

IN THE COURT OF APPEAL OF TONGA  
NUKU'ALOFA REGISTRY



APPEAL NO.11/00

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

**AND** : **BILLY GAFFRIEAS TOFAVAHA** - **Respondent**

**Coram** : Ward CJ  
: Tompkins J  
: Beaumont J

**Counsel** : Mr T. Havea for appellant  
: Mr L. Veikoso for respondent.

**Date of hearing:** 13 July 2000.

**Date of judgment:** 21 July 2000.

### **Judgment of the Court**

This is an appeal by the Crown against a sentence of two years imprisonment suspended for three years imposed for an offence of manslaughter by negligence on the single ground that it is manifestly inadequate.

The facts accepted by the respondent were that he and two others had, between them, consumed two litres of gin. The respondent then drove at a speed that frightened a female passenger sufficiently for her to ask to be allowed to alight from the vehicle.

*Rec'd 21/7/00*

The respondent was a prison officer and his drinking companions on that night were police officers. He had previously won the baton of honour and, on the occasion in question, they were celebrating the fact that one of the others had also just won it.

At Haveluloto the car swerved to the wrong side of the road and collided with a car coming in the opposite direction. A passenger in that other vehicle was a 23 year old woman. She was taken unconscious to hospital where she died from her injuries three days later. Those injuries included multiple fractures of the pelvis and injury to her left lung.

The respondent was seen by a doctor who noted abrasions and superficial bruising. He also recorded that the respondent was clinically intoxicated to the extent that his speech was slowed and slurred and he exhibited slight impairment of co-ordination in his gait and finger movement.

When passing sentence the trial judge first indicated that he considered the appropriate sentence for the offence was three years imprisonment but he reduced that by one third because the respondent had admitted the offence from the outset and was, he accepted, remorseful about the death of the young woman.

He then passed to consider whether to suspend the sentence. He continued:

"To me the choice is the choice of putting a Prison Officer in prison to live among the criminals he formerly served or whether to leave you free so that the Superintendent could consider returning you to your work in the administration office. I think no good will be done to you or to the community if I sentence you to live at Hu'atolitoli and I'm going to suspend the whole of the sentence for three years. I believe your punishment will be in your remorse and in your knowledge of what you have done and that you have fallen from the position in which you were regarded as a man of honour.

It is wrong for the court to hurt you further by making you live in the prison when you have not yourself committed a crime but only an error of judgment. Your error of judgment was serious enough and made it a crime. You did not commit a premeditated crime against the State and I think it best not to send you to prison."

He then also disqualified the respondent from driving for three years.



There can be no doubt that this respondent is a man of considerable ability who has done well in his chosen field. A sentence of imprisonment will almost certainly finish that career. The sentencing judge was right to take that into account but we consider he gave it too much weight.

Whatever sympathy the judge may feel for the offender, he cannot escape the fact that an innocent young woman has lost her life as a result of the respondent's actions. The law has always regarded the killing of another person as extremely serious and the penalty must reflect that. There must be a place for sympathy when a court is passing sentence but it cannot be allowed to supplant the duty to order a penalty appropriate to the facts of the offence.

In the present case, the judge made a substantial reduction to the sentence for the respondent's remorse and his immediate and unswerving admission. The court should always consider reducing the sentence following a plea of guilty but the extent of the reduction will depend on a number of factors including the nature of the offence, the court time saved and the real chances of an acquittal if the case was contested. In this case there was little chance the respondent would have escaped conviction had he contested the charge. In those circumstances the effect of a plea of guilty is reduced and reduction on the scale allowed in this case is inappropriate.

We must also disagree with the judge's suggestion that this was not a premeditated crime. The respondent and his companions chose to drink to excess and the respondent then drove. Even after the danger of his actions had been pointed out to him by one of his passengers he continued to drive. He no doubt did not intend the result that ensued but he certainly should have realised that such an act was fraught with the gravest danger.

The learned judge was right to emphasise that this young man has made the most of his talents up to this point in his life and that this offence has jeopardised his future. However that is not a reason for avoiding the consequences of his criminality. He, more than most people, should have realised the consequences of his actions that night yet he behaved in a grossly irresponsible manner. Any person who kills another after choosing to drink and then to drive whilst affected by the alcohol must realise that he will go to prison.

Bearing in mind the personal circumstances of the respondent, the sentence of three years was not, in itself, wrong and, although we consider the reduction for the plea of guilty was excessive, we do not consider we should alter that part of the sentence passed. Moreover, the order that the sentence be suspended was not appropriate in such a case and resulted in a sentence that is manifestly lenient. The appeal must be allowed.

The order is that the sentence of two years imprisonment suspended for three years is quashed and a sentence of two years imprisonment is substituted. We make no order in relation to the period of disqualification from driving.

*G. Ward.*

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**Ward CJ**



*[Signature]*  
.....  
**Tompkins J**

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.....  
**Beaumont J**