

**IN THE COURT OF APPEAL OF TONGA
ON APPEAL FROM THE
SUPREME COURT OF TONGA**

APPEAL NO.06/2001

BETWEEN : **REX** - **Appellant**

AND : **TIMOTE TU'ITAVUKI HOLANI** - **Respondent**

Counsel : Mr S. Sisifa for appellant
 Mr S. Tu'utafaiva for respondent

Date of hearing: 16 July 2001.

Date of judgment: 27 July 2001.

JUDGMENT DELIVERED BY CHIEF JUSTICE WARD

[1] I have had the advantage of seeing the judgment of Burchett and Tompkins JJ and I unreservedly endorse their view of the gravity of the offence, the seriousness of the appellant's conduct and the strength of the mitigating factors.

[2] I also respectfully adopt their opinion that the principles relating to Crown appeals against sentence stated by this Court in R v Misinale, CA 13/99, must apply to this case. Bearing those principles in mind, however, I consider that the order suspending this sentence is clearly inappropriate and cannot stand. Any offence of manslaughter by negligence, where death was the result of a deliberate decision to drive when intoxicated, must receive a sentence of immediate imprisonment.

[3] Where I must differ from my learned colleagues is in their conclusion that the penalty in this case should properly fall at the lower end of the scale and thus allow part of it to be suspended.

[4] This was a very serious case both in the manner in which it occurred and in its consequences. The appellant drank a substantial quantity of rum whilst he was driving. When that was consumed, he and his companions purchased more and he continued to drink and drive. Even when asked to stop by his passengers, he did not heed them and continued to drive at a high speed. Almost inevitably, he lost control of the vehicle and a young woman was killed.

[5] This young man clearly had a bright future. His conviction will no doubt have a serious adverse effect on it and I accept that adds to the penalty. There were a number of strong mitigating factors and the sentencing judge properly allowed for those in determining the length of the sentence. The sentence of 18 months imprisonment for an offence of this gravity clearly shows that the mitigation had a very substantial effect on his decision.

[6] As I have said this was a dreadful offence but one that is all too common in Tonga. The courts must make it clear that any person who deliberately drives when he has been drinking and continues to drive when he is plainly intoxicated will receive a severe penalty. When that conduct causes the loss of another person's life, the only appropriate sentence is one of imprisonment and suspension is inappropriate. In the case of *R v Tofavaha*, CA 11/00, one in which the personal circumstances of the appellant were equally remarkable, this Court commented that the sentence of two years imprisonment was lenient and that it should be served in its entirety. To do less in this case would, in my opinion, be unjust.

[7] The appellant is a well educated young man but the very education that enabled him to embark as such a responsible career should have meant

that he, more than most people, would appreciate the danger of his conduct. A term of imprisonment is undoubtedly a heavy penalty but he will be free at the end to continue with his life. The direct result of his selfish and irresponsible conduct has deprived a totally innocent young woman of that opportunity for ever.

[8] I consider the sentence of 18 months was the minimum that could properly be passed for an offence such as this. The appeal should be allowed. The sentence of 18 months imprisonment is upheld but the order suspending it is quashed as are the orders that he abstain from drinking alcohol and attend an alcohol education course. The order that he be disqualified from driving for three years should remain unaltered.



G Ward.

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WARD CJ