

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

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CR 50 of 2018


03/04/19

BETWEEN: R E X - Prosecution

AND: NGANA TATAFU FOLAU 'ALOVILI - Defendant

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

Mr T. 'Aho and Ms. 'E. 'Etika for the Prosecution

Mr. Ng. 'Alovili appeared in person

VERDICT

- [1] The accused, Ngana 'Alovili, pleaded not guilty on indictment to one count of Reckless Driving Causing Death contrary to section 25 (5) of the Traffic Act.
- [2] The particulars were that, on or about the 23rd September 2017 at Ha'ateiho, he did drive vehicle registration Number R 1671, in a speed and manner which was dangerous to the public and he did not pay proper care and attention to other users of the road, where he was travelling at a high speed along Taufu'ahau road at Ha'ateiho, which caused the vehicle registration number R 167 to hit 'Onesi Lino whilst he was crossing on the Taufu'ahau Road and this caused 'Onesi Lino' death.
- [3] The essence of the Crown case was that the accused was travelling in a westerly direction in excess of the speed limit which was 50 kph in that area and that he had collided with the deceased as the latter had crossed the Taufu'ahau Road which is the main road from Nukualofa to the East of Tongatapu at about 11.30 pm. There was evidence that the accused had been driving a small hire car and that the collision had caused extensive frontal damage. Mr Lino who was a strongly built man had impacted the area of the windscreen towards the driver's right side of the vehicle.

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The impact occurred on the accused's side of the road towards the centre of the road.

- [4] There were three witnesses who gave evidence that the accused was travelling at an excessive speed. None of these witnesses were asked at what actual speed they thought he was travelling. In his record of interview, the accused had told the interviewing officer that maybe it was over 60kph.
- [5] One of the witnesses, a Mr Fiefia, said that he noticed the car speeding towards the area where he was standing near the road close to where the accident took place. He had been closing up after operating his market nearby. He said the car was noisy because it was speeding. He said the accused was in the middle of the road travelling fast when he ran over the guy and he hit the windscreen. He said the body of the man back flipped in the air and ended up about 30-40 metres from the place of impact. He slowed down and then sped off. He said he had seen emergency lights on and a horn sounding as he drove past. There was no other car on the road. He said there had been no car travelling in the other direction that is in an Easterly direction towards the accused's vehicle. The impact took place on the accused side of the road. He said the accused had been travelling towards the middle of the road.
- [6] He said he saw the deceased get out of a vehicle and cross the road. He said it took him about 5 seconds to get out of the car he was a passenger in and impact with the accused's vehicle. Under cross-examination, he said he walked straight across the road and did not stop at the half way line. He said the deceased was wearing long pants and a shirt both being black. He gave evidence there was moonlight and some light from a street light further down the road.
- [7] Mr Hamani gave evidence also that the accused was speeding. He was walking towards an intersection with a side road near where the accident on the Taufa'ahau road occurred at about 11.30 that Saturday evening, and he heard a vehicle honking from further down the road. He said the head light was on high and there was an emergency indicator. He said the vehicle was speeding and that had made him scared and he had run towards the intersection shortly before the impact occurred. He said the lighting in the area was bright from a street light and work places. He said he and his friend had got safely to the intersection when the impact occurred and he heard the thud. He said he had not noticed any vehicle travelling on the other side of the road in an easterly direction towards the accused's vehicle. He denied being affected

by kava that evening although he admitted going to a place to drink kava at about 10 and leaving about 11.30. He was related to the deceased.

[8] A Mr Hendrikson Latu gave evidence that he and two others including the deceased had consumed about one and a half bottles of vodka earlier that evening. He had been drinking earlier before the deceased had arrived at his home. . He drank more at another residence they had driven to and the deceased had remained in the car. Later, he dropped the deceased off at the side of the road near where the impact took place because he said the accused was to drink further with friends that were going to pick him up. Later, he said no one was going to pick him up and that the deceased was going to drink in a pool club across the road. He said he saw a car honking as he drove further away when he was in the area of a Chinese store before the Church of Tonga where he had gone to watch sport on television. When he got to the Church he heard the impact. He said he did not know if there was any vehicle behind him going in his direction. He said he had not noticed this but he would not have dropped him on the road if there had been a car behind him.

[9] Photographs were placed in evidence which depicted the accused demonstrating where the collision had taken place on his side of the road towards the centre of the road. He said in his record of interview that he had been returning from delivering food to his family and had been driving when the deceased who had been hidden by a car passing in the other direction crossed into his path. He had heard somebody threaten him, so he drove off and alerted the police it seems shortly after which was confirmed by the officer in charge in evidence. He had put the emergency lights on and the horn because the car was damaged. He said that had it not been for the passing car blocking his view of the deceased, he would have seen him as he crossed the road.

[10] There was no scientific evidence given involving any attempt to reconstruct the incident, nor evidence of skid marks at the scene prior to impact or speed.

[11] The accused did not give evidence and did not call evidence.

VERDICT

[12] The evidence of lay witnesses suggested the accused was driving at a speed beyond the limit of 50 kph and indeed the accused admits he was possibly driving at a speed

over 60 kph. The road fronts the Silapeluaa Rugby Field to the North and there are buildings in the vicinity both sides of the field and on the southern side. It is a designated 50kph area and evidence was given of this. There is no reliable evidence of the actual speed at which the accused was travelling. The eyewitnesses had him under observation for only short periods of time before the impact and, in my view, could only give an impression of the speed he was travelling at which they said was excessive. I was not assisted by any reconstructive evidence of braking or skid marks that might have helped me. His own admission, however suggests that he was probably travelling in excess of the speed limit, and the witnesses corroborate this.

[13] I am, however, troubled by the accuracy of the evidence that he had emergency lights on flickering and was sounding a horn prior to the impact. The accused admits doing so but only after impact as he was driving away in an extensively damaged car. I prefer the accused's account to that of the witnesses on this issue. I see no reason for the emergency light or horn to be honked by the accused earlier. The accused had denied using the hazard light earlier in his record of interview when this was put to him.

[14] I am hesitant, however to find beyond reasonable doubt that the mere fact of his driving at an indefinite excessive speed meant that the accused was travelling in a speed or manner that was dangerous to the public. There was evidence that he was travelling in the middle of the road but it was not suggested that he was travelling beyond the midline or in a way that was dangerous to other vehicles on the road. Photographs of the area suggest that the road at the point of impact was not very wide and so I find nothing significant in the fact that he was travelling towards the centre of the road.

[15] On the evidence I heard, quite apart from the question of whether his speed was excessive and dangerous, I am unable to find beyond a reasonable doubt that his driving was a material cause of the impact that caused the death of Mr Lino. The evidence revealed that Mr Lino had been drinking quite heavily earlier that evening. He had been dropped off by his friend at the side of the road. This was the main road out of Nukualofa heading east as I have said. The accused said, in his record of interview, that he did not see the deceased before the impact because his view of him had been blocked by a passing car travelling easterly. There was evidence that the deceased had got out of the car and had walked quickly across the road with the impact occurring seconds after. I take into account Mr Latu's evidence that he did

not see the accused who he said appeared to be travelling at an excessive speed until shortly after he got as far as the Chinese shop depicted in the plan and heard the impact at the Church but I take into account the fact he had been drinking heavily that evening and his evidence may not be reliable in so far as his reconstruction of events is concerned.

[16] I consider that it is probable that the deceased had crossed the road and had walked into the path of the accused's motor vehicle as he travelled on his side of the road. I accept that it is possible that the accused's vision of him crossing the road had been blocked by a vehicle passing in an easterly direction shortly before the point of impact. The point of impact seems to be towards the mid line (there is no painted marking indicating the median) but on the accused's side of the road. I am not satisfied that the evidence led by the Crown as to the absence of other vehicles travelling in an easterly direction negatives the truth of the accused's assertion to the interviewing officer that his view of the deceased walking across the road had been blocked by a passing car. This was an account, given only about four days after the event, and without any lawyer present. The fact that there was no evidence of skid marks suggests to me also that the accused had no opportunity to take any evasive action and this suggests to me that the deceased probably walked out into the path of the accused's car without pausing to look. The witnesses, who suggested there was no passing car, were being asked to reconstruct events, that arose suddenly and I consider it most unlikely they would be able to give a reliable account on whether a vehicle had passed by the deceased in an easterly direction shortly before the impact when their attention would not have been focused on this. Because I am left in a state of doubt on this point, the Crown has failed to convince me that the impact was anything more than a tragic accident as the deceased crossed the road.

[17] I cannot find beyond a reasonable doubt that the accused in these circumstances materially caused the impact. As such, the accused is not responsible for the deceased's tragic death and he is acquitted of the charge of reckless driving causing death. He is discharged from the indictment.



Cato
C. B. Cato

DATED: 29 MARCH 2019

Acting Chief Justice