

**IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NEIAFU REGISTRY**

*Scan & file*  
**CR 108 of 2015**

*AK*  
*04/05/16*

**BETWEEN:**

**REX**

**-Prosecution**

**AND:**

**VAKA FANUA**

**-Accused**

**BEFORE THE HON. JUSTICE CATO**

Mrs. Langi for the Crown

Mr. Taufateau for the Prisoner

**SENTENCE**

1. The prisoner, Mr. Vaka Fanua, appeared before me today for sentencing arising out of his conviction for reckless driving causing death contrary to the provisions of section 25(5) of the Traffic Act. The particulars of reckless driving were that he had driven in a speed and manner which was dangerous to the public, and had not paid proper care and attention to other users of the road; had tried to overtake the victim's vehicle which was a minibus, and had hit the vehicle causing it to overturn and thereby caused the death of Mr. Tikisinale Kena, a young man also in his twenties. Mr Kena, who was

*rec'd 04/05/16*  
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driving, was thrown from the bus as it rolled on impact and later died in hospital.

2. The prisoner is aged 20 and is an unlicensed driver. He and a number of other young men had travelled from Leimatu'a to Neiafu to extend the hire of a rental car. On the return journey, the prisoner drove the car having been asked to do so. In the area of Feletoa in mid afternoon, he went to overtake a minibus on a straight road. I accept that the minibus was travelling over the middle of the road on an unmarked sealed road and there was no oncoming traffic. The prisoner was travelling, however, at a speed which when he was forced to veer out towards the edge of the road caused him to have to drive off the road. I find that it was this swerving movement at a speed which, in the circumstances, was excessive (although not over the speed limit for the area which was given at 70-80 km) that caused him to lose control, resulting in his skidding on gravel and or grass off the right side of the road. In an effort to regain control, he corrected and drove back to the middle of the road impacting with the middle of the bus and possibly also a second time, causing the bus to roll over several times, leave the road with the deceased being thrown out of the bus. The prisoner and the other young men did not attempt to render assistance but ran away, one of the group driving the vehicle back to Leimatu'a.
3. The prisoner defended the charge. He maintained that he was not speeding and that the minibus was not on the right side of the road. He simply said to the police his vehicle had swayed and he had got into grass at the side of the road and lost control. The jury did not accept this and returned a

verdict of guilty after a four day trial. I remanded him in custody for sentence today.

4. I was informed by the Crown that this is the first case concerning sentence by this Court under this provision of the Traffic Act as amended in 2010 for reckless driving where the elements consist of speed and driving in a manner dangerous to the public, rather than being an offence of causing death or serious injury under the influence of alcohol. Parliament imposed a 15 year maximum for reckless driving causing death, as it did for excess alcohol causing death. Formerly, cases such as this would have been the subject of manslaughter by negligence which carried a sentence of ten years imprisonment. Mrs Langi presented me with a comprehensive list of sentencing precedents relating to manslaughter by negligence which formerly involved cases of this kind where death had resulted, and in some of these alcohol was also involved. I indicated at the hearing, I did not find these very useful, because many did not, in my view, adequately reflect the loss of life involved, with some of the sentences being fully suspended. It may be that this concern was reflected also in Parliament's decision to introduce a new regime under the Amendment of 2010 where offences for reckless driving and driving under the influence of alcohol causing death were introduced. In both cases, the penalty is 15 year imprisonment which is a substantial increase in the maximum limit over the ten year maximum for manslaughter by negligence. In my view, this was a clear indication by Parliament that sentences should reflect the fact that very serious cases involving violations of traffic law resulting in death should result in longer sentences of imprisonment. In the absence of a discreet offence of

careless driving causing death, the Crown may consider manslaughter by negligence to be an appropriate alternative to the more serious charges now available under the Traffic Amendment, 2010 where death arises.

5. I consider, by comparison with rape cases where the maximum sentence is 15 years imprisonment also and Court of Appeal has stated that the starting point should be five years, a starting point for this offending should be between 4 to 5 years imprisonment. In cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased. Here, in my view, there were aggravating features; first the driver was unlicensed and drove accordingly in willful disregard of the law, his inexperience being I have no doubt a material factor in the accident, and secondly, he further made off from the scene without rendering assistance. Both counsel agreed with me that these were aggravating features, at least in principle. The prisoner said in his record of interview to the police that he did not remain because he was scared. However, having inquired of Mrs Langi about the driver's condition and assistance given to him at the scene, I am satisfied that an ambulance arrived within a very short time anyway so I do not propose here to treat this as an aggravating factor.
6. I consider that Courts, in cases of reckless driving where a death or serious injury results, must impose sentences which deter others from driving in this manner and causing death or injury to other members of the public. The 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 serious injury. I

accept Mr Taufatehau's submission however, here that, whilst reckless (and in this case as particularised dangerous) driving was established, the circumstances of the driving was at the lower end of this offending. In my view, the starting point should be four years imprisonment with an additional 6 months imposed as an aggravating feature because he had chosen to drive without a licence. I have no doubt as I have said, that his inexperience and lack of training was a material factor in his losing control with the tragic consequences that followed.

7. I have read his probation report and listened carefully to the able submissions of Mr Taufatehau which assert that the accused is the second of 6 children. He is aged 20 as I have said, had limited education, some health problems, and assists his father in their plantation which is used for commercial and domestic purposes. His mother describes him as a quiet person who may have been injuriously led by others in his extended family. He attends church. He has no previous convictions. He knew the deceased. Though he chose to plead not guilty, I accept he has genuine remorse for what he has done and he and his family have apologized and made compensation in the form of a cow and mats to the victims' family which has been accepted. This was in essence a major contribution to the funeral. There are good references also from his Church Minister and the Town Clerk.
8. I consider mitigation of 16 months imprisonment is appropriate. I also observe that he was one of five young men in the car at the time none of whom showed any objection to his driving if they knew he was unlicensed. However, he is responsible alone for his foolish decision to agree to drive and for the consequences that followed. The

sentence I impose is one of three years imprisonment backdated to the date of his remand in custody.

9. I consider that, as a first offender, also a young offender, and as Mr Taufatehau submitted a person of otherwise good character, he is likely to be rehabilitated and probably unlikely to reoffend. Accordingly, I suspend the final 18 months of his sentence on the following conditions;

a. He is to commit no offences punishable by imprisonment for two years;

b. On his release, he is on probation for 12 months and must live where directed by his probation officer for that period.

10. I add that I do not think it appropriate or in the public interest to fully suspend a sentence for offending of this seriousness, which, although at the lower end, has resulted in death.

11. The prisoner is warned that a failure to meet the conditions imposed may mean that he would be recalled to serve the suspended part of his sentence.

**Dated: 21 April 2016**



**JUDGE**