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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

CR 10 of 2017

BETWEEN: R E X - Prosecution

AND: PALETILI AFU - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Aho for the Prosecution

Mr Niu SC for the Defendant

SENTENCE

[1] The Prisoner, Mr Paletii Afu, was charged with reckless driving causing death contrary to section 25(5) of the Traffic Act, 2 counts of reckless driving causing grievous harm contrary to section 25(4) of the Traffic Act and four counts of reckless driving causing bodily harm contrary to section 25(3) of the Traffic Act. The maximum sentence for reckless driving causing death is 15 years imprisonment, section 25(5); for reckless driving causing grievous harm, 7 years imprisonment or a fine of up to \$25,000 or both, Section 25(4); and reckless driving causing bodily harm, three years imprisonment or a fine of \$10,000 or both. Initially, he pleaded not guilty to all the counts but on, the 5th April 2017, he changed his plea to guilty on all the counts.

Recd 18/05/17
Jato

[2] This was a tragic case. Mr Afu was travelling behind a motor vehicle, on the 13th August 2016 at about 12am, that was travelling East on Taufa'ahau Road in the village of Veitongo. The vehicle in front of him was a lorry that had as passengers the deceased, a baby, and several others sitting on the back tray. When the lorry got to the eastern end of the village, the driver of the lorry slowed down and indicated to turn right just before the Veitongo Primary school. Mr Afu commenced to speed up as he went to overtake the lorry and did not see that the lorry had indicated to turn right into a right turn just before the Veitongo Primary school. The vehicle driven by Mr Afu collided with the middle right side of the lorry and the passengers were ejected from the tray of the truck.

[3] Because I was uncertain as to whether speed featured in the accident and whether it should affect the level of sentence, I asked both counsel to appear before me on 17th May, 2016 that is after submissions had taken place with the defendant, to clarify the position. It emerges that, although Mr Afu likely sped up to overtake, he had not been travelling behind the vehicle at an excessive speed as it was travelling along the road before indicating to turn right. Having heard counsel, I am satisfied that the gravamen of the offending is the fact that Mr Afu failed to keep a proper lookout and appreciate that the lorry was engaged in the process of turning right as he proceeded to pass with tragic consequences. Excessive speed I am satisfied was not a culpable aggravating factor for me to consider, here.

[4] What I find is that a momentary period of reckless inattention in proceeding to overtake the lorry as it was turning right, led to a collision in which tragically one of the passengers, a one year old baby, was thrown from the tray of the lorry and died, two others suffered serious injuries and four others injuries of a lesser kind.

Before I turn to the level of sentence I should impose I make the following observation about road traffic in Tonga.

- [6] It is of concern to this Court but, a fact of life in Tonga, that people often travel as passengers in cars or on the trays of truck, without any restraints, seat belts or rails in case of a collision occurring. Consequently, it is not uncommon for passengers to be thrown from cars or trucks consequent upon a collision of some kind, sometimes with fatal consequences as this Court has seen in a number of cases that have come before it. Indeed, what also gives rise to concern is the fact that there are so many plainly unroadworthy vehicles on Tonga's roads creating an ongoing potential for accidents to occur. It is not uncommon to see vehicles with seriously impaired windscreens, for example or in such an obvious state of disrepair that they should not be permitted to be on the roads, at all. It is not uncommon either to see overcrowding in motor vehicles and passengers sometimes children precariously perched on the trays of trucks, and travelling unsafely without restraints.
- [7] The maximum sentence of imprisonment, as I have indicated, is 15 years for reckless driving causing death. As I have said, also, I consider the material cause of this collision was the failure of Mr Afu to appreciate the driver of the lorry was about to turn right as he went to overtake. I note Mr Aho mentioned three years in his memorandum as being an appropriate starting point in this case, but I consider, taking into account the maximum sentence is 15 years (indicating Parliament's concern that reckless driving causing death is punished severely) and the fact that death and other serious injuries resulted from Mr Afu's reckless omission a somewhat higher starting point of four years, is required, although still at the lower level.

[8] That said, it is plain from reading the several references supplied to this Court by Mr Niu that Mr Afu, who is aged 33 and is a first offender, is a person of good character. He pleaded guilty to the offences. He has lost his long term employment over this incident as a security officer when he resigned. He did well at school and attended University it seems for a couple of years. At the present time, he is the custodial parent of three young children, he and his wife being separated. He is presently involved in cropping on land he owns which provides income for he and his family. I am satisfied also that he is remorseful and has tried to make financial compensation to the victim's family. He has paid \$2,210.00 for the funeral, and also has provided a replacement truck worth \$7500 to the family. An apology was made and I am advised by the Seventh Day Adventist church Director who produced a reference for the Court that this was accepted by the family. I consider that the defendant merits 18 months mitigation. The sentence I impose upon him for reckless driving causing death is 2 and half years imprisonment.

[9] I have considered whether the sentence should be fully suspended. I consider he meets all the requirements for a fully suspended sentence. He has been co-operative, has pleaded guilty, shown remorse and compensated the victim's family in quite a substantial way considering his means and is a first offender. He has a custodial obligation to his three young sons, who live with him, although Mr Niu did indicate, at my request, the children would be looked after by his parents should he be required to serve a sentence of imprisonment. He is now engaged in cropping, on land the family owns for his family's subsistence. I consider, however, that there should be an element of retribution or punishment about the sentence to reflect the fact that his reckless driving had such serious onsequences. The terms upon which I fully suspend the sentence are;

a. He will commit no offences punishable by imprisonment for the period of the suspension;

b. He will undertake at the direction of probation 70 hours of community work with the recommendation that, if considered appropriate, this be served in some capacity at the Viola hospital.

[10] He is warned that he must meet these terms or he may be recalled to serve the term of imprisonment.

[11] In relation to the two counts of reckless driving causing grievous bodily harm, I sentence him on each to 18 months imprisonment to be served concurrently with the offence of reckless driving causing death.

[12] In relation to each of the four counts of reckless driving causing bodily harm, he is sentenced to 9 months imprisonment to be served concurrently with the offence of reckless driving causing death.



C. B. Cato
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JUDGE

DATED: 18 MAY 2017