

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

Sean + He
CR 109 of 2014

M
14/12/15

REX

-v-

PAEA WINSTON HELU

BEFORE THE HONOURABLE JUSTICE CATO

Sentence

Mr Finau for the Crown

Mr Pouono for the prisoner

[1] Mr Helu appears for sentence today, on one count of manslaughter. I delivered sentence orally but said that I intended later to deliver a written judgment so that there was an

Rec'd 14/12/15
Cato

accessible record of what I had said, not only for the benefit of the prisoner, but for prison authorities, probation, the wider Tongan community and as a sentencing precedent for lawyers. Manslaughter involving violence is not uncommon, in Tonga and as I mention below can raise some difficult sentencing problems. There is some revision of the text and expression but not the substance of what I have said, the principles applied or the sentence itself.

[2] The summary of facts records that, on or about 10th May 2014, at around 5pm the prisoner had begun drinking with his brothers at Fasi. Later, they went to a bar in town. The prisoner dropped them off home and returned to the bar. He parked his car and went for drink, emerging after a short time to find the deceased inside his vehicle. The deceased had removed speakers and his radio in an attempt to steal them. In a rage, the prisoner punched him inside the vehicle. He then held on to him in the vehicle and drove him to another area. There he pulled him out of the vehicle and continuously punched him and kicked him whilst he was lying on the ground. He then drove off. A few hours later he was discovered and taken to hospital where he later died. He died from Bilateral Pneumothorax secondary to blunt force chest trauma. He has suffered multiple rib fractures, resulting in bleeding and lung complications from which he died. He was aged 19, at the time of his death. The prisoner was aged 32 and had a conviction for assault and possession of arms without a licence. He surrendered himself to police and was co-operative. I did not find either of his two previous convictions of any real relevance on this sentencing.

[3] Manslaughter varies greatly based as it is on death by an unlawful act and accordingly, the sentences imposed, the maximum being 25 years imprisonment, also vary considerably. This is a serious case of manslaughter involving the death of a

young man apprehended during the course of breaking into the prisoner's motor vehicle and attempting to steal items from it. His death was attributable to a severe assault involving punching and kicking to the chest area. I have said, in other cases, involving violence that kicking during an assault can be as dangerous as using a weapon, a view which has been expressed in a number of English cases. During the course of what was a severe attack on the deceased, five ribs were broken leading to internal bleeding, complications of the lungs and suffocation.

[4] The killing of a human being is the most important sentencing consideration here. The Court must impose a sentence which properly reflects the circumstances and the action of the prisoner in killing the deceased. The law denounces the death of this young man as a consequence of this kind of conduct. Deterrence is also another consideration so that other members of the community are deterred from effecting retribution for unlawful acts, and adopting vigilante reprisal. The police have the responsibility for commencing a prosecution, bringing offenders before the courts and having the matter resolved in an appropriate way.

[5] I raised with counsel at the outset of this sentencing what should be the appropriate starting point for this offending. In recent weeks, I have had a number of cases of manslaughter for sentence before me. In Patric Unga, CR 84/2014, 5th November, 2015 which the Crown cited in its memorandum in this case, several of the leading cases on manslaughter sentences were considered. In summary, where there is provocation and there has been a seriously violent response, an appropriate starting point is 10 to 12 years; less, where the provocation may be said to be considerable and the response involves lesser violence. Where there is no provocation and serious violence results in death, starting points may exceed 12 years. In a recent case

Kalavi, CR 8/2015 for example where there was no provocation, and the prisoner hit a Chinese store owner to the head on, at least, two occasions killing him during the course of a robbery, I considered the starting point should be 14 years. Kalavi was a young man of 19 with previous relevant convictions. One of the authorities referred to by the Crown in Unga, Kotfutu'a v R [2010] TLR 120 involved a repeated punching of a woman in the stomach, involving several episodes, that caused her death. The Court of Appeal interfered with the sentence on the ground that the sentencing Judge had not been informed about an apology and restitution being made by the deceased's family. The Court reduced the period of imprisonment from 15 years to 13 years imprisonment with the final three years suspended, but did not interfere with the starting point of 15 years. The Court observed that where serious brutality was involved, without provocation, a starting point could exceed 12 years.

[6] I do not accept here, as Mr. Pouono submits, that there was any real provocation, in this case. The deceased, was caught in the act of stealing by the prisoner but, during the period between seeing him interfering with his car, driving him away some distance before beating him up, the prisoner had ample time to calm down and either take him to the police station or call the police. He, having assaulted this young man, then chose to leave him which demonstrates a callous disregard for his welfare. I consider an appropriate starting point is 13 years imprisonment.

[7] I have read the probation report on Mr. Helu and the statement from his wife which I find informative. I have read a reference about him from his boxing association and other references, also. I have found a reference from Captain Phillipa Serevi of the Salvation Army who is responsible for the drug and alcohol course, useful. She confirmed he had undergone a course involving 26 sessions of counseling and had been able to stop his

drinking and his use of cannabis. The prisoner's judgment was plainly affected by the amount of alcohol he had consumed that evening, but that in itself is not a factor I can take into account in mitigation.

[8] I have no doubt that Mr. Helu had a severe drinking problem which his wife, in her statement said, had greatly affected his life for some years. However, the fact that he has recognized this, and has now sought assistance for this is a factor I can consider in mitigation.

[9] To his credit, he has pleaded guilty and cooperated with the police, as well as sought assistance for his drinking. By doing so he has accepted responsibility for his actions. I am also told (and it has been confirmed in writing by the deceased's father) that he has made an apology to the family of the deceased which has been accepted. In Tongan culture, this carries importance. In small nations where communities live closely together the acceptance of apology and remorse are important features in sentencing. Taking all those factors by way of mitigation including the fact that he is a family man, I allow him three and a half years mitigation. That means the sentence for manslaughter is 9 and a half years imprisonment backdated to the period he has spent on remand in custody.

[10] The factors that I have referred to earlier such as his voluntary decision to give up drinking and his approach for assistance in that regard, the resultant course he underwent successfully for alcohol abuse, his guilty plea and co-operation with authority, and his acknowledgement of responsibility means that I consider he has a very reasonable prospect of rehabilitation. Consequently, I suspend the final two years of his sentence on the following conditions;

1. he commits no further offences punishable by imprisonment for a period of three years.
2. he is placed on probation as a condition of his suspension for a period of 12 months.
3. during the term of probation he is not to drink alcohol or take drugs.
4. he is directed to undergo a follow up course of drugs and alcohol abuse under the direction of his probation officer and the Salvation Army.
5. he is to undergo an anger management course under the direction of the appropriate agency as directed by his probation officer

These conditions are imposed as part of his suspension so that when he is released from prison he is under supervision and will be assisted to continue on with his rehabilitation. Should he commit other crimes or breach the terms of suspension, he may be recalled to serve the suspended part of his sentence. A copy of this judgment should be sent for retention on his file with Corrections so that it is able to be acted upon , on his release.

Dated 4th December, 2015

