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IN THE SUPREME COURT OF TONGA **CR 113 of 2016**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **POASI NGALUAFE** **- Defendant**

BEFORE THE HON JUSTICE CATO

Mrs. Langi for the Crown
Mr. William Edwards for the Accused

VERDICT

[1] The accused, Mr Poasi Ngaluafe, appeared before me for trial initially on one count of causing death whilst driving with alcohol in his body in excess of 250 micrograms per litre of breath contrary to section 26A(1) of the Traffic Act. During the course of the trial, the indictment was amended to include a charge of driving a motor vehicle whilst under the influence of alcohol in excess of 250 microgram per litre of breath contrary to section 26(1) (2)(b) of the Traffic Act. He pleaded guilty to that charge, but the Crown did not accept his plea in discharge of the indictment and his trial continued.

[2] The evidence was quite brief. The accused admitted to driving with a breath level limit of 660 micrograms per litre of breath or well in excess of twice the legal limit. The evidence revealed that the offence took place after the accused had been driven home, on the 8th May 2016 late in the evening. He decided to take his

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motor vehicle out and drive elsewhere. During the drive which was not far from his home, he ran over a person sitting, it would seem, upright in his path that is on his side of the road. He appeared to drag the body under the car, before trying to reverse, the deceased falling in front of the vehicle. The collision resulted in the deceased suffering head and other injuries and suffering an instantaneous death. The deceased was Tongan and was dressed in dark clothes. The area in which the collision took place was unlit and said to be dark, although there may have been some light coming from an oncoming car which passed the deceased on the other side of the road shortly before the collision.

[3] Mr Isitolo Ali was driving his car towards the deceased on the other side of the road and noticed that he was sitting in the middle of the other side of the road. He said that he would have been about 25-30 metres from him when he noticed the man. He noticed, as he drew level, his head nodding as though he were asleep. He had decreased his speed and, as he had passed, he told him to get up. He had passed the deceased by about four metres when he observed an oncoming car and, shortly after, the deceased was hit by that vehicle. He said he had been travelling around 40-45 kilometres per hour before slowing down. He thought the other vehicle was travelling very fast. It did not brake before impact and its lights were on. The evidence suggested that Mr Ali's lights had to some extent illuminated the deceased in the road.

[4] It did not appear, however, that Mr Ali had much of an opportunity to observe the speed of the oncoming vehicle. Indeed, in his evidence, he said that he did not notice the vehicle approaching, his attention at the time being directed, understandably to the deceased sitting in the road. I am unable to conclude what speed the accused was travelling at prior to the

collision and unable to infer that he was driving in excess of the speed limit.

[5] Although his lights were on and evidence from a vehicle examiner was given that they were in working condition, no evidence was given as to the range of the beam of these lights or the opportunity the accused would have had to see the deceased in the rood prior to impact. There were no skid marks suggesting that the accused had not been aware there was anyone in the road prior to impact. The state of the evidence is such that I am unable to infer that, while the accused was driving and in control of the vehicle considerably in excess of the breath alcohol limit, that there was anything errant or at fault about his actual driving of the vehicle that evening that resulted in the collision.

[6] During the course of the evidence, I mooted with counsel whether this offence was one of strict liability, as Mrs Lange had suggested. I drew to their attention such authorities as had been raised by Professor John Smith in his book on Criminal law, (Smith and Hogan, 10th ed, 2003, at page 44,) when he refers to an old English case, of Dalloway (1847) 2 Cox CC 273. Dalloway had been driving a cart on a highway without his hands being on the reigns and a very young child had crossed the road a few yards ahead of the horse and was killed. The issue was whether Dalloway was guilty of manslaughter or not. The direction to the jury by Earle CJ was that, if the prisoner had reins and by using those reins could have saved the child, he was guilty of manslaughter. If they thought he could not have saved the child by the use of those reins, he was not guilty of manslaughter. Professor Smith commented;

> "If D had not been driving the car at all the incident could not have occurred ; and in that sense he " caused' it but it was necessary to go further and show that the death was due to his negligence in not using the reins."

[7] I also referred to the discussion in Clarke (1990) 91 Cr App Rep 69 (also mentioned in Smith and Hogan at pg 44, fn 1,) where Russell LJ in a comment directed at drunkenness, recklessness and the Lawrence direction (1981) 73 Cr App R 1 said;

> " If Mr Elias is right in his submission that drink is relevant when considering the first limb of Lawrence, but not the second, a surprising result is produced. Suppose a person gets into a car when indisputably unfit through drink to drive it; he drives at a snail's pace and is involved in a collision that is wholly the other driver's fault; the other driver is killed. On Mr Elias's definition, the driver drives recklessly because he is driving while unfit through drink to do so. If another road user happens to be killed, he is guilty of causing death by reckless driving. That in our view cannot be correct."

[8] At the conclusion of the evidence, Mrs Langi submitted that the case was one of strict liability although the maximum penalty was 15 years imprisonment. In her view, even if I found the driver here was not at fault in his driving, nevertheless, by driving the vehicle with excess breath alcohol, he was liable for the death of man he collided with sitting in the road. I expressed some unease with this view, but appreciating that the issue raised a matter of considerable importance for the application of the Traffic Act, in Tonga, I adjourned the hearing for a lengthy period for both counsel to consider their positions and produce any relevant authorities they were able to do before me for argument.

[9] Strict liability, sometimes referred to as absolute liability, had its origin in public welfare regulatory offences in the nineteenth century. It seems in convicting defendants, in the absence of fault on their part, the courts were motivated by pragmatic, utilitarian considerations such as efficient operation and development of schemes to promote welfare and health. In early times, strict liability offences were usually accompanied by lower penalties, the stigma of conviction being reduced in these cases. However, over time, it came to apply in cases where penalties were significant. See Smith and Hogan at page 132, and *Gammon (Hong Kong) Ltd v AG of Hong Kong* [1985] AC 1, at

17 where the Privy Council applied strict liability to a case where the offence was punishable by a fine of $250,000, and three years imprisonment, although the Court acknowledged that the fact the offence carried such heavy penalties was a formidable point.

[10] The application of mens rea in cases that were truly regarded as criminal, that is, as Lord Reid said, cases that were not absolute liability involving only "quasi-criminal acts", was affirmed in *Sweet v Parsley* [1970] AC 132, a case involving the issue whether mens rea applied where premises were being used for the purpose of drug offending. .There, Lord Reid said after discussing absolute liability and its application in cases of quasi-criminal acts;

> "... but when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or disgraceful the offence, the greater the stigma. So he would have to consider whether in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men should escape. And equally important is the fact that, fortunately, the Press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration. But, I regret to observe that in recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence."

[11] Whilst in the vast majority of cases involving death or injury, driving above the prescribed limit will be plainly causative of death and the driver will be at fault in some way, this may not always be the case. Cases come to mind where a defence in the nature of inevitable accident might arise; a child who runs out into the road without warning and is in collision with a car driven by a drunken driver; or an approaching car who suddenly

crosses the centre lane into the path of a drunken driver. Once there is evidence adduced that suggests a collision was inevitable, then in the absence of the offence being characterized as one of strict liability, the prosecution will have to prove beyond reasonable doubt that the defendant was materially at fault in more than a de minimis way. In order to do this, the prosecution will have to adduce evidence that establishes beyond reasonable doubt that a sober person driving within the limits of the law would have been able to have avoided the collision.

[12] Mrs Langi had submitted throughout the trial that the offence was one of strict liability, and all the Crown had to establish to succeed, was that the accused drove a motor vehicle under the influence of alcohol namely above the limit of 250 micrograms of alcohol per litre of breath, and that, whilst driving, a fatality had resulted. Mr Edwards submitted that the offence was not one of strict liability pointing to the serious consequences that conviction carried namely liability of up to 15 years imprisonment and a heavy fine.

[13] Whilst I recognise that legislation of this kind is aimed at reducing road accidents which all too often result in injury or death, when a driver is in under the influence of alcohol, the fact that conviction carries with it such heavy penalties had tended to persuade me that the offence should not be characterized, in the words of Lord Reid, as a "quasi-criminal offence" in the strict liability category. During the trial, I had indicated that I was uneasy about the submission that this was an offence of strict liability and that the accused should be convicted even if the prosecution had not established that he was at fault.

[14] Before I had heard final submissions, the case of *R v Hughes* [2014] 1 Cr App R 6, (SC), reversing R v Williams (Jason) [2011] 1 WLR 588, CA (mentioned in Archbold, (2016 ed, at para 32-76)) came to my attention. This was a decision of the Supreme

Court. There, the appellant had been driving a motor vehicle without compulsory third party insurance and had been on a probationary licence as well which rendered him liable to offences involving fines and penalty points and disqualification, but not imprisonment. The Supreme Court considered that these were strict liability offences.

[15] Mr Hughes, the appellant, had driven on a road and had a collision with a driver who was found to be on drugs. The latter had been driving erratically and had crossed into the path of the appellant's motor vehicle with the result that he was killed. Although the trial Judge had accepted the appellant was not at fault and had acquitted him, on appeal, he had been convicted by the Court of Appeal following their earlier decision, in *R v Williams (Jason)* [2010] EWCA Crim 2552; [2011] 1 WLR 588. This case also involved an uninsured driver who had been driving in a proper manner along an urban dual carriage way when a pedestrian had jumped over the central reservation and stepped out in front of his car. It was held in Hughes by the Court of Appeal, consistently with Williams, that the appellant had caused the death and that it was not an element of the offence that the prosecution was required to prove fault with the defendant's driving, that is it was a strict liability offence. Mr Hughes appealed.

[16] Under the new section 3ZB of the Road Traffic Act 1988, as added by section 21(1) of the Road Safety Act 2006 (UK), it was provided that a person was guilty of an offence if he caused the death of another person by driving a motor vehicle on a road, and at the time when he was driving, the circumstances were such that he committed an offence under Section 87(1) of the Act, (driving other than in accordance with a licence); section 103(1)(b) (driving while disqualified); or section 143 (using a motor vehicle while uninsured or unsecured against third party

risks). This offence carried a maximum sentence of two years imprisonment.

[17] The Supreme Court rejected the argument that a driver, who had committed the offence of driving while uninsured which was said to be a serious matter, was guilty of the aggravated offence of driving causing death unless there was present, in his driving, some act or omission in the control of the car, which involved an element of fault, whether amounting to careless, inconsiderate driving or not and which had contributed, in some more than minimal way, to death. It was unnecessary that such act or omission be the principal cause of the death. The Court rejected the argument that merely driving the car on the road whilst uninsured was sufficient to amount to legal causation and was no more causative than setting the scene for the collision to occur. (See further, "setting the stage", an expression of Woodhouse J in the case of Kilbride v Lake [1962] NZLR 590, at 592 on fault and actus reus so well known to New Zealand students of criminal law many generations, ago). The Court, in Hughes, observed;

> "to give effect to the words" causes... death ... by driving and to constitute the offence, there must be something more than "but for" causation for the driving to be a "legally effective cause" of the death.

The Court, further, observed that;

> "It may well be that in many cases the driving will amount to careless or inconsiderate driving, but it may not do so in every case. Cases which might not could for example include driving slightly in excess of a speed limit or breach of a construction and use regulation. If on facts similar to the present case, D was driving safely and well at 34 mph in a 30 mph limit, or at 68mph in a 60 mph limit was unable to stop before striking the oncoming drunken driver's car, but would have been able to stop if travelling within the speed limit, his driving would be at fault, and one cause of death, but would be unlikely to amount by itself, to careless driving. The same might be true if he could not stop in time because a tyre had become underinflated or had fallen below the prescribed tread limit, something which he did not know but could by checking, have discovered."

[18] I referred Hughes to counsel prior to hearing their submissions. Mrs Langi quite properly conceded in the light of Hughes, that she was unable to maintain her argument that the offence was one of strict liability. She referred me, however, to a New Zealand case of R v Ten Bohmer [2000] 3 NZLR 605(CA) per Thomas J, where a drunken driver had been convicted of driving causing death after he had taken a right turn into the path of the deceased who was on a motor bike. The appellant had argued that the Crown must prove a causative link between the excess blood alcohol level and the collision, which the trial judge and the High Court Judge had rejected. The Court of Appeal held that the lower courts were correct in dismissing this argument, and in so doing observed that causation involved linking the accused's behaviour to the prohibited result in a way which could be described as not insubstantial or not insignificant. Thomas J, however, went on to say that the requirement for causation does not import any element of fault in driving which the use of the words 'act or omission' in previous legislation, had been held to import. His Honour observed at para 30;

> "The defendant, by virtue of being of or driving a motor vehicle, may cause the death of the accused without being guilty of careless or reckless driving or the like. The question is whether the Defendants' driving caused the deceased's death, not whether any act or omission on his or her part amounting to negligent or otherwise blameworthy conduct caused the death. The element of fault is not to be reintroduced in to the provision by way of an expanded approach to causation."

Despite disclaiming fault as an feature of causation, which would suggest a strict liability approach, the Court did suggest that, in cases where a death had been caused by a pedestrian suddenly running out in front of the car, or a car being hit by a driver travelling on the wrong side of the road, the defendant's conduct could not have caused the resulting bodily injury or death and he would not be liable for causing a collision. These observations suggest that whilst dismissing fault as an element of causation, the Court, was understandably reluctant for blameless drivers to

be convicted of serious driving offences and accordingly, appeared, in an appropriate case, prepared to depart from the full rigour of a strict liability approach.

[19] The leading English case of Hughes, unlike R v Ten Bohmer, asserts, however, that fault of some kind with the driving that caused the death is required to be established in cases of this kind, and that is the approach I am required to adopt in Tonga, as Mrs Langi acknowledged.

[20] Mrs Langi, attempted to persuade me that the accused was at fault in failing to be able to avoid the deceased sitting in the road and that he had been unable to see him and do so because he had been driving too fast and was well over the legal limit. I have given close consideration to this submission, but, as I have already said, the evidence does not persuade me that the accused was travelling in excess of the speed limit and would, with his headlights on, have been able to see the deceased and stop in time to avoid him. Nor did I have any evidence before me to suggest that a sober driver travelling at a lawful speed, in all the circumstances, would have been able to detect the deceased sitting in the road and have avoided him. I am therefore unable to conclude beyond a reasonable doubt that anything errant in the Mr Ngaluafe's driving caused the collision.

[21] In these circumstances, I acquit the accused of count 1 causing death while driving under the influence of alcohol in excess of 250 micrograms per litre of breath, contrary to section 26A(1) of the Traffic Act.

[22] I, however, convict him of the alternate charge of driving a motor vehicle while under influence of alcohol in excess of 250 microgram per litre of breath contrary to section 26(1) (2)(b) of the Traffic Act to which he pleaded guilty. This is his first offence

of driving whilst over the prescribed limit. In my view, because his reading was high, a fine of $1000.00 payable forthwith, and in default, 2 months imprisonment, is appropriate.

DATED: 21 APRIL 2017

Judge