

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

ATTORNEY GENERAL'S OFFICE	
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AC 14 of 2021
(CR 304 of 2020)

BETWEEN:

SIMIONE IKAHIHIFO

Appellant

-and-

REX

Respondent

JUDGMENT OF THE COURT

Court: Whitten P
Hansen J
Randerson J
White J

Counsel: Ms A. Kafoa for the Appellant
 Mr T. 'Aho for the Respondent

Hearing: 21 September 2021

Judgment: 28 September 2021

Introduction

1. This appeal raises important issues of principle concerning sentencing for offences of reckless or dangerous driving causing death or other serious harm.

Background

2. On 13 April 2021, Niu J sentenced the appellant to 7 ½ years imprisonment for dangerous driving causing death (contrary to then s 25(5) of the *Traffic Act*) and four years and two months imprisonment for dangerous driving causing grievous bodily harm (contrary to s (4) thereof), to be served concurrently. His Honour refused to suspend any part of the head sentence.
3. Following a grant of leave,¹ the appellant appeals against sentence on the grounds that the head sentence was manifestly excessive and that the Judge erred by refusing to partly suspend the sentence.
4. The Attorney General does not oppose the appeal and, by notice dated 21 July 2021, agrees that the sentence imposed was wrong in principle and manifestly excessive.

¹ By Whitten LCJ on 27 May 2021.

The offending

5. On 11 August 2020, the appellant spent several hours drinking spirits with friends. About 9:45 p.m., when the appellant was described by one of his friends as 'drunk', he drove his vehicle with a passenger along Hihifo Road towards Nuku'alofa. The vehicle was estimated to be travelling between 80 and 100 km/h (in a 70 km/h zone) when the appellant decided to overtake a slower moving vehicle in front. In doing so, the appellant's vehicle collided head-on with a smaller vehicle travelling in the opposite direction. The collision occurred at a point approximately parallel to the vehicle the appellant was overtaking.
6. The driver of the other vehicle died instantly. His front seat passenger, the foster daughter of the deceased, suffered serious fractures to both legs which required surgery and resulted in some residual disability. The appellant lost consciousness at the scene while his passenger was able to free himself from the vehicle unharmed. Due to the appellant's condition, the police were unable to conduct a breathalyser test. Later, when questioned, the appellant chose to remain silent.

Submissions below

7. In its submissions below, the Crown pointed to the appellant's excessive consumption of alcohol as one of a number of aggravating factors. It also identified mitigating factors including his early guilty plea, lack of previous convictions and remorse demonstrated by his apology to the deceased's family as well as reparations in the form of food, gifts and money and assistance to the young woman who was also injured. The Crown noted the maximum statutory sentences for dangerous driving causing death of 15 years imprisonment and for dangerous driving causing grievous bodily harm, seven years imprisonment. The Crown then submitted:
 - (a) by reference to a number of comparable sentences,² that the appropriate starting point for count 1 was five years imprisonment and for count 2, two years imprisonment;
 - (b) the sentences should be cumulative, resulting in an overall starting point of seven years imprisonment;
 - (c) from which 18 months should be deducted for mitigation;
 - (d) resulting in a head sentence of 5 ½ years imprisonment;
 - (e) with no more than the final 18 months being suspended.
8. In her submissions, Counsel for the appellant sought to add to the mitigating factors by stating that, in response to his addiction to alcohol, the appellant had completed 45 hours of an alcohol and drugs awareness program conducted by the Salvation Army.
9. Of the comparable sentences referred to by the Crown, counsel for the appellant specifically referred to *Mafoa'aeatu Latu* (CR 19/18). There, for similar offending,

² Malolo Inia (CR 29/15); Lemeki Manu (CR 86/20); Vaka Fanua (CR 108/15); Samiu Fainga'anuku (CR 52/16); Mafoa'aeatu Latu (CR 19/18); Vilisoni Finau (CR 514/18); Mano Pahulu (CR 2/19); Vitalini Liku'ohihifo (CR 17/19).

Paulsen LCJ set a starting point of 5 ½ years imprisonment. His Honour described that as lenient and “arrived at only after having regard to the views of the victims to exercise leniency”. For the defendant's lack of previous convictions, remorse, reconciliation with the victim's family and attempts at addressing his alcohol problem, his Honour reduced the starting point by 12 months. He then allowed a further discount for the defendant's early guilty plea of 15 months, resulting in a sentence of three years and three months imprisonment. The final 15 months of that sentence was suspended for two years, on conditions. The defendant was also disqualified from driving for three years. For dangerous driving causing grievous bodily harm, the defendant was sentenced to 18 months' imprisonment, concurrent with the head sentence.

10. Counsel also referred to the sentence in *Vitalini Liku'ohihifo* (CR 17/19)³ where Cato J set a starting point of three years imprisonment, which his Honour described as being “considerably less than the starting point of 4 to 5 years ordinarily imposed for such offending”. For that defendant's guilty plea, remorse, apology, compensation and good character, that starting point was discounted by 15 months' imprisonment. The resulting sentence of one year and nine months imprisonment was fully suspended on conditions.
11. *Liku'ohihifo* was highly distinguishable from the instant case. There, the defendant, who had been drinking (although the police were unable to establish whether he was over the limit), drove his vehicle onto the right hand side of the carriageway in an attempt to overtake two vehicles in front, when the deceased, who had been standing in the middle of the road, suddenly stepped out in front of the defendant's vehicle, giving the defendant little opportunity to avoid the collision. Cato J referred to the defendant as having pleaded guilty in circumstances where, in his Honour's view, the defendant may well have had an arguable defence.
12. The appellant's counsel then submitted starting points for the causing death count of three years and two years for the causing grievous bodily harm. She also submitted that the sentences should be concurrent and either partly or fully suspended.

The sentence below

13. After referring to the parties' submissions, the sentencing judge explained his calculation of starting points of 9 years for the dangerous driving causing death and 4 years and 2 months for the dangerous driving causing grievous bodily harm as follows:

“[21] I have to accept that the Legislature has enacted that the maximum sentence for dangerous driving causing death be increased from 10 years imprisonment to 15 years imprisonment, and that it did that, in 2015, because of the increasing number of deaths on the road caused by dangerous driving, in particular, drunk driving. The aim of that enactment is to deter drunk and dangerous drivers from driving. The Legislature has left it to the Courts to impose sentences upon drunk drivers who have caused death with sentences that should deter them and others from drunk driving in future, so that deaths on the road would be prevented, so that lives would be saved.”

³ [2019] TOSC 29 (14 June 2019)

[22] I am obliged to uphold and to apply that law to prevent deaths on the road. I consider that a deterrent sentence should be one that is closer to the maximum sentence than one which is farther away from the maximum sentence enacted by the Legislature for the offence. The half way mark of the maximum sentence is the point at which the sentence may be more or less deterrent. Otherwise there would be no point in the Legislature having set such a high sentence for this offence. Deaths on the road caused by drunk drivers would continue to rise, despite the effort of the enactment of 2015 to lower it. What is worse is that innocent persons, like 'Aisea Kaifa and 'Ana Na'a, have continued to be killed and maimed by drunk drivers like you. In New Zealand, where the maximum sentence for drunk driving causing death was 5 years imprisonment, the Court of Appeal held in the case of *R v Fallowfield* [1996] 3 NZLR 657, that 3 years imprisonment (or more in very bad cases) should be expected. It thereby set $\frac{3}{5}$ (three fifths) of the maximum sentence as the deterrent sentence for the offence. It stated at p.662:

'Just as the recent cases reflect an increase in the level of sentences where death has resulted, so that trend should be reflected where serious injuries result. This is the course to be expected from the Courts in recognition of a significant social problem increasingly unacceptable in the community. To the extent that harsher penalties deter potential offenders it represents support from the Courts for those who strive to reduce injuries sustained on the roads.'

[23] The people in Tonga, like 'Ana Na'a, and people who come temporarily like tourists and people like 'Aisea Kaifa, who came from the U.S. to rebuild his family home at Ha'apai, all have the right to be prospected [sic] whilst they use the roads in Tonga. They have a constitutional right to that protection. Clause 18 of the Constitution provides for that. It says, as relevant, as follows:

18. All the people have the right to expect that the Government will protect their life liberty and property and therefore it is right for all the people to support and contribute to the Government according to law

All the people have supported and contributed to the Government when they pay consumption tax or sales tax for goods they buy and for the services they use. They are therefore entitled to be protected when they use the roads. And Government has, when it sits as majority in the Legislative Assembly, enacted this law in 2015 for the sole purpose of protecting the people when they use the roads.

[24] This Court is part of Government. It is the third of three parts or bodies of Government. Clause 31 of the Constitution provides for that, as follows:

"31. The Government of this Kingdom is divided into three Bodies –

1st The King Privy Council and Cabinet (Ministry);

2nd The Legislative Assembly;

3rd The Judiciary."

This Court is as much funded by the taxes of all the people as the other two parts of the Government of this Kingdom, and it is therefore as much obliged

as the other two parts to protect the life liberty and property of all the people, who have already supported and contributed those taxes.

[25] As judge of this Court, I have sworn, as required by clause 95 of the Constitution "that I will perform truly and with impartiality my duties as a judge in accordance with the Constitution and the Laws of the Kingdom". That means I have to uphold and apply the law which Government has enacted to protect the life, liberty and property of the people who use the roads.

[26] Now that Tonga has set the maximum sentence for the offence at 15 years the deterrent sentence should be at least $\frac{3}{5}$ (three fifths) of it, namely, 9 years imprisonment. That should at least be the starting point.

[27] For the causing of grievous bodily harm, which has a maximum of 7 years imprisonment, a starting point of $\frac{3}{5}$ fifths of that maximum should be appropriate, namely, 4 years and 2 months."

14. The Judge agreed with the appellant, that because the two offences were committed together, the sentences should be served concurrently.⁴
15. In relation to mitigation, his Honour agreed with the Crown that 18 months be deducted from the head sentence leaving a balance of 7½ years imprisonment.
16. On the issue of suspension, the Judge stated:

"[30] As to suspension of the whole or any part of that sentence, I do not consider that there is much to be said in your favour. Although you are a first offender, you are not a young person. You are 55 years old and you ought to have known better. Yet you knowingly drove from your place at Longolongo to Nukunuku after you knew you were already drunk with a bottle of liquor to drink at Nukunuku, knowing you would have to drive back to Longolongo. Then when you finished that bottle you drive to Fatai and got another bottle to drink and which you drank. You knew very well what you were doing, namely, that you were drunk and that you should not be driving. Yet you chose to drive and you chose to drive at excessive speed, such that you had to overtake the vehicle in front of you – knowing very well there was another vehicle causing [sic] towards you.

[31] You could not have failed to see that other vehicle because it had its lights on and you must have seen them because you were able to see the vehicle in front of you and swerved to the right to avoid hitting it. You deliberately chose to overtake that vehicle knowing that the oncoming vehicle was right up close to you and that you might collide with it. You decided to proceed knowing that.

[32] When the police asked you about what happened you chose not to say anything. You did not cooperate. You did not want to take the responsibility for your action. I consider that you have only pleaded guilty because the evidence against you were [sic] overwhelming.

[33] I consider that the mitigation and reduction of the starting point from 9 years to 7½ years have been generous to you. Any further reduction of that

⁴ [28]

term by way of suspension will weaken the deterrence which can only be achieved if the actual time you serve is kept to the half way mark of 7 years 6 months. I therefore do not consider that any part of your sentence be suspended.”

Appellant’s submissions

17. On this appeal, counsel for the appellant relied on all the decisions referred to by the Crown below as support for the submission that the sentencing Judge erred in fixing a starting point for the dangerous driving causing death of nine years, and that the appropriate starting point should be five years’ imprisonment. She also referred to the decision in *Gacitua v R* [2013] NZCA 234, where the defendant there was sentenced to three years for reckless driving causing death and two years for reckless driving causing injury. Counsel accepted the Judge’s reduction of 18 months for mitigation, resulting in a submitted head sentence of 3 ½ years’ imprisonment and 2 years for causing grievous bodily harm, to be served concurrently.
18. On the issue of suspension, it was submitted, by reference to the oft-cited considerations in *Mo’unga*,⁵ that although the Applicant is not young, his good previous record, willingness for rehabilitation (demonstrated by his voluntary attendance at a Salvation army alcohol and drugs awareness program) and apparent “cooperation with the police throughout the investigation” (which was not referred to below), warranted suspension of the “final 3 years or less of the head sentence” with conditions.

Consideration

19. As far as we are aware, this is the first occasion on which this Court has been asked to consider the approach to sentencing for reckless or dangerous driving causing death and other serious harm, certainly since the 2012 amendments to the *Traffic Act*,⁶ which replaced the former s 25,⁷ and thereby increased the maximum penalty for such driving causing death from 10 years to 15 years imprisonment. The 2020 amendments to the Act have retained the same penalties although the offences are now found in s 27.
20. It is not apparent from the sentencing remarks that the Judge considered, or applied, any of the principles expressed in the various comparable sentences to which his Honour was referred. Nor, it appears, was his Honour conscious of considerations of consistency in approach to sentencing for similar offending. As observed in *Fifita v Rex* [2000] TOCA 5:⁸

“... ‘inconsistency in sentencing standards’ is to be shunned strongly by the courts as an ‘error in point of principle’, a matter that was emphasized in Everett -v- The Queen [1994] HCA 49; (1994) 181 CLR 295 at 299. The consistency which is demanded is not to be equated to consistency of result but requires consistency of approach: Lowe -v- The Queen [1984] HCA 46; (1984) 154 CLR 606 at 609. For the same principle may yield different sentences where the facts relating to two offenders are different. ...”

⁵ *Mo’unga v R* [1998] Tonga LR 154 at 157.

⁶ Traffic (Amendment) Act 2012.

⁷ s 2.

⁸ CA 07 2000 (21 July 2000).

21. Those aspects of the approach his Honour did take, which involved consideration of clauses 18, 31 and 95 of the Constitution, were barely relevant to the task, and, we think, misdirected his Honour's attention on what was required.
22. While the Judge's reference to *R v Fallowfield* [1996] 3 NZLR 657 (not referred to by either party below or on this appeal) was likely to have provided some guidance, the conclusion reached by his Honour on the applicable starting point for the equivalent offence in Tonga was erroneous.
23. *Fallowfield* concerned an appeal against a sentence of three years imprisonment for driving while under the influence of alcohol causing bodily injury and driving while disqualified. Section 55(2) of the then New Zealand *Transport Act* 1962,⁹ prescribed a maximum sentence, relevantly, of five years imprisonment. The offences encompassed acts or omissions from momentary inattention to gross recklessness and consequences from minor bodily injury to death. Gault J, who delivered the decision of the Court of Appeal, noted¹⁰ that it had become increasingly common where death had resulted for prosecuting authorities in New Zealand to charge manslaughter¹¹ rather than offences under the *Transport Act* and that the Courts had imposed sentences of more than five years' imprisonment in serious cases. That practice had resulted in few instances where it had been necessary to consider sentences at the upper end of the range for *Transport Act* offences, and a tendency to categorise separately cases where death resulted from those where injury resulted. The Court considered that:

"...[such] a distinction was obviously drawn where manslaughter was charged but, apart from that, it rested on a false assumption that culpability necessarily is greater where death results. Undoubtedly causing death will increase the seriousness of offending other factors being equal, but the consequences of offending are but one aspect to be taken into account in assessing culpability for sentencing purposes.

Whether death ensues might turn on the location of the accident and the availability of rescue and medical services. A course of the most outrageous conduct might result in serious injuries leaving a victim to a lifetime of suffering whereas a minor act of carelessness by a person just over the lawful alcohol limit might result in death."

*The preferable approach to sentencing for cases of alcohol-affected driving causing injury or death is to seek to place the offending in its proper position in the scale of seriousness of offending, whatever the charge, and taking into account only as a factor the consequences for the victims. The maximum sentence for alcohol-impaired driving causing injury is not necessarily less than that provided in the *Transport Act* merely because the same offence encompasses also acts or omissions causing death.*

If it was ever the case, it certainly cannot now be contended that the community is sympathetic to those who drink and drive. Beyond question drunken driving causing death or injury constitutes serious offending and is

⁹ Repealed, as from 1 March 1999, by s 214(1) *Land Transport Act* 1998 (1998 No 110).

¹⁰ At 662-663.

¹¹ Pursuant to s 177(1) of the *Crimes Act* (NZ) 1961, anyone who commits manslaughter is liable to imprisonment for life.

condemned as such. It is the more so when there is involved recklessness, bravado, stupidity, exhibitionism or other particular irresponsibility. Deliberate use of a motor vehicle after drinking, especially after long bouts of heavy drinking, has the element of wilfulness that is repugnant and reflects disregard for the law and for the safety of others. That wilfulness takes on an added dimension of culpability when the driving is by a person who has been disqualified from driving — particularly for previous drink or drug related offending.

...

Just as the recent cases reflect an increase in the level of sentences where death has resulted, so that trend should be reflected where serious injuries result. This is the course to be expected from the Courts in recognition of a significant social problem increasingly unacceptable in the community. To the extent that harsher penalties deter potential offenders it represents support from the Courts for those who strive to reduce injuries sustained on the roads.

*There can be no fixed tariff because of the range of conduct covered by the offences and the range of circumstances in which it occurs. However, where the consumption of drink or drugs is heavy, the conduct reckless or worse and the consequences are serious terms of imprisonment up to three years, and more in very bad cases, should be expected. Where there is the added factor of driving while disqualified the disregard for a decision of a Court and the wilfulness of the conduct will call for an increase in sentence. The list of aggravating and mitigating factors set out in *Skerrett* remains a helpful guide. Repeated disqualified driving, which is all too prevalent, is to be met with increasing sanctions.”*

24. In that case, the Court of Appeal considered that even allowing for the plea of guilty, which was entered only after conviction was inevitable, and therefore attracted little discount, the combination of high intoxication, disqualification and exhibitionism constituted serious offending with disregard for the law and for the safety of others. The sentence of three years' imprisonment was therefore not excessive and the appeal was dismissed.
25. It may be seen from the above that *Fallowfield* does not stand for the proposition, as concluded by the Judge here, that the starting point for dangerous driving causing death in Tonga should be 3/5ths of the statutory maximum penalty of 15 years. Further, and in the absence of any statutory requirement, the broad discretion available to a sentencing judge can rarely ever be reduced to some form of linear mathematical exercise.
26. Accordingly, we consider it necessary to review the sentence in this case and the correct approach to sentencing in cases of this kind.
27. The decisions referred to by counsel below almost consistently suggested a settled primary starting point for dangerous driving causing death of four to five years imprisonment. The genesis of that range may be found in the decision in *R v Fanua* [2016] Tonga LR 208, which itself appeared to have been the first case concerning the increased penalties. There, Cato J considered that the Courts, in such cases, must impose sentences

which deter others from driving in the proscribed manner and causing death or injury to other members of the public and that sentences must serve as an example to others to ensure the security or safety of the public and to properly reflect the fact that a person has died or suffered injury.¹² His Honour had regard to a number of authorities in adopting a starting point of five years' imprisonment, which was accepted as appropriate by both Prosecution and Defence. In doing so, his Honour drew a comparison with rape cases where the maximum sentence is also 15 years imprisonment, and where this Court has stated that the starting point for rape in Tonga should be five years.¹³ His Honour added, that in cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased.

28. In our view, a comparison with sentencing in rape cases does not assist notwithstanding that maximum sentences are the same. Serious sexual offending and culpable acts from which death results lead to quite different sentencing considerations. More assistance is likely to be derived from a consideration of the law and sentencing approaches in manslaughter cases than from sentences imposed in sexual cases. Relevantly, towards the lower end of the spectrum lies manslaughter by negligence which carries a maximum penalty of 10 years imprisonment.¹⁴ Up from there is manslaughter, other than by negligence, which carries a maximum of 25 years. At the ultimate end of the spectrum is murder, which, in its simplest form, is intentionally causing death, and which continues to carry the alternative penalties of death or mandatory life imprisonment.¹⁵ Therefore, by that somewhat elementary comparison, the dangerous driving causing death lies somewhere between the two forms of manslaughter. This Court has historically described the conduct required for manslaughter by negligence as 'gross negligence'¹⁶ or 'a very high degree of negligence', and in driving cases, a disregard for the life and safety of others.¹⁷ The mental element of recklessness in the instant offence involves knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk: *R v G* [2003] 4 All ER 765 at 766.
29. A search for published comparable sentences for manslaughter has proved of little assistance. That is because most of those charged with manslaughter by negligence involved dangerous driving (before that offence was created) and at a time when the maximum penalty was much lower; and sentences for most other cases of manslaughter have involved overt acts of violence and with a much higher maximum penalty.
30. Nonetheless, by the 2012 amendments increasing the maximum penalty for reckless driving causing death from 10 to 15 years imprisonment, Parliament clearly intended that more severe sentences be imposed for such offending, potentially even greater than for

¹² [4] to [6].

¹³ *Fa'aoso v R* [1996] Tonga I.R 42, and affirmed in a number of decisions, including, recently, *Ihu'ahulu v Rex* [2014] TOCA 25.

¹⁴ *Criminal Offences Act*, s 93.

¹⁵ *Criminal Offences Act*, s 91.

¹⁶ *Fisi'inaua v R* [1995] Tonga LR 62.

¹⁷ *R v Holani* [2005] Tonga LR 18.

what may have hitherto constituted manslaughter by negligence.¹⁸ It also clearly intended to provide greater deterrence to reduce the alarming rise in the incidence of such driving and its tragic consequences.

31. In our view, a general starting point of four to five years imprisonment for reckless driving causing death, is unlikely to consistently reflect, or effect, those statutory imperatives.
32. *Fallowfield* was referred to in the more recent decision of the New Zealand Court of Appeal in *Gacitua v R* [2013] NZCA 234¹⁹ (referred to by counsel for the appellant here). There, the Court referred to sentencing in cases of death caused by dangerous or reckless driving or driving and when under the influence of alcohol or drugs as ‘highly fact-specific’ and that much depends on the particular circumstances of the offending. Prior to the introduction of s 36AA of the *Land Transport Act* (NZ) 1998, and the increase in the maximum sentence for dangerous or reckless driving causing death from five years to 10, a starting range of between two and five years prevailed with a general sentencing range of 18 months to three years for cases without significant aggravating or mitigating factors.
33. The Court of Appeal then reviewed the accepted approach in New Zealand to sentencing in cases in this category of measuring culpability by reference to the following aggravating and mitigating factors:²⁰

Aggravating factors, in four categories:

Highly culpable standard of driving at time of offence

- (a) The consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a ‘motorised pub crawl’.
- (b) Greatly excessive speed; racing; competitive driving against another vehicle; ‘showing off’.
- (c) Disregard of warnings from fellow passengers.
- (d) A prolonged, persistent and deliberate course of very bad driving.
- (e) Aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking).
- (f) Driving while the driver’s attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held).
- (g) Driving when knowingly suffering from a medical condition which significantly

¹⁸ Note, however, s 94 of the *Criminal Offences Act*, by which a person acquitted of manslaughter in connection with the driving of a motor vehicle may be convicted of an offence under (the former) s 25 of the *Traffic Act* even though he was not charged with it.

¹⁹ At [22] to [27].

²⁰ From *R v Skerrett* (CA 236/86, 9 December 1986) which adopted the factors for sentencing for reckless or dangerous driving causing injury or death identified by the English Court of Appeal in *R v Boswell* [1984] 3 All ER 353 (Crim App) at 357. The guidance provided by *Boswell* was updated in *R v Cooksley* [2003] 3 All ER 40 (Crim App) at [5] to take account of legislative changes in the United Kingdom including, in 1993, increasing the maximum penalty for the offence of dangerous driving causing death from five years imprisonment to 10 years.

impairs the offender's driving skills.

- (h) Driving when knowingly deprived of adequate sleep or rest.
- (i) Driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns.

Driving habitually below acceptable standard

- (j) Other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle.
- (k) Previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving.

Outcome of offence

- (l) More than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable).
- (m) Serious injury to one or more victims, in addition to the death(s).

Irresponsible behaviour at time of offence

- (n) Behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash or trying to throw the victim off the bonnet of the car by swerving in order to escape.
- (o) Causing death in the course of dangerous driving in an attempt to avoid detection or apprehension.
- (p) Offence committed while the offender was on bail.

Mitigating factors:

- (a) A good driving record;
- (b) The absence of previous convictions;
- (c) A timely plea of guilty;
- (d) Genuine shock or remorse (which may be greater if the victim is either a close relation or a friend);
- (e) The offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and
- (f) The fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving.

34. The Court of Appeal then identified starting points for sentence (under the statutory maximum penalty in New Zealand of 10 years imprisonment) in four categories:

- (a) In cases in which no aggravating features are present, a starting point of between

12 and 18 months.

- (b) An offence involving a momentary dangerous error of judgement or a short period of bad driving, aggravated by a habitually unacceptable standard of driving (factors (j) or (k)), by the death of more than one victim or serious injury to other victims (factors (l) and (m)) or by irresponsible behaviour at the time of the offence (factors (n) to (p)), a starting point of two to three years.
 - (c) When the standard of driving is more highly dangerous (as indicated, for example, by the presence of one or two of factors (a) to (i), a starting point of four to five years.
 - (d) Cases involving extremely high level of culpability involving three or more of the aggravating factors (a) to (i), a starting point of six years imprisonment.
35. We see no reason why the above guidelines should not be instructive in Tonga, with the recommended starting points or ranges necessarily modified to reflect the higher prescribed maximum penalties. However, such guidelines are just that. They do not represent strict or inflexible formulaic rules to be applied in every case. As stated in *Fallowfield*, the initial task is to place the offending in its proper position in the scale of seriousness of offending. The *Gacitua* guidelines may assist in that task. By the same token, it may be necessary to depart from such guidelines, up or down, in determining the appropriate starting point for the particular offending in a given case.
36. In the instant case, the appellant's conduct involved a number of the aggravating factors referred to *Gacitua*, within the 'highly culpable standard of driving at time of offence' category, namely:
- (a) consumption of alcohol, to the point of the appellant being observed as 'drunk', and which, as described in *Fallowfield*, demonstrated an 'element of wilfulness that is repugnant and reflects disregard for the law and for the safety of others'; and
 - (b) excessive speed.
37. As far as the evidence suggests, the offending here involved only the one ill-fated attempt to overtake at a time and place relative to the vehicle being overtaken and the proximity of the deceased's oncoming vehicle which made the attempt patently unsafe. However, it did involve the aggressive driving referred to in *Gacitua* such as persistent inappropriate attempts to overtake.
38. Considering those features of the seriousness of the offending, we consider that the appropriate starting point for the dangerous driving causing death in this case is seven years' imprisonment.
39. For the dangerous driving causing grievous bodily harm, we set a starting point of four years' imprisonment.
40. However, to reflect the totality of the offending which resulted in the death of one and serious injury to another, we consider it appropriate to add one year from the grievous bodily harm sentence to the starting point for the death count, resulting in a total starting point for the head sentence of eight years' imprisonment.

41. The balance of the sentence for the grievous bodily harm count, which we will record at three years, is to be served concurrently.
42. For the appellant's early guilty plea, good previous record, remorse demonstrated by very meaningful reparations to the family of the deceased and the other victim, and their forgiveness, we reduce the head starting point by three years, resulting in a sentence of five years' imprisonment.
43. On the issue of suspension, even though the sentencing judge had regard to some of the considerations in *Mo'unga*,²¹ and the need for the sentence to provide effective deterrence, his Honour arrived at the decision not to suspend any part of the resulting sentence largely by reiteration of the features of the offending which produced the head sentence.
44. In *Mo'unga*, this Court explained that on the question of whether to suspend all or any part of a sentence as provided for by s 24(3) of the *Criminal Offences Act*, considerations of the serious nature of the offending, and the need for general and specific deterrence are to be reconciled with the community's interest in a sentence which will encourage the appellant in his rehabilitation. Ultimately, 'the major consideration is whether a suspension is likely to aid in the rehabilitation of the offender'.
45. That this was, at the age of 55, the appellant's first criminal offence and that he had already taken steps towards rehabilitation by attending an alcohol and drugs awareness program prior to sentencing, warranted partial suspension.
46. We consider it appropriate to order that the final two years of the head sentence be suspended on the conditions set out below.

Result

47. The appeal is allowed.
48. The sentence of the Supreme Court is quashed.
49. In substitution:
 - (a) the appellant is sentenced to:
 - (i) five years' imprisonment for dangerous driving causing death; and
 - (ii) three years' imprisonment for dangerous driving causing grievous bodily harm;
 - (b) both sentences are to be served concurrently;
 - (c) the appellant is to continue to receive alcohol and drug rehabilitative counselling within prison;
 - (d) the final two years of the head sentence are to be suspended, for two years from the date of the appellant's release from prison, on condition that during that period he is not to commit any offence punishable by imprisonment; and
 - (e) the appellant is disqualified from holding or obtaining a driver's licence for a period

²¹ *Mo'unga v R* [1998] Tonga LR 154.

of three years from 13 April 2021.



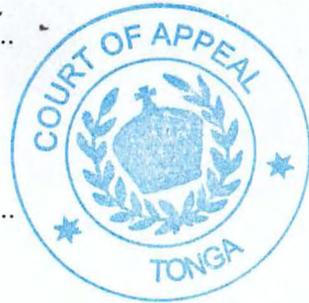
Whitten P



Hansen J



Randerson J



White J