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IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 1 of 2023

[CR 137 of 2022]

BETWEEN:

FILIPE TONGAMOA

Appellant

AND

REX

Respondent

JUDGMENT OF THE COURT

Court: Randerson J
 Heath J
 Dalton J

Appearances: Mr T. 'Aho for the Appellant
 Mr F. Samani for the Respondent

Hearing: 25 September 2023

Judgment: 28 September 2023

- [1] This is an appeal against sentence. The appellant was charged that he drove his vehicle in a manner which was dangerous to the public. He drove at speed while he was intoxicated. He lost control of his car so that it hit two cars and did grievous bodily harm to the complainant. The maximum sentence under s 27(4) of the *Traffic Act* is 7 years.
- [2] The appellant relied on two cases: *R v Mafile'o* CR41/2021 and *R v Tu'ipulotu* CR4/2019. In both these cases the Courts dealt with a young driver who was very drunk and caused grievous bodily harm to the complainant. In both cases the defendant was a first time offender. In these respects these were comparable cases because the appellant was also young, very drunk, and a first time offender.
- [3] This case is somewhat more serious than the two cases just referred to. In this case several people were injured. The driver of the oncoming car suffered minor injury because the steering wheel was pushed into his chest and stomach and he was

stunned. There were three other people in the car with the appellant, two of them were knocked out, momentarily. The third was seriously injured. This third passenger, who was the complainant, suffered a fractured right femur. He also suffered hairline fractures to his 1st, 2nd, and 3rd ribs on his right side, a bilateral lung contusion and a pneumothorax. He was taken to hospital and was on life support for six days. The pneumothorax was a very serious injury which could have caused his death. As well, he needed an operation to re-align his femur. As a result of the operation he developed a knee infection. He is lucky to have made a full recovery.

- [4] As well as injuring people, the appellant's driving caused damage to the oncoming car-its windscreen was smashed. Also, just before the appellant's car stopped, it hit a police car, but there was no report of damage to that car.
- [5] Because of the number of people injured as a result of the appellant's driving, the damage to the oncoming car, and the very serious nature of the injuries to the complainant, this offending is more serious than that in the cases of *R v Mafile 'o* and *R v Tu'ipulotu*. In both those cases a 3 years starting point was adopted for sentencing and ultimately, in both those cases, a 2 year wholly suspended sentence was handed down. Because of the serious consequences in this case, it may be that a sentence slightly higher than the sentences in *R v Mafile 'o* and *R v Tu'ipulotu* was appropriate.
- [6] In this case the sentencing Judge adopted a starting point of 4 years, the same starting point as had been adopted in *Ikahihifo v R* AC14/2021. That case was not comparable with the present case because in *Ikahihifo* the accident caused by the dangerous driving was much more serious: the driving caused the death of one person, as well as causing grievous bodily harm to another (2 broken legs requiring surgery and leaving some residual disability). A starting point of 4 years was too high in the present case.
- [7] The appellant's case had significant features in mitigation. He had an early guilty plea, he was only 20 years old, he had no previous convictions, and he had a promising career as a rugby player ahead of him. He had good references from his rugby club, and from others in the community. He had made an apology to the complainant and had visited the complainant several times in hospital. He had offered some money as compensation to the complainant. The complainant had

accepted his apology. As well, the appellant had apologised to the owner of the vehicle he hit and paid a considerable sum of money to have it repaired.

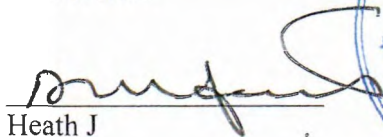
- [8] The sentencing Judge did recognise all these matters, except the last of them. Unfortunately, by error of counsel, the last of these matters was not put before the sentencing Judge, and it is apparent that he placed some weight on what he thought was an absence of remorse shown to the driver of the oncoming vehicle.
- [9] The Crown's submission before the sentencing Judge was that the sentence should be 2 years wholly suspended. That is, the Crown asked for the same sentence as had been given in *R v Mafile'o* and *R v Tu'ipulotu*. As explained, we can understand that a slightly more severe sentence was warranted in this case, perhaps one involving some actual imprisonment. However, in our opinion the sentence imposed by the sentencing Judge was too high. He imposed a sentence of 2 years and 5 months' imprisonment with the last 18 months suspended for 18 months. This meant that the appellant had to spend 11 months in prison. We think that this last requirement made the sentence manifestly excessive.
- [10] There was one other aspect of the sentence which we think was too harsh. The sentencing Judge made it a condition of the suspended sentence that the appellant "live where directed" by the probation authorities while the sentence was suspended. The defence had particularly asked the sentencing Judge not to do this, because the appellant had such a promising rugby career that it was likely that he would need to travel overseas. What should be most important for this young man is that he rehabilitates and lives a life free of crime in the future. Perhaps the single most important factor in this, is that he is able to pursue his talent for football and in so doing make a living, a good living, in a legal pursuit. The condition of the suspended sentence was likely to interfere with his rehabilitation.
- [11] By the time this appeal was heard the appellant had already served 7 months imprisonment. Because this court has found that the sentence was manifestly excessive it must resentence. In doing so this Court must have regard to the time the appellant has already spent in jail. That distorts the sentence which we consider otherwise appropriate, so the sentence in this case will not be a useful precedent for other cases.

[12] The Court:

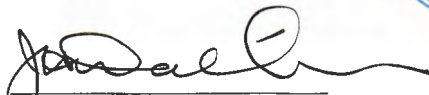
- 1) Allows the appeal in part;
- 2) quashes the sentence of imprisonment imposed below;
- 3) sentences the appellant to imprisonment for the time served to the date of this order;
- 4) does not disturb the order made by the sentencing Judge that the appellant is to be disqualified from driving or obtaining a driver's licence for 2 ½ years from 1 March 2023.



Randerson J



Heath J



Dalton J

