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REX

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MANITISA FAKAUHO

BEFORE THE HON. JUSTICE FINNIGAN

**Counsel** : Mr Cauchi for Crown, Mr Niu for Accused

**Date of Hearing** : 5 April 2000

**Date of Judgment** : 5 April 2000

**ORAL JUDGMENT OF FINNIGAN, J**

The accused appears for sentence on a charge of manslaughter, to which he has pleaded guilty.

I shall deal first with the issue of the maximum sentence. The offence was committed on 12 February 1999, when the maximum penalty was 15 years' imprisonment. On 3 November 1999 s 93 of the Criminal Offences Act cap 18 was amended, to provide a maximum penalty of 25 years. The Crown submits that the proper maximum for the offence is that which exists at the time of conviction.

I have not been referred to, and have not consulted any of the laws of England. In my view the matter is provided for in the laws of Tonga. The accused by law has a right to be a free man, this is clause 1 of the Constitution, cap 2. This right exists until taken away by the police or the Courts according to law, that is clause 14, or until the accused is sentenced by a Court, that is clause 10. Pursuant to clause 20, the legislature and the King of Tonga can not pass any law to take away any right to liberty that the accused has, except from the time of that law. The amendment that increased the potential period of imprisonment took away the right of a person sentenced to imprisonment for manslaughter to be a free man after 15 years or less. It empowered the Court to deprive him of liberty for up to

25 years. This provision cannot be retrospective. I shall sentence the accused for committing a crime with a maximum penalty of 15 years.

The crime is manslaughter. Sione, provocation, and rushing by the accused to the aid of your brother, can be an explanation, but for this crime it cannot be an excuse. Like wise, you were drunk, but you remembered a lot of what happened. Being drunk is an explanation of your bad behaviour, but not an excuse.

If I had directed the jury about provocation in s 88 of the Criminal Offences Act, on what has been told to me this morning, I could not have suggested to them that you were sufficiently provoked as to reduce murder to manslaughter. It would have been their right and privilege and for them alone if they still reduced the charge, but I have heard nothing to suggest that you were sufficiently deprived of the power of self control or had reasonable grounds to believe that it was your legal duty to kill Maikolo in order to protect your brother. Therefore I must treat your offence as being at the more serious end of the scale.

You went to a man who was not threatening you but was using a piece of wood against your brother. You took a knife in your right hand and struck him. This was itself excessive and unlawful. You struck him directly on his neck and the force of your blow sent the knife 8cm into his neck. That is the length of this index finger. You struck him also on his cheek and the knife went 4 cm into the bone of his cheek. That distance is the length of this finger, down to the second knuckle. Then you put the knife in your left hand and struck him again on the arm, the wound was 5 cm deep. With the blows to his neck and cheek you caused grievous bodily harm and were liable to imprisonment for up to 10 years. With the blow to his arm you caused him bodily harm and were liable to 5 years' imprisonment. I must remember that it was not the most violent kind of killing, and it does have some mitigating features. You were not at first seeking to fight. I accept that you came to the dance not carrying the knife and not looking to harm anybody.

However, you did use a dangerous knife and death was the result. For doing this the law says I must consider imprisonment for up to 15 years.

After considering the whole matter, I have concluded you must go to prison for 9 years. Further to that, I have considered the following things. There is no evidence of premeditated use of the knife, you did plead guilty although not until after one year, I accept that you are remorseful and fully regret what you did, and I accept that you have been forgiven by Maikolo's family, and will live in peace and harmony with them. As well, I have no doubt that you are a young man of good character, apart from this crime. For these reasons I shall use the full extent of my power to suspend part of that sentence. After serving 6 years you will be released, with the balance of the sentence suspended for 3 years.

Finally, I have this to tell you. You did not make your plea of guilty until last week, but there is nothing to say that you should make a plea of guilty early in order to be given the benefit of that in sentencing. You have been in custody since 13 February 1999 on this charge, with bail denied. I direct that your sentence will start from that date. Sione, you have had the utmost leniency that the court can allow you.

NUKU'ALOFA, 5 April 2000



*[Handwritten Signature]*  
JUDGE