

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

CR 78 of 2019

25/06/19
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BETWEEN: **R E X** - Prosecution

AND: **PAKI MO TALAHA TAUSINGA** - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. J. Sikalu for the Prosecution
Mr. S. Tu'utafaiva for the Accused

VERDICT

- [1] The accused, Paki Tausinga, was indicted on three counts before me arising out of a road accident that occurred in Nuku'alofa on the 26th September 2018 in the early hours of the morning in a judge alone trial.
- [2] He was charged with;
- a. Reckless driving causing bodily injury contrary to section 25(3) of the Traffic Act;
 - b. Failure to render Assistance to an injured person in an accident contrary to section 35(1) of the Traffic Act;
 - c. Failure to Report an accident to the police contrary to section 35 (3) of the Traffic Act;
- [3] The particulars of reckless driving were that, on or about the 26th September 2018 at Nuku'alofa, he did drive vehicle registration C 19726 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, when he was travelling at a high speed along the Taufa'ahau Road at Nuku'alofa which caused the said vehicle to hit Malia Melesete 'Epalahame whilst she was crossing the Taufa'ahau Road and this caused her bodily harm.

[4] I am satisfied beyond any reasonable doubt that on the 26th September 2018, there was an accident in which the complainant Melesete 'Epalahame suffered bodily harm when she was walking either on the Taufa'ahau Road or closely adjacent to it.

[5] Counsel for the accused, Mr Tu'utafaiva at the close of the evidence, (the only evidence being adduced by the prosecution), submitted that the prosecution had not established that the accused was the driver of the motor vehicle that caused the accident. He submitted that, if contrary to this submission, I found the prosecution case proven as to the identity of the driver, notwithstanding the driver was not proven to be reckless. He, however, conceded that if identity was established, it followed that his client was guilty of count 2 (failing to render assistance) and count 3 (failure to report an accident to the police).

The Identity of the Driver

[6] Mr Tu'utafaiva placed in issue identity. He submitted that the evidence did not sufficiently establish identity of the accused as the driver who was involved in the accident. The evidence on this point is first that of a security officer, Polaloini Tonga, who on the previous evening said that the accused had been drinking with a friend at the Taufa'ahau Village which accesses the Taufa'ahau Road about 107 metres from the location of the accident. The accused arrived about 9pm on the 25th September 2018, and drank until about 10pm. He was then said to go with others to the Tali'eva bar which is situated across the road from the site of the accident. He later was seen to return about 12 pm and travel out of the village and reached the Taufa'ahau road. He said he heard the sound of a collision seconds or minutes later, "a short time later." He said the accused used to be a taxi driver.

[7] The complainant gave evidence that she had been drinking with a friend earlier in the evening and that they had gone in the friend's car to drink at the Tali'eva bar. Their car had been parked in a parking area across the road from the bar. She admitted that she was intoxicated when she later crossed the road from the Tali'eva bar to return to

the car. She said she thought it was about 12 when they left the bar. She thought the road was clear when she and her friend walked across the road. That was the end of the recollection she had until she woke up in hospital.

[8] Her friend gave evidence that she had not consumed much alcohol and that she was walking in front of the complainant. She said a vehicle sped up and hit the complainant who was behind her. She had reached her vehicle which was parked with its rear wheel close to the edge of the road. She said the complainant flew up in the area and her head connected with a car which was parked about a metre away from her vehicle facing parallel to the road, in the parking area. The parking area rose from a drainage area which bordered the road and can be seen in photographs exhibited. This witness did not see the actual collision or the car approaching. She turned around when she heard the collision and saw her friend fly up in the air. The car drove off. She did not know how far the complainant was behind her when she reached her car. She had reached the rear end of her car which can be seen very close to or abutting the side of the road.

[9] Two eye witnesses were further down Tafua'ahau road on the corner of a bakery about 27 metres from the site of the accident. Both said that the vehicle swerved in and collided with the complainant causing her to hit the back of the car that was parked parallel to the Tafua'ahau road. Lupe Teutau said the car reversed back and then drove off. She said the car was silver and she thought had a T licence plate. She also said that the windscreen was cracked she said on the driver's side. She did not know the driver who drove past the witnesses opposite the bakery.

[10] Mele'ana Faitangane was the other eye witness, who was standing with her friend Lupe in the same area when they saw the collision. She said the complainant was in the parking area by the car that was parked parallel to the Tafua'ahau road. She flew up in the air and fell on the side of the car that was facing North. She said the car swerved into the parking area and drove off. It was a silver vehicle. The windscreen was shattered. She said she could not see the number plate. The left hand side of the car had hit the complainant. Under cross-examination, she said that he was driving at a high speed and swerved. She later said he did not swerve in a lot. Importantly, she said that, as the car went past although she did not clearly see his face, she recognized the driver and that he worked for Cowley's. Later when asked how she knew this she said that he worked with her father there delivering bread. She also said that she

recalled a T licence. I am satisfied that there was sufficient light for her to have been able to see the driver in the area of the bakery. Later she suggested that she had a clear view of his face as he passed.

[11] The final piece of relevant evidence that is of importance is a piece of plastic which I am satisfied was found in the road at the scene of the collision with a piece of rubber that had pieces of glass imprinted in it. The plastic I am satisfied was a piece of the front head light of the car. Although the piece of rubber was not examined for comparison, the glass was compared with the left damaged headlight of the vehicle taken by police several days later from the accused's residence. I am satisfied that the comparison which was photographed and is exhibited and witnessed by a senior land transport officer, Makasini Latu, matched the damaged headlight.

[12] Mr Latu also gave evidence that the number plate that was on the accused's car when seized by the police after the accident did not belong to that car. He said that the accused had registered a car although a different car from that involved in the accident which had a T taxi licence plate.

[13] I am satisfied beyond reasonable doubt that the combination of evidential factors I have mentioned establishes that the accused was the driver responsible for the collision in the early hours of the 26th September, 2018. He was identified as leaving an area close to the scene of the collision a little before the time of the collision. He was recognised by Mele'ana Faitangane who said he had worked with her father. Even allowing for the fact she said initially she did not get a good look at his face, she appears to have seen enough at the time he passed her to recognise him. In my view, the fact that the broken glass said to be found 1-2 metres on the roadway from the scene of the collision matching the car later found at the accused's home is strong supporting evidence of her identification. That, together with the fact he was seen to drive out of the Taufa'ahau Village, shortly before the accident leaves me in no doubt he was the driver. I do not take into account one way or the other the fact that the number plate present on the car when seized does not correctly relate to that car, or that the accused had another car with a T plate at the time. The accused did not give evidence and I cannot speculate about the plates. Nor do I think that the fact that both witnesses said it was a silver car detracts from the security of the identification. The car was gold and I accept what the prosecutor submits that at night a colour can be deceptive.

[14] Accordingly, I find the accused guilty and convict him of counts 2 and 3 of the indictment, that is failing to render assistance to an injured person in an accident contrary to section 35(1) of the Traffic Act and failing to report an accident to the police contrary to section 35(3) of the Traffic Act the Traffic Act.

[15] I am not, however, satisfied that the high speed said to be present by eye witnesses was such that it could be said to be excessive or unlawful. Nor can I infer from the evidence I heard that he had drunk alcohol to excess and this must have affected his driving. He had travelled only for a comparatively short distance and I do not infer, in the absence of reliable expert evidence, excessive speed from the fact that the complainant seems to have been forced up into the air possibly making collision with the left hand windscreen of the car before falling into the parking area and making contact with the rear of the parallel car. Nor am I satisfied beyond reasonable doubt that his swerving which the eye witnesses said occurred was to that degree that could be said to be dangerous. The evidence of Mele'ana Faitangane suggests in any event that he did not swerve from the roadway a great distance. Also, I take into account that the edge of the roadway descends at the point of the accident into an indentation for drainage before rising to form the parking area, which can be seen in the photographs. In my view, it would be possible for a driver to drive off the road and into the drainage area possibly accounting for the swerve before making contact. I am unsure just where the complainant was when the collision took place and if she was close to the parallel car, she would have been close to the road, or indeed in the road where the piece of glass was found according to Officer Tu'itavuki who located it, he said one – 2 metres in the roadway. Her friend did not apparently see where she was at the time of the collision. Consequently, I cannot say that the accused failed to exercise due care and attention particularly as reflected in such a serious charge in colliding with her. If the parallel car was close to the road as Mele'ana Faitangane said and the complainant was in that area as the evidence suggests before the collision as seems likely, then the distance between her and the roadway would not be very great. I have doubt about the suggestion from Lupe that he reversed before driving off because that was not mentioned by Mele'ana. Nor do I take into account that he drove off without rendering assistance as constituting consciousness of guilt. People may panic in such circumstances. Overall, I am in a position where faced with a very serious charge requiring clear proof of a high degree of culpability to constitute reckless driving, I am in a state of uncertainty about the quality of the

evidence to prove this serious charge. I am in the state of mind reflected in the time honoured phrase “reasonable doubt”. I accordingly acquit the accused of count one of the indictment, reckless driving.

NUKU’ALOFA: 20 JUNE 2019



C. B. Cato
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JUDGE

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a cross, surrounded by a laurel wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal, with a small star at the bottom.