

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

REX

-V-

'ILAISAANE KAHO

BEFORE THE HON. JUSTICE SHUSTER

HAVING HEARD – From Crown Counsel Mr. Kefu , Defence Counsel Mr. Pouono and from the defendant in person.

Let me say at the outset - this is not at all a straightforward case. In 2009 the defendant was charged on an indictment filed in this Court on 14th September 2009 with murder and an alternate count of manslaughter which crime is alleged to have occurred on 18th April 2009.

On her first appearance before Ford CJ, the defendant pleaded Not Guilty to murder but she pleaded Guilty to manslaughter when she was first arraigned on 18th September 2009 before Ford CJ.

The court record indicates her plea of Guilty to manslaughter was not acceptable to the Crown. At an adjourned hearing on 07th October 2009 the Crown [Mr. Kefu] indicated to Ford CJ that the Crown wished to proceed to trial on the count of murder which the Crown is entitled to do.

On 07th October 2009 Ford CJ fixed a trial date for 26th October 2009 before Laurenson ACJ and a trial subsequently took place in October 2009.

On 30th October 2009 the court record indicates the defendant was convicted of murder by Laurenson ACJ and a jury.

On that same date after being convicted by the jury the defendant was sentenced to life imprisonment - a sentence prescribed by law.

On 05th November 2009 the defendant appealed her conviction for murder she applied for bail pending the hearing of the appeal but that was refused.

The matter was subsequently heard by the Tonga Court of Appeal who in a ruling delivered on 14th July 2010, overturned the murder conviction.

The Court of Appeal by a memorandum dated 14th July 2010 sent the case back to the Supreme Court, for sentencing before another judge on the manslaughter charge to which the defendant had pleaded Guilty on 18th September 2009.

On 28th July 2010 the case was assigned by Ford CJ who had sat as the President of the Court of Appeal during the Appeal Court hearing - to Andrew J for sentencing with a direction - to focus on the issue of the "degree" of provocation.

On 29th July 2010 Andrew J set a date for sentencing for 09.30 hours on 05th September 2010 unfortunately Andrew J had left the Kingdom of Tonga on 17th August 2010 when he officially resigned, without officially handing over all his outstanding files - to any accountable court official.

At a meeting of the court users group called on Wednesday 18th August 2010 as Acting Chief Justice, I directed the Chief Registrar at that meeting to forward all outstanding files from Ford CJ and Andrew J when they left the Kingdom to me.

Despite my repeated requests, for files not one such file materialized from the Office of the Chief Registrar.

Since 17th August 2010 neither the Chief Registrar, the Registrar of the Court of Appeal, or any official of the Crown or learned Defence Counsel has drawn this outstanding matter to the courts attention until 01st February 2012

On 01st February 2012 our case management computer operator – [Loma] brought the file to me and drew my attention to the fact the defendant remains unsentenced. I thank Loma for drawing this matter to our attention

In response to this news - I arranged a Pre trial Conference with counsel, I arranged a Production Order and ordered a Pre Sentence Report and a Victim Impact Report - for the prisoner - that same date and arranged for her production in due course.

COMMENT

In relation to this file and many other files - ANY unwarranted delay in sentencing or producing a defendant/ prisoner in an easily identifiable file involving serious offending - in our Supreme Court case management system – WILL work as an injustice to any person awaiting trial or, sentence.

In relation to this particular case I have been told the prisoner has patiently waited in prison - waiting to be sentenced for this crime. I have also been told that she has been a model prisoner throughout her detention without being sentenced.

In my considered opinion the person with the sole responsibility for the inordinate and unnecessary delay in finalizing this particular case, File CR 136 Of 2009 responsibility MUST fall squarely on the shoulders of the Chief Registrar.

Responsibility must also fall squarely on the shoulders of the Registrar of the Court of Appeal who was sitting with responsibility in 2010. Was this the same person, holding the post of Chief Registrar who has full access to all case files and all court records, on a daily weekly and also monthly basis.

Are the responsibilities of the Chief Registrar - the safe keeping of all files in the Supreme Court and the smooth running of the courts, that is to say both the Appeal Court and the Supreme Court?

Has the Chief Registrar, together with the officers of the Crown Law, our Court staff - including myself and, learned defence counsel failed the

defendant in this matter? Failed her by not speaking out asking when is the case going to be called?

It is ALL our individual duty - to secure justice. In the handling of this case the answer to that question must be a resounding – YES we have all failed the prisoner and this must NEVER happen again.

RECTIFICATION

When this 'dormant' file, was first drawn to my attention by Loma – on 01st February 2012 the matter was listed before the Supreme Court to be dealt with as a matter of urgency. The case was first mentioned in Chambers.

The case was listed to be called in open court on 10th February 2012, on that date the Court ordered an up to date PSR and also a Victim Impact report, the case was adjourned to 08th March 2012 for mitigation / sentence and the defendant was remanded in custody.

Unfortunately on 08th March 2012 the Probation service said they had not received a copy of the Court Order dated 10th February 2012 - which according to our court records had been placed into file rack 54 on 10th February 2012. Another delay relating to this unfortunate defendant!

The probation service asked for a further adjournment which was reluctantly agreed to. The case was adjourned to Thursday 15th March 2012 at 09.30 for sentence, with a PSR and Victim Impact Report to be filed before that date.

On 15th March 2012 the prisoner appeared for sentencing on the charge of manslaughter

Having plead guilty on first arraignment on 18th September 2009 to an indictment alleging a single count of **Manslaughter** alleged to have occurred on Saturday 18th April 2009. The court was reminded of the salient facts of the case by the Solicitor General Mr. Kefu who provided the court with helpful submissions on sentencing in manslaughter cases.

THE BRIEF FACTS

According to the Crown the defendant and the deceased were related. They are sisters in law who did not enjoy good personal relationships towards each other. According to the Crown the night before this crime took place, the deceased swore at the defendant's husband.

At church the following day 18th April 2009 the defendant and the deceased met each other. The defendant asked the deceased why she swore at her husband the previous night.

A scuffle ensued, involving the defendant and the deceased pulling each others hair. When the defendant felt she was losing the fight, the prosecution say she reached into the pocket of her husband's jacket which she was wearing; and she pulled out a knife with a 13cm blade. She stabbed the deceased twice, pushing the knife into the deceased's lungs up to the hilt. {13cm}

As a result of the two knife wounds the deceased suffered a significant loss of blood. The court was told the defendant fled the scene of the stabbing. The deceased was taken to hospital but she died, ostensibly through loss of blood.

The defendant was subsequently arrested she was interviewed and later charged with the offences shown in the indictment. The court was told the defendant has always admitted her part in the manslaughter. She denied murder claiming she was provoked.

AGGRAVATING FEATURES

- The use of a weapon a knife when hair pulling was the norm - in a fight between two women who were - family members.
- When the defendant thought she was losing the fight the defendant pulled the knife from her husband's jacket pocket and she used that knife in anger.
- Her victim was not armed with any weapon
- The defendant used that knife not once but twice - to stab her victim in the chest which is a vulnerably part of the body..

- The defendant stabbed her victim twice to the chest, that knife went into the victim's chest up to its hilt – some 13cm
- The knife measured 23cm in total the blade was 13cm
- The defendant fled the scene, she did not render first aid or render any assistance or call out for help for the deceased.
- The deceased suffered significant loss of blood she bled to death

MITIGATING FEATURES

The mitigating factors are –

- The defendant fully accepted her responsibility for causing a death to the police when interviewed.
- The defendant pleaded guilty to the charge of manslaughter at the first available opportunity - before Ford CJ.
- The fact that the defendant was a first time offender.
- The fact the defendant has apologized to the family and the apology has been accepted although the victims still feel some anger.
- The fact the defendant has been a model prisoner for nearly three years.

I told the defendant this was one of the more serious offences of manslaughter to come before the Court - it involved a grudge. A fight that the defendant was unable to control so she resorted to using a weapon of offence and then she ran away from the scene. See R v B [House of Lords]

I told the defendant had the defendant pleaded Not Guilty for manslaughter on the facts as outlined and had been found guilty after a trial, then the defendant would have been sent to prison for a period of between 12/13 years. My tariff was 7/8 years on the facts given

A fairly lengthy custodial sentence is warranted in this type of case to DETER OTHERS from using knives to settle differences.

Any use of a knife, used as a weapon of offence by a defendant - is a serious aggravating feature to this type of offence, and the use of knives as weapons of offence - must be deterred at all costs.

We do not want to become a knife culture crime area here in Tonga as Europe has quite recently become.

A person who has their hair pulled is not entitled to counter that minor assault of hair pulling - by stabbing someone twice in the chest resulting in 13cm knife wounds entering the persons lungs.

Provocation as advanced in this case would be at the very low end of the scale. It is minor in my considered view. People must get along with each other such is human frailty.

I refer to the maxim- sticks and stones may break my bones but words will never hurt me. The teaching of the scriptures- Turn the other cheek. Words do not justify stabbing people with a sharp fishing knife.

Running away from the scene of a crime tends to show "guilty knowledge" as per- ***Rv B [House of Lords decision]***

CONCLUSION

Having considered all the facts of this case, in particular considering the fact the defendant pleaded guilty, on first arraignment before Ford CJ and, the fact the defendant fully co-operated with the police and with this court by entering an early guilty plea and - having heard from the defendant in person today.

In this courts view the most appropriate way of dealing with this case is by way of a prison sentence starting from - a band of 7/8 years for an early guilty plea. Part of that sentence should also be suspended as the defendant is a First Time Offender.

The defendants is sentenced as follows:-

COUNT ONE- has been dealt with by the Court of Appeal in July 2010.

Count TWO– The defendant is sentenced to **SEVEN AND A HALF YEARS** imprisonment

SUSPENSION OF PART OF THIS SENTENCE

Because the defendant has no previous convictions in the Kingdom of Tonga, and for all the reasons set out above in mitigation the court has decided to suspend the last **THREE YEARS** of the seven and a half year sentence of imprisonment which it has just passed; conditional upon the defendant keeping the peace and being of good behaviour and committing no further offences, during the remaining period of that suspension.

ORDER- The seven and a half year prison sentence just passed, will start from 30th October 2009 when the defendant was first remanded in custody by Laurensen ACJ.

I certify have warned the defendant about committing any further offences and I have explained the effect of section 59 of the Prisons Act 2010 for sentences over 4 years imprisonment

This is to be a deterrent sentence, applying the principles enunciated in Crown –v- Cunningham

A copy of this order is to be served on the defendant and on the Probation Service and on the Commissioner of Prisons

DATED 15th March 2012

JUDGE