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

CR 138 of 2018

13/09/19

BETWEEN:

REX

- Prosecutor

AND:

SIMI MOALA

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Ms. 'E. Lui for the Crown
Mr. S. Tu'utafaiva, for the accused

Hearing on sentence : 20 August 2019

Ruling on sentence : 3 September 2019

RULING ON SENTENCE

[1] Simi Moala, you now appear before me to be sentenced for the traffic offence of reckless driving causing death, of which you were found guilty by a jury on 17 July 2019. The judge at your trial, Lord Chief Justice Paulsen, has left after having completed his term of service in Tonga, and I am tasked with passing sentence on you for that offence.

[2] I have read the transcript of the evidence given by the witnesses at the trial and also the summary thereof which the Lord Chief Justice conveyed to the jury in his summing up and have seen the photographs and documentary evidence

ready for filing

exhibited at the trial. I have also read the written submissions of the Crown, and have listened to the oral submissions of your counsel as well that of the Crown counsel. In addition, I have also read the probation officer's report and the victim impact report filed.

- [3] According to the evidence of the witnesses given at the trial, and to your answers to questions put to you by the police a few days after the incident, you were driving a light open van at speed of between 50 and 60 mph in the village of Tatakamotonga, and at that speed overtook 2 motor vehicles in front of you and hit a 5 year old boy who was running across the road from your left side to your right side after you had overtaken the two motor vehicles, and thereby caused his death.
- [4] The traffic offence which you have committed carries a maximum sentence of 15 years imprisonment, and it was only enacted as law in 2010, because of the prevalence of deaths on the roads resulting from drunken driving, reckless driving and dangerous driving. We all know that our roads are narrow. They consist of only two lanes – one going one way and one going the other way. And every day, there are more and more motor vehicles being used on the roads – such that we are forced to drive behind the vehicles in front of us and not overtake them because the other lane is being used by the vehicles travelling in the opposite direction; otherwise we would collide with those vehicles. We are required by those circumstances to exercise care and attention, and mostly importantly, restraint and patience, and that is what this law was enacted to achieve – in order that lives are not lost and injuries are not caused to the users of the road, yes, including this little 5 year old boy who thought he could safely dash across the road before the next vehicle came along.
- [5] You did not abide by those requirements. You became impatient. You did not exercise restraint. You wanted to get to Talafo'ou where you were going to pick up the washing machine you went to get and to get back to Haveluloto quickly. The several motor vehicles in front of you were going too slow for you to follow so you decided to overtake them. You speeded up and overtook them. You did that because you saw that the oncoming vehicle, the Noah, was still far away and you thought that you could go onto the lane of the Noah and

overtake the two vehicles in front of you and get back to your lane before the Noah got to you. What you did not know was that the 5 year old boy was thinking the same thing – that he could dash across the road before the leading vehicle of the two vehicles you were overtaking and the Noah vehicle coming in the opposite direction would get to him. He therefore started running across the road. What he did not know was that you were already making your overtake of the two motor vehicles and he only knew it when he was already running and was in the middle of the road. You did not see him begin his run; you did not expect that a kid would be dashing across the road in front of you. You were not prepared for it and it happened without any warning to you.

[6] You were then in the middle of the road where the broken white line dividing the two lanes of the road was. You were then driving towards your northbound lane with clear road ahead of you, except that suddenly the kid was there in front of you running from your left to your right. You did what came into your mind to do to save that kid. You braked, by slamming your foot on the brake pedal. But the brake was faulty such that the front right wheel of your vehicle stopped before the left wheel stopped, and both the rear wheels did not stop at all. Consequently, the front of your vehicle pulled to your right. Had both front wheels of your vehicle stopped at the same time, as they ought to have stopped when you slammed on the brakes, your vehicle would not have pulled to your right and you might have missed the kid altogether and he would have reached the other side of the road safely. But because of the faulty brake of your vehicle, your vehicle pulled to the right – to the direction in which the kid was running, and because your rear wheels were not stopping, the whole weight of your vehicle kept the momentum of your vehicle moving forward at the speed you were travelling – although your two front wheels were stopping and were making two skid marks on the road as shown in the photographs – and you hit the kid with the front of your vehicle.

[7] You caused the death of the child. You caused it by driving a motor vehicle which you knew had faulty brakes. You were overtaking and you were travelling at a speed which was excessive for the brakes of the vehicle. You knew you were in a village where people, and children, sometimes run across the road. You ought to have thought and to have anticipated that kids may run across the

road without warning. You cannot claim that this was an accident because you say the kid should not have dashed across the road like he did. That is not correct. The kid was dashing across the road properly and safely. It was you who was driving a vehicle with faulty brakes which caused his death. If both front wheels of your vehicle had stopped at the same time and if your rear wheels also both stopped at the same instant as the front wheels, as they ought to have done, there might not have been this death of the child.

[8] When you were interviewed by the police some 3 days after the incident, you told them exactly what I have described above. You cooperated with the police. You were remorseful and felt sorry that you had killed this child. You even asked that the child's family forgive you for what you had done.

[9] The Crown counsel has referred me to recent cases where similar offenses have been committed and to the sentences which were imposed upon the accused persons in those cases. In *R v Latu* (CR 92/2018) Latu and others were drinking alcohol at his home at Kanokupolu. Towards midnight they ran out of liquor and decided to come to Nuku'alofa and get some more. They were 5 of them and they came in Latu's car with Latu driving. They got their liquor and were returning. This time Latu was speeding and the others asked him to slow down but he did not. Because of his speed and because of his drunken state, Latu lost control of the car and it hit a lamp post and then a tree. One passenger died and another suffered severe injuries. He was charged with reckless driving causing death and with reckless driving causing grievous harm. He pleaded guilty and the Court sentenced him as follows:

- (a) the starting point was 5 years 6 months, and then
- (b) reduced to 4 years 6 months because he was
 - (i) first offender,
 - (ii) remorseful,
 - (iii) reconciled with the victim's family,
 - (iv) has quit drinking in attempt to rehabilitate
- (c) further reduced to 3 years 3 months because of his guilty plea as his final imprisonment sentence,

- (d) but that the last 15 months be suspended for 2 years on condition:
 - (i) he commits no offence punishable by imprisonment during the suspension,
 - (ii) complete a Life Skills and Drug and Alcohol Abuse course with Salvation Army, and
- (e) his driving licence is cancelled and he is disqualified from having one for 3 years.

[10] In *R v Aisea* (CR 160/2018), 'Aisea was driving his car with his niece as passenger from Popua where he lived to Teufaiva stadium where he was to attend a parade. He was in a hurry and he was travelling at speeds between 50 and 70 kmph in an area with a speed limit of 40 kmph on the By Pass Road. Latu was overtaking 2 vehicles in front of him with speed he said was 65 kmph at the same time a truck coming in the opposite direction was overtaking another motor vehicle in front of it. The truck was coming fast as well and towards him. 'Aisea was stuck out on the wrong lane with a big truck bearing straight at him on the truck's lane. 'Aisea lost it and just turned his car off the road onto his right side before he knew that there were 2 girls standing there waiting for the bus. His vehicle hit them both. One died the following day in hospital and the other suffered only minor injuries to her arm.

[11] He was charged with reckless driving causing death. He pleaded guilty and the Court sentenced him as follows:

- (a) starting point was 4 years imprisonment, and then
- (b) reduced to 2 years 3 months because –
 - (i) he was remorseful,
 - (ii) attended the funeral and made peace with the deceased's family,
 - (iii) provided money and goods in the customary manner,
 - (iv) the family had forgiven him, and asked not to imprison him, all for which 9 months were deducted, and
 - (v) for his guilty plea for which 12 months were deducted.

- (c) that he serves only 6 months of the 2 years 3 months, the balance being suspended because of being a first time offender and there was high prospect that he would not re-offend.

[12] In *R v Fanua* (CR108/2015), Fanua had no driver's licence and he drove a car with 4 other young men as passengers. He tried to overtake a bus which was being driven along the middle of the road, in front of him. In that process he lost control of the car because of the speed he was travelling and the car went off the road and then came back onto the road and hit the bus causing it to tip over and roll several times thereby causing the death of the bus driver. He was charged with reckless driving causing death. He pleaded not guilty and was tried by a jury which convicted him.

[13] He was sentenced by the Court as follows:

- (a) the starting point was 4 years imprisonment,
- (b) and it be increased to 4 years 6 months because of driving without a licence, because his lack of experience contributed to causing the collision,
- (c) but reduced by 18 months because of having
 - (i) no previous conviction,
 - (ii) he was remorseful (despite not guilty trial) and
 - (iii) family apologised and gave compensation with a cow and mats which were accepted.

thereby leaving a total of 3 years imprisonment but that

- (d) the final 18 months to be suspended on condition he commits no offence and on probation for 12 months and live where directed by the probation officer.

[14] In *R v Liku'ohihifo* (CR77/2019), Liku'ohihifo had been drinking alcohol with friends in Nuku'alofa then left late at night to return to his home at Kolonga. At Nualei, where the speed limit was 70 kmph, he overtook 2 vehicles in front of him which were travelling at a much slower speed. But a man was crossing the road in front of him from his right as he was overtaking and he braked but he

could not avoid hitting him and causing his death. He was charged with causing death whilst under the influence of alcohol contrary to S.26A of the Traffic Act but that charge was withdrawn and he was then charged with reckless driving causing death under S.25(5) of the Act and he pleaded guilty to it. He was remanded in custody for one month for a probation report and submissions as to sentence.

[15] The Court held that the starting point was 3 years imprisonment which was one year less than would have been the starting point because of circumstances which might have justified a not guilty plea due to the fact that the victim might have stepped out across the road carelessly as was shown that he might not have looked before doing so. That starting point was

- (a) then reduced by 15 months because of –
 - (i) his guilty plea,
 - (ii) remorse,
 - (iii) apology which was accepted,
 - (iv) compensation which was accepted,leaving a balance of 1 year 9 months imprisonment,
- (b) which was fully suspended because,
 - (i) he had gone a long way to rehabilitate himself by his actions and attitude and
 - (ii) he had been remanded in custody for one month,
- (c) but that he must
 - (i) serve 45 hours of community service,
 - (ii) undergo a course on alcohol abuse under the salvation Army programme,
 - (iii) not drink alcohol during the period of suspension, and
 - (iv) not commit any offence punishable by imprisonment during the period of suspension.

[16] The Crown counsel suggested that the starting point for the accused in the present case be 5 years imprisonment, the case being of medium level of recklessness between the level in the Latu case where Latu had driven at

excessive speed whilst drunk and not heeding the requests of the passengers to slow down, and the level in the Fanua case where Fanua was driving without a licence and tried to overtake a bus which was travelling in the middle of the road. I do not think that that is a fair comparison. I think that a fairer comparison would be achieved by comparing the present case with the three cases of Fanua, Liku'ohihifo and 'Aisea which were all cases of overtaking. The starting points were as follows:

Fanua : 4 years imprisonment.

Liku'ohihifo : 3 years imprisonment.

'Aisea : 4 years imprisonment.

And it is clear that the Court only had the starting point of 3 years for Liku'ohihifo because of the circumstances that there might have been a good defence (in that the deceased had carelessly walked onto road in front of the accused vehicle). Otherwise, the starting point would have been 4 years imprisonment. Accordingly, I consider that, in line with those 3 recent cases, the starting point in the present case should be 4 years imprisonment.

[17] Crown counsel submitted that there were aggravating features which should increase the imprisonment sentence, such features being:

- (a) the accused did not attend the funeral,
- (b) nor personally seek forgiveness from the child's family,
- (c) he knew that his brakes were not working properly,
- (d) he did not assist at the scene after the collision occurred,
- (e) the child's parents will live with the loss of their son for the rest of their lives, and
- (f) he did not have a driver's licence.

[18] Mr. Tu'utafaiva responded and I accept that the accused could not attend the funeral or join his family when they went to apologise for him because he was in police custody, and although he knew the brakes of the motor vehicle did not work properly, the brakes did work because the wheels of the vehicle stopped

and they caused the skid marks shown in the photographs of the scene. He submitted that that should not be an aggravating feature because that was the very feature which would have persuaded the jury to convict him. It should not be an aggravating feature. I agree with Mr. Tu'utafaiva. As I have stated above, if the brakes were working as they ought to have worked, the death might have been averted. But they did not work as they ought to do, and the jury found the accused guilty because of his prior knowledge that they did not work as they should have. I also do not accept that his failure to assist at the scene at the time should be an aggravating feature. No evidence was given that any adverse result occurred because he did not assist. I would think – looking at the damage that was sustained by both vehicles – it was extremely fortunate that neither driver was killed in collision. So it is not fair to hold it against the accused that he did not assist with anything. As with all the cases referred to, it was not an aggravating feature that the family of the deceased person would live with the tragedy caused for the rest of their life. As to having no driver's licence, I should not penalise him for that because he has not been charged with that offence.

[19] Crown counsel however pointed out the mitigating features:

- (a) the accused is a first offender,
- (b) he expressed remorse,
- (c) he cooperated with the police,
- (d) his family apologised to the deceased's family and was accepted,
and
- (e) his family made customary gifts for the funeral.

In the Fanua case, a reduction of 18 months was made by the Court in respect of similar mitigating features, and I consider that that should be applied in the present case. Accordingly, the imprisonment sentence of the accused in the present case is 2 years 6 months.

[20] Now, as to suspension of that sentence or of part of it, both Crown counsel and accused counsel agreed that part of the sentence be suspended but indicated no period for the same. I must therefore look at the 3 cases of Fanua, Liku'ohihifo and 'Aisea. In Fanua's case, the last 18 months of the 3 year imprisonment

sentence was suspended. In Liku'ohihifo's case, the whole 1 year 9 months imprisonment sentence was fully suspended. In 'Aisea's case, only 6 months of the 2 years 3 months imprisonment sentence was required to be served, and the balance was to be suspended.

[21] I consider that the present case is more in line with the case of Liku'ohihifo because of the sudden crossing of the person who was hit by the vehicle onto the road and path of the accused vehicle. I do not see any reason not to apply that suspension of the sentence in the present case, but subject to conditions.

[22] Accordingly, I sentence you, Simi Moala, as follows:

For the offence of reckless driving causing death, you are sentenced to 2 years 6 months imprisonment but that sentence is fully suspended for 2 years upon the following conditions:

- (a) You are to serve 45 hours of community service and you are to attend forthwith at the office of the probation officer with a copy of this ruling to arrange for commencement of your community service; and
- (b) You are not to commit any offence punishable with imprisonment during the period of your suspension.

NUKU'ALOFA: 3 September 2019.




Niu J
JUDGE