IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY **CR 166 of 2004**

THE CROWN

V

TEVITA KELEPI

BEFORE THE HON MR JUSTICE SHUSTER
MS A FINAU REPRESENTED THE CROWN
MR V FA'OTUSIA REPRESENTED THE DEFENDANT
SENTENCING DATE 29TH SEPTEMBER 2011

SENTENCING REMARKS

The defendant was charged with an offence of murder; with alternate charges of manslaughter / grievous bodily harm. The crime is alleged to have been committed on 09th July 2004. The offences are as described in the indictment filed in the Supreme Court on 04th September 2004.

CHRONOLOGY

- According to court records the defendant first appeared before Ford J on 1 August 2005 and the defendant was ordered to be detained in custody - until further order of the court.

- On 7th December 2005 Ford J ordered a directions hearing for 10th February 2006 at 09:00 in his chambers.

- On 8th December 2006 Ford J ordered an up to psychiatric date report from Dr Puloka on the accused's mental state and the Judge asked the question quote - "if the defendant is fit to stand trial?"

- On 30th May 2006 Ford J ordered the defendant to be taken to the Vaiola Hospital for four weeks - under part IV of the Mental Health Act 2001- the question the Judge asked was quote - "Is he being held under part 111 of the Mental Health Act?"

- On 19th April 2008 Ford J ordered a directions hearing for 23rd April 2008 - to fix a trial date pursuant to section 18 of the Criminal Offences Act Cap 18.

- On 2nd May 2008, a hearing date was set for 27th May 2008 at 09.30 pursuant to section 18 of the Criminal Offences Act.

- On 27th May 2008, the hearing was adjourned because defence counsel was overseas. The case was adjourned to 10th July 2008 and on that date a treatment order under section 62 of the Mental Health Act was made by consent - there was to be a review of the case on 03rd August 2009 at 09.00 in Chambers.

- On 8th September 2009, Dr Puloka was ordered to provide an up dated report on the defendant. A report was submitted by the doctor indicating the defendant was fit to plead - but nothing appears to have been done - to arraign the defendant pursuant to that order.

- On 21st July 2011, this file was located - as one of three homicide cases which had each previously been listed before Ford CJ - and which had not been completed: - upon finding that information a directions hearing was ordered for this case for 26~ July 2011 and enquiries were made to trace the whereabouts of the defendant.

- On 17th August 2011, the defendant was located and the matter was listed to appear in open court and a psychiatric report was requested as to the defendant's fitness to plead to an indictment. A jury was empanelled according to law s 18 COA - to determine that fact.

- Doctor Puloka told the jury on 17th August 2011, that he had examined the defendant and in his opinion the defendant was fit to plead and he was capable of giving instructions to his lawyer. The jury concurred with Dr Puloka the defendant was fit to plead.

- On I7th August 2011, the defendant was formally arraigned he and pleaded not guilty to the indictment - as is his legal right. An expedited trial date was set for 12th September 2011 and the defendant was remanded in custody to the trial date.

- On 12th September 2011 the defendant appeared for trial, at this point defence counsel indicated the defendant wished to change his plea to plead guilty to manslaughter - the defendant was re-arraigned he pleaded guilty and was convicted. The case was adjourned for sentence.

- The court ordered that in respect of counts one, and three, in the indictment that these two specific charges are to - lie on file, and are to be marked "Not to be proceeded with "except with the order of this Court or the Court of Appeal.

- On I2th September 2011, the case was adjourned for the preparation of PSR and an up to date medical and psychiatric report was ordered for 29th September 2011 when the defendant appears for sentence.

AGREED FACTS

The facts as accepted and agreed - are that on 09th July 2004 at Nukunuku, the defendant had drank a bottle of bounty rum with his friends and his younger brother `KOPITIASI KELEPI- Born 12/04/1 986- and who was the victim in this homicide.

The defendant by his own admission was drunk, as was his brother. The defendant claimed he had prepared some food which he says his younger brother ate, leaving the defendant with nothing to eat at all.

The defendant explained to the police in his ROI how he was angry with his younger brother for eating all the food. The defendant said in interview that he went outside the house and picked up an axe, he came back into the house where his brother was seated in a chair, but faced away from him. The defendant admitted to the police and this court that he came up behind his brother and he hit his brother with the axe - twice on the victim's forehead, and, once on the back of his brother's neck.

The defendant accepts his brother was certified dead on arrival at the Vaiola hospital - the cause of death was recorded - "As hit by an instrument [an axe] the deceased's neck was broken and the deceased's spinal cord was severed at point - CI."

According to the defendant's ROI- and defence counsel's mitigation, the defendant did not mean to kill his brother. Defence counsel stated the defendant was angry and he only wanted to teach his brother a lesson.

The file indicates since early July 2004 the defendant has been in custody, on remand to the Vaiola Hospital - without warrants covering most of the period of his remand - simply because this matter has been what I call "lost in the system."

The only certainty discovered is a suggestion that a treatment order was made under section 62 of the Mental Health Act 2003 by Ford CJ – ordered on 10th February 2008.There was scant follow up to that order and no official copy of an order can be found on the court file - to that effect.

It should be apparent to any concerned citizen here in Tonga - that in view of all the foregoing - the defendant might not have been afforded a fair trial as required under the Constitution - our supreme law, within a reasonable time frame - by the actions of what has happened to the defendant and his entire family.

Our failure to detect the existence of three homicide files more particularly because each lost file involved serious allegations of "excessive violence" in my view shows patent and latent defects in our existing case management systems -defects which must of necessity be addressed by constant review of all cases by independent persons in particular review by competent - and dedicated "Registrars" as case managers.

Our failure to detect the existence of three homicide files proves there was a distinct lack of supervision by current and past management, that lack of supervision of our court services -also includes the various members of the law society who represented the three defendants - I say this, because court users, must never be afraid to speak out and say or question, "What is happening or, what has happened - to our particular case[s]".

We have taken steps to try to ensure this problem never occurs again, we are trying to put into place proper case "review" procedures.

THE INDICTMENT

Count One Murder - an offence contrary to sections 87 (1) (b) and 91 of the Criminal Offences Act (Cap 18) of the Laws of Tonga

Particulars are: -

TEVITA KELEPI of Nukunuku on or about the evening of 9th July 2004 at Nukunuku you did murder Kopitiasi Kelepi when you intended to cause bodily injury by hitting him with an axe and you knew was likely to cause death, and you were reckless whether death ensued or not.

This charge is left to lie on the file - and the file is marked not to be proceeded with, without the leave of this Court or the Court of Appeal.

IN THE ALTERNATIVE

Count Two Manslaughter - an offence contrary to sections 92 and 93 of the Criminal Offences Act (Cap 18) of the Laws of Tonga.

Particulars are: -

TEVITA KELEPI of Nukunuku on or about the evening of gth July 2004 at Nukunuku you did cause the death of Kopitiasi Kelepi when you hit him with an axe on his head and neck which led to his death The defendant has pleaded guilty on arraignment to this charge and he must be given credit for his plea to this charge.

Count Three Grievous Bodily Harm - an offence contrary to sections 106 (I) and (2) (b) of the Criminal OffencesAct (Cap 18) of the Laws of Tonga

Particulars are: -

TEVITA KELEPI of Nukunuku on or about the evening of 9th July 2004 at Nukunuku you did wilfully and without lawful justification cause grievous bodily harm to Kopitiasi Kelepi by hitting him with an axe on his head and neck causing injuries

This charge is also left to lie on the file - and the file is marked not to be proceeded with, without the leave of this Court or the Court of Appeal.

<u>On 29th September 2011 - the defendant appeared for sentence.</u>

Having considered all the facts of this case and having heard from the psychiatrist Dr. Puloka in person on 17th August 2011 and perusing the psychiatrists numerous reports - It would be apparent to anyone, that the defendant was a mentally disturbed and a potentially dangerous person at the time he committed this offence.

The court concludes that if the defendant were to be released from detention; then he would be, or, he might pose a significant threat to members of the general public - including his own family members.

In the Court's view, the defendant will be required to complete ongoing medical and psychiatric treatment, over a fairly long period of time.

It was an aggravating feature that the defendant was angry with his bother for eating all the food. It is an aggravating feature that the defendant whilst angry he went outside and returned with the axe and hit the victim's forehead twice and the back of the victims neck once with the axe-severing his brothers spinal cord, death was instantaneous.

Considering the facts of this case - I would be failing in my public duty if I did not impose a deterrent sentence - but a sentence from which the defendant will continue~to receive appropriate treatment for his mental illness. There can be no doubt in my mind the defendant is and was in July 2004 - a DANGER to the public especially when he had been drinking.

Accordingly, the defendant is sentenced to **EIGHTEEN** years imprisonment which sentence is to run from the date of the defendant's arrest which was 09th JULY 2004. The court hopes the defendant will continue to receive appropriate treatment and assistance from the psychiatric department of the Vaiola Hospital. The court makes a TREATMENT ORDER for treatment of the convict under section 62 of the Mental Health Act 2003.

This is to be a deterrent sentence - applying the principles enunciated in the case of Crown v Cunningham and is imposed to protect members of the public. A previous treatment order made under section 62 of the Mental Health Act is to continue. A copy of this Order is to be served on the Prison service and the Viola Hospital's Psychiatric Department.

DATED: 29 September 2011 **J U D G E**

T.L.Piei