IN THE COURT OF APPEAL OF TONGA
ON APPEAL FROM THE SUPREME COURT
NUKU'ALOFA REGISTRY **CA.No.18/99**

BETWEEN : R E X : **Appellant;**

A N D : MA'AFU MATAKAIONGO : **Respondent.**

Coram : Burchett J
: Tompkins J
: Beaumont J

Counsel : Mr Cauchi for the Appellant
: Mr Veikoso for the Respondent

Date of Hearing : 16 July 1999
Date of Judgment : 23 July 1999

JUDGMENT OF THE COURT

This is an application by the Crown for leave to appeal against sentence in a case of manslaughter by negligence in the driving of a motor vehicle.

The respondent, who was born on 20 December 1981, had not quite reached 15 years and nine months of age at the time he committed the offence on 3 September 1997. Although he admitted to losing control of the minivan he was driving at a high speed (120 kms per hour), he was not brought before the court to be dealt with until 8 July 1999, when he pleaded guilty. He is still at school, in form 5 at Tailulu College, and has no criminal record.

The respondent had been sent by his father to pick up some coconuts from the family plantation and, although, of course, he was unlicensed, he was driving his father's minivan. His best friend Tahilanu was seated beside him, and there were two other friends in the back seat. All were about the same age. The respondent's speed led to loss of control, and the vehicle hit a coconut tree, killing Tahilanu.

It was not suggested that the drinking of alcoholic liquor was involved in any way. What made the respondent's negligence so grave that it incurred an indictment for manslaughter was his recklessness in driving at so high a speed when he knew he was unlicensed and inexperienced. There is no suggestion the conditions were bad; and it was early afternoon. The respondent was very remorseful; it was he who told the police about his own failure to drive at an appropriate speed; and he pleaded guilty to the serious offence alleged against him.

In the circumstances, the judge at first instance took the view that a sentence of three and one half years, which he would ordinarily have thought proper, should be reduced to two and one half years by reason of the respondent's plea and his contrition, and that the whole of the sentence should be suspended for three years. Although the Crown appealed against the leniency of the sentence, nothing was said in support of the appeal which could overcome the respondent's youth and all the indications pointing to the prospect of his rehabilitation. At his age, and on the evidence, it would be wrong to send him to gaol.

However, one matter appears to have been entirely overlooked at the sentencing hearing. By section 6 of the *Traffic (Amendment) Act* of 1991, a new section 29 was inserted into the *Traffic Act.* In 1997, this section was further amended. As amended, s. 29(3) provides, relevantly to a case such as the present:

> "Where a person is convicted of any offence involving the driving of a motor vehicle ... the Court may, in addition to any other sentence, make an order cancelling his motor driver's licence (if any) and disqualifying him from obtaining any motor driver's licence for a period not exceeding 5 years from the date of conviction."

In our opinion, it is an error of principle, in any case involving a serious offence falling within this provision, to fail to give consideration to the question of the cancellation of any licence and the imposition of a period of disqualification. The motor driver's licence is so integral to the lawful operation of a motor vehicle, and motor vehicles are so central to modern living, and so large a source, in careless hands, of injury and death, that the empowerment of the Court to cancel and disqualify, or to disqualify, brings with it an obligation to be discharged only by the deliberate exercise of the discretion, one way or the other.

In this case, the probation officer's report made specific reference to the respondent's immaturity, and the consequences of his high degree of negligence were tragic. The legislation aims both at the protection of the public and the reformation of a driver who has offended very seriously, by forcibly reminding him that driving is a privilege to be earned by constant care, a privilege which may be lost if care is not shown. We have no doubt that, had the judge not overlooked section 29(3), he would have made an order under that provision. In *Rex v Misinale*, in which we are also handing down judgment today, we emphasize that a Crown appeal requires more than a merely "inadequate or inappropriate" sentence. Crown appeals should not be expected to be frequent. However, the error of principle to which we have pointed in the present case concerns an issue of great importance, and the circumstances are special.

For these reasons, the sentence of two and one half years imprisonment and the suspension of it for three years are affirmed. But the application for leave to appeal is allowed, and the Court orders, pursuant to section 29(3) of the *Traffic Act* that the respondent be disqualified from obtaining any motor driver's licence for a period of three years from his

attaining the age of 18 years, being a period not exceeding five years from the date of his conviction. To that extent, the appeal is allowed.

Burchett J

Tompkins J

Beaumont J