

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

CR 04 of 2019

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19/03/19

BETWEEN:

REX

- Prosecution

AND:

CHAROTEESHA TU'IPULOTU

- Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr 'A Kefu SC and Mr. F Samani (on 14 March 2019) and Mrs L Fakatou (on 4 March 2019) for the Prosecution
Mrs L Kuli (on 14 March 2019) and Mr V. Mo'ale (on 4 March 2019) for the Accused

Date of Hearing: 4 and 14 March 2019
Date of Ruling: 15 March 2019

SENTENCING REMARKS (ORALLY)

[1] Miss Tu'ipulotu appears for sentence today having pleaded guilty on arraignment to:

- (a) One count of reckless driving causing grievous bodily harm contrary to s. 25(4) of the Traffic Act for which the maximum penalty is a fine of \$25,000 or imprisonment for a term of not more than 7 years, or both; and

rec'd 18/03/19
HC

(b) Being in charge of a motor vehicle on a road while under the influence of drink in excess of 250 micrograms of alcohol per litre of breath contrary to ss. 26(1) and 26(2)(b) of the Traffic Act for which the maximum penalty is imprisonment for a period not exceeding 2 years and a fine not exceeding \$5,000, or both.

[2] Upon conviction for these offences Miss Tu'ipulotu is also liable to have her motor drivers licence cancelled and to be disqualified from holding or obtaining a drivers licence (ss. 26(3) and 29 of the Traffic Act).

Summary of Facts

[3] Unusually this sentencing hearing has taken place over three days. Having heard from counsel on 4 March 2019 I was not satisfied that I had sufficient facts before me to arrive at a proper decision. On 14 March 2019, I heard evidence from three witnesses called by the Prosecution and Miss Tu'ipulotu's record of interview was produced by consent. I also heard further submissions from counsel and adjourned until 15 March 2019 to deliver my decision. I find the relevant facts to be as follows.

[4] Miss Tu'ipulotu is a 23 year old woman. She is a New Zealand citizen but grew up in Tonga and resides at Ma'ufanga, Tongatapu.

[5] On 8 September 2018, Miss Tu'ipulotu's boyfriend graduated from Tupou Tertiary Institute. Miss Tu'ipulotu had recently returned to Tonga from Australia and went drinking with her boyfriend and others to the Billfish and then to a bush area at Havelu to celebrate. There were a number of people present at the drinking party and this included the victim who I identify as A. A was a late arrival to the gathering. A is a 26 year old woman and resides at Tofoa, Tongatapu.

[6] The group were drinking for a number of hours into the early morning of 9 September 2018. Miss Tu'ipulotu was intoxicated and she argued with her boyfriend and wished to leave. When he would not leave Miss Tu'ipulotu disappeared for a time but returned. I infer that she was extremely frustrated with her boyfriend and anxious to leave. There was evidence that he was abusive towards her due to her requests to leave as he wanted to carry on drinking. She

got into and started her boyfriend's car, which was just a few meters from the group. She drove towards the group. A did not hear the car start and did not get out of the way. She was run down by the car which came to a halt with one of the tyres resting on her left thigh.

- [7] A major concern to me was whether A had intended to run down her boyfriend and/or A. It is counsel's agreed position that she had no such intention. This concession (which I accept) has had a very significant impact upon the view I take of this case and the sentence that I consider appropriate.
- [8] A suffered a severe fracture to her left femur for which she was hospitalised for a lengthy period.
- [9] When arrested Miss. Tu'ipulotu co-operated with the Police. She was tested at 7.42am and found to have a reading of 660 micrograms of alcohol per litre of breath. When arraigned Miss Tu'ipulotu pleaded guilty to the offences at the first opportunity.

The material before me

- [10] In addition to counsel's submissions I have been provided with:
- (a) A pre-sentence report;
 - (b) A victim impact report;
 - (c) Submissions from the Prosecution;
 - (d) Submissions on behalf of Miss. Tu'ipulotu; and
 - (e) An additional reference from Miss Tu'ipulotu's grandmother.

Pre-sentence report

- [11] The pre-sentence report advises that Miss. Tu'ipulotu was born in New Zealand but her father is Tongan and she was brought to Tonga when she was 10 months old and raised by her grandparents. It is reported that she had a good upbringing and education. She was educated to Form 5 before moving back to New Zealand. In New Zealand she ended her education without obtaining any qualification. She returned to Tonga.

[12] Miss Tu'ipulotu's grandfather reports that something in her had changed when she returned from New Zealand. She got involved in drinking and going out. She got pregnant to her boyfriend in 2017. She had her child in Australia where she lived for some time with her natural mother before returning to Tonga to attend her boyfriend's graduation. Miss. Tu'ipulotu's family is supportive of her. Her grandfather believes that her boyfriend is a bad influence who leads her to drink. He wants her to keep away from her boyfriend and return to Australia to live with her mother. Miss Tu'ipulotu's mother wants the same outcome.

[13] The sentencing recommendation in the pre-sentence report is for a fully suspended sentence of imprisonment subject to conditions.

The Prosecution's submissions

[14] The Prosecution argues that there are aggravating features of this offending including the degree of recklessness involved, the involvement of alcohol, the high level of Miss. Tu'ipulotu's intoxication, the seriousness of the injury to A and the consequences of the offending on A and her family which go beyond A's physical injury and include financial hardship. The Prosecution recognises that Miss Tu'ipulotu is entitled to credit as she is a first time offender, she cooperated with the Police and pleaded guilty at the first opportunity and she has made her apology and provided gifts to A in a customary manner (which have been accepted). Mr. Kefu submitted that a custodial sentence is required but the Prosecution would accept a fully suspended as appropriate.

The defence submissions

[15] In his submissions on 4 March 2019, Mr. Mo'ale highlighted the Court of Appeal's decision in *R v Tau'alupe* (Unreported, Court of Appeal, 26 March 2018, AC 8 of 2017, Handley, Blanchard and Hansen JJ) as authority for the proposition that young first time offenders with good prospects should not be sent to prison if at all possible.

[16] However, boldly Mr. Mo'ale did not advocate for a fully suspended sentence of imprisonment or indeed for the imposition of any punishment at all. He submitted that Miss Tu'ipulotu should be discharged without conviction under s. 204 of the Criminal Offences Act.

[17] In her submissions for Miss Tu'ipulotu on 14 March 2019 Mrs. Kuli emphasised that Miss. Tu'ipulotu had no intention to injure her boyfriend and A and that what had occurred was an accident. She advised me also that Miss. Tu'ipulotu's child has been returned to Australia and Miss. Tu'ipulotu plans to return there also. She submitted that any sentence of imprisonment imposed be fully suspended.

Victim impact report

[18] The victim impact report notes that A suffered what is called a comminute and posterior displacement fracture of her left femur which I understand means the bone was broken into more than two fragments. This occurs in cases of high impact trauma. She was hospitalised from September to November 2018 and returned to hospital in December for surgery to her leg. She was released in late December and has been living at home. A uses crutches to get round and still experiences pain in her leg and will suffer the physical effects of the injury for some time. Her family has been put under considerable financial pressure as she was the sole breadwinner. She may be able to return to work shortly but sees that will be a physical challenge. A does not appear to have suffered emotional or psychological damage and acknowledges the assistance of Miss. Tu'ipulotu and the gifts she has provided.

Discharge without conviction

[19] The Court's power to discharge an offender without conviction is conferred by s. 204(1) of the Criminal Offences Act. A discharge without conviction is deemed to be an acquittal (s. 204(2)). It may be that Mr. Mo'ale was encouraged in this submission by some recent decisions where discharges without conviction have been granted (*R v Ala* (Unreported Supreme Court, 7 November 2018, CR 90 of 2018, Niu J) and *R v Maile* (Unreported Supreme Court, 26 November 2018, Niu J) being two examples). Both of the cases are on appeal and it would be wrong for me to comment on them. However in neither case did the Judge refer to or follow the approach in *R v Tu'iba'ateiho* [2015] Tonga LR 44 which is presently the leading authority in Tonga.

[20] The offence of reckless driving causing grievous bodily harm is a serious offence and the legislature has made it clear by the penalties that apply that serious consequences are to flow from a conviction. It will be a rare case where the

circumstances of the offending for such an offence would justify the Court granting a discharge without conviction. Mr. Mo'ale advanced no arguments to suggest that the consequences upon Miss Tu'ipulotu of a conviction outweigh the gravity of her offending and indeed I do not think any such argument could seriously be made. There is no basis to discharge her without conviction.

Discussion on sentence

- [21] I have had regard to the authorities that the Prosecution referred me to. It was suggested that the appropriate starting point for sentencing purposes is 3 year imprisonment which I consider that appropriate given two particularly aggravating features of this case namely, that Miss Tu'ipulotu was intoxicated and that the level of her recklessness in driving directly at a group of unaware and intoxicated people was at the higher end of the scale.
- [22] By way of mitigation, Miss Tu'ipulotu is a first time offender, she was cooperative with the Police and has apologised and offered gifts to the victim. Her apology has been accepted. She is on good terms with A who has asked that the Court be lenient upon her. I discount Miss. Tu'ipulotu sentence by 9 months for these factors reducing the sentence to 2 years and 3 months imprisonment. Miss Tu'ipulotu is also entitled to credit for her guilty pleas which I accept were entered at an early stage and I reduce her sentence by a further 6 months for this. I thereby arrive at a sentence of 1 year and 9 months imprisonment.
- [23] The next issue I must consider is whether the sentence should be suspended in full or in part. Based on the principles in *R v Mo'unga* [1998] Tonga LR I accept that Miss Tu'ipulotu meets the requirement for the suspension of her sentence. The Prosecution has indicated that it would not object to a fully suspended sentence of imprisonment being imposed and in the circumstances of this case I agree. Miss Tu'ipulotu is relatively young and with her supportive family she has excellent rehabilitation prospects. I agree with Mr. Kefu that she has a problem with alcohol that she must address and she would benefit from the opportunity to develop some alcohol and drug awareness and life skills so that she can move forward positively with her life. I consider that the interests of Miss Tu'ipulotu and the community will be best served by imposing a fully suspended sentence with a punitive aspect and conditions that aid in her rehabilitation.

Result

- [24] On the offence of reckless driving causing serious grievous harm I sentence Miss Tu'ipulotu to 1 year and 9 months imprisonment. The sentence is fully suspended on the following conditions:
- (a) She is not to commit any offences punishable by imprisonment during the period of her suspension; and
 - (b) She is to be placed on Probation and is to attend and successfully complete life skills and alcohol and drug abuse courses with the Salvation Army (or such other organisation as Probation may direct) within a period of six months;
 - (c) She is under the direction of Probation to perform 70 hours community work; and
 - (d) She is to attend Probation before 4pm on Tuesday, 19 March 2019 to make arrangements for the performance of the said community work.
- [25] On the charge of being in charge of a motor vehicle under the influence of drink I sentence Miss Tu'ipulotu to 6 months imprisonment which is also fully suspended and to be served concurrently with sentence imposed above.
- [26] I make an order under s. 29(1) Traffic Act cancelling Miss. Tu'ipulotu's driving licence and disqualifying her from obtaining a drivers licence for a period of 2 years from today's date.
- [27] I have warned Miss. Tu'ipulotu that if she breaches any of the conditions stated above she may be required to serve the periods of imprisonment imposed.

NUKU'ALOFA: 15 March 2019.

cc Probation
Salvation Army



O.G. Paulsen

LORD CHIEF JUSTICE