents of violence. He was sentenced to life imprisonment aged 27 on the 11th July 2003. No minimum period was sought by the Crown. He was deported to Tonga in, December 2013 and lived with his family until committing this homicide in April 2014, when he was aged about 38.

[10] I was concerned about this prior conviction and requested a report from New Zealand police as to the circumstances of the offending. All I had before me, at the date of verdict, was information that he had been convicted of murder. The sentencing was adjourned for this to be provided. After I had received this information, I requested the prisoner be examined by Dr Poloka who obtained further information on the prisoner.

[11] In his thorough report, Dr Puloka described the prisoner as having a vulnerable personality type or trait, the characteristics being "introversion, intuition, feeling judging" personality type

according to one of the Myers - Briggs personality types. He quoted characteristics of these people, known as INFJs, as warm as they are complex. INFJs hold a special place in the heart of people who they are close to, who are able to see their special gifts and depths of caring. INFJs are concerned for peoples' feelings, and try to avoid hurting anyone. They are very sensitive to conflict and cannot tolerate it well. Situations which are charged with conflict, he explained, may draw the normally peaceful INFJ into a state of agitation or charged anger.

[12] This personality trait, he said, was not an abnormality. The prisoner had an adjustment disorder with mixed disturbances of emotions and conduct. There was no plan by the prisoner to harm or kill the deceased but, during the time of the commission of the offence, the prisoner's mind was in rage. The violent anger had over ruled the prisoner's good decision making. He said that there was no need for medication but there should be psychological intervention, and total abstinence from alcohol and other illegal drugs should also be part of the treatment. Alcohol was related to the commission of the offence but the main problem was his adjustment disorder. He said that the prisoner had decided not to take alcohol or drugs for the rest of his life. He recommended that he be sent to the the Psychiatric unit of Vaiola hospital for at least 6 months for him to receive further psychological treatment regarding his coping mechanism, especially anger when provoked. He also suggested that the Salvation Army was another service that could give him assistance in anger management and substance related disorder. He observed that the prisoner's act of homicide in New Zealand and the current homicide here in Tonga were examples of a marked distress in him that is out of proportion to the severity or intensity of the stressor. He was of the opinion that psychological treatment in order for Mr 'Unga to reform his life should be one of the main purposes of the expected sentencing in order for him

not to harm others or to commit homicide again in the future. He also noted that, whilst as a prisoner in New Zealand, he took sessions in psychological intervention for anger management for about six months.

[13] The prisoner, because of his previous offending and the nature of it and his disordered personality, plainly could be a serious danger to the public in the future. In cases of mental abnormality which is not the case here, offenders can receive discounts for their offending which is plainly related to their disorder. The prisoner, here, does not suffer, however, from a mental disorder but a personality disorder, but not so extreme according to Dr Puloka as to be regarded as an abnormality.

[14] Dr Poloka mentioned frustration with the phone not being returned and, at the same time, his being provoked that led to a heightened physiological arousal and killing. I note that, in the New Zealand case, the killing seemed to arise from his partner's apparent desire to end their relationship. In that case, also, his reaction was intense and unplanned. He gave himself up to police. At his sentencing, Harrison J noted that the history of violence in the relationship, which he described as very dysfunctional, was one that suffered from passion and violence. He observed that his sister had said, as a sister here to his probation officer, that he was by nature; shy, loving and a loyal person. Harrison J accepted that what he did was out of character. The reaction, which he described as savage and ferocious, was motivated, the Judge said, by a mixture of blind passion, jealousy, and possessiveness. He accepted he was genuinely remorseful.

[15] The probation report, in this case, also speaks of his sister describing him as being a gentle and silent character. She said he was a happy person with friendly attitude but was dangerous when he was angry and could not control his temper. The probation report mentions that he had an average Tongan

education, before he went to NZ and overstayed. He was 21 at the time. He commenced taking marijuana in New Zealand and appears to have informed his probation officer that he had lost control over the killing of his partner.

[16] In the context of this sentencing, the New Zealand homicide is important. He had only been released a few months when he killed, again in Tonga. When dealing with a case where an offender had also exhibited a dangerous propensity, being also involved in two homicides and receiving a life sentence for diminished responsibility, the High Court of Australia (Mason CJ, Brennan, Dawson and TooheyJJ) said in Veen v The Queen (No 2) [1987-88] 164 CLR 465, at 477;

> "There are two subsidiary principles which should be mention. The first is that 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. Counsel for the applicant submitted that antecedent criminal history was relevant to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

[17] In my view, the offending in New Zealand has obvious similarities to the homicide here and is a very relevant matter to be considered on sentence. The fact that in occurred in New Zealand is irrelevant, and should not mean that the Court puts it to one side because the offence did not occur in Tonga. The offending whether it occurred in Tonga or elsewhere is a part of the prisoner's history which requires to be considered on sentence in the public interest, because it demonstrates that he has a dangerous propensity to kill when exposed to frustration of even mild provocation and, hence, he represents a serious danger to society. He has shown, in my view, a continuing and callous disregard for human life when exposed even to mild provocation and consequently a continuing disregard of the law. In my view, a more severe starting point is required for these reasons, though not one that is disproportionate to the offending. Mr Kefu submitted that a 14 year starting point, in this case, was appropriate. I agree that this is an appropriate starting point for the offending, although for reasons which may differ in approach from Mr Kefu (who was probably influenced by the Court of Appeal in Kofutu'a v R). I adopt the approach in Veen, to arrive at a 14 year starting point. I consider the seriousness of his offending must be viewed in a different light from an offender who has not exhibited a history of homicidal offending. The fact that he well understood the seriousness of his previous offending and indeed took psychological counseling whilst in prison in New Zealand for it, means that his failure to exercise self control on a second occasion is worse. It justifies a more severe response. However, that aside, as Mr Kefu submitted, a very significant starting point, in any event, is appropriate on ordinary principles when death results from hitting a person about the head with a heavy weapon, which is inherently a brutal act .

[18] I have considered his probation report, and note that the accused was co-operative with police, and did not attempt to run away after the incident. In being co-operative and making a statement to the effect that he was unsure what would happen when he hit the deceased, he probably assisted his cause and avoided a murder verdict. In a case like this, as I have said, the difference between murder and manslaughter is a fine line. I believe his expression of remorse and I note also that he and his family have apologized and given some money to the family and their apology has been accepted. In these circumstances, the sentence I impose is 12 years and six months imprisonment backdated to the date of his remand in custody for this offending.

[19] In these circumstances, I have considered whether I should suspend any part of this sentence. At first, I considered I should not. On further reflection, I consider that I should. He has expressed remorse, has apologised for causing the death, and has been co-operative with police. His family speaks of his otherwise gentle character. I also consider that a further reason for suspending the final 18 months imprisonment is to ensure in the public interest that there is proper and orderly supervision of his release into the community and his rehabilitation. He has attended Dr Poloka for a lengthy period of examination in Tonga and I consider, as the Doctor recommends in his report, that there should be further opportunity given early in this sentence for him to resume psychological counseling. I have noted that the present offending occurred after previous counseling for anger management had been undertaken in prison in New Zealand. Hopefully, under Dr Puloka's care and with this added experience, the prisoner will appreciate that he has a very serious problem which requires correction before he can safely return to society. He has, obviously, a long standing personality

trait which I am satisfied is a major cause of his offending and alcohol, in combination, is likely another factor. That said, I consider it also necessary for the protection of society that his release is monitored and on conditions, rather than be an unsupervised release 18 months later, as was the case when he returned from New Zealand to Tonga in December, 2013. By the time he is released for the present offending, he will have spent almost two decades of his adult life in custody. Re-integration into society after such a long period of institutionalized life requires support.

[20] I suspend the final 18 months of the sentence on the following conditions;

a. He is not to commit an offence punishable by imprisonment for a period of three years;

b. He is to be placed on probation for 18 months with the following conditions;

i. He is to live where directed by his probation officer;

ii. He is not to consume drugs or alcohol during the period of his probation;

iii. He is to be forthwith placed under the care of a qualified psychiatrist for appropriate follow up counseling;

iv. He is to undergo further counseling with the Salvation Army on drug or alcohol abuse on his release.

[21] He is warned that a failure to abide by any of these conditions could see him being recalled to serve the remainder of his sentence, in custody.

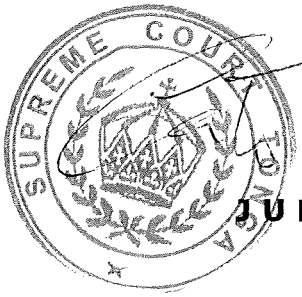
[22] I recommend to the Commissioner of Prisons that very early in his sentence he be transferred to the secure wing of Vaiola Hospital for such reasonable period as Dr Puloka considers is required for him to further his psychological treatment, and that that before his release, he be given additional follow up psychological counseling to prepare him for release into the community.

[23] I make a similar recommendation that during this period at Vaiola he undertake counseling also for alcohol and drug abuse, and anger management.

[24] I direct that the report of Dr Puloka, dated 15th October, 2015 and a copy of the sentencing notes of Justice Harrison, relating to his New Zealand murder conviction, and the memorandum of Jim McCully (Interpol) in relation to his New Zealand offending be retained with his prison file. A copy of this judgment and the Crown submissions on his sentence should also be retained on his prison file.

[25] A copy of this judgment is to be sent to Dr Puloka. I have found his report, analysis and suggestions most instructive.

DATED: 5 NOVEMBER 2015



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