

Sean + L.C.

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

CR 18 of 2021

REX  
-v-  
SIOLOSI HU'AKAU

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## SENTENCING REMARKS

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mrs 'Aholeilei for the Prosecution  
The Defendant in person  
Date: 8 April 2021

### The offending

1. On 25 February 2021, the Defendant pleaded guilty to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm, contrary to ss 27(5) and (3) of the *Traffic Act* respectively. He now appears for sentencing.
2. On or about the evening of Sunday, 25 October 2020, 'Amone Fungavaka was driving with his wife, Stella Fungavaka, to Kolonga to visit their son. Upon reaching the Talafo'ou area, 'Amone was driving at about 35-40km/h. When they passed the Prime Minister's residence at Talafo'ou, 'Amone drove more slowly so that they could admire the scenery of the beachfront.
3. As they approached a sharp turn towards Navutoka, a red vehicle was also approaching the turn from the opposite direction. It was being driven by the Defendant. There were two other passengers in his vehicle. He was speeding. As he approached the turn, he lost control of his vehicle, swerved onto the right lane and collided head on with the Fungavaka's vehicle.
4. Stella sustained multiple fractures, including a collapsed lung. As a result of her injuries, she was pronounced dead on arrival at the hospital. One of the

passengers in the vehicle driven by the Defendant, Pelenaise Lefai, suffered fractures to her right femur.

5. The Defendant was apprehended by Police. He co-operated and admitted to the offending.

### **Crown's submissions**

6. The Crown submits the following as aggravating features:
  - (a) the death of Stella;
  - (b) Pelenaise suffered fractures;
  - (c) the Defendant was speeding and driving in a manner dangerous to the public; and
  - (d) he admitted to Police that he was not aware of the speed limits because he did not obtain his driver's licence validly – it was given to him over the counter through his mother.
7. The Crown submits the following as mitigating features, namely, that the Defendant:
  - (a) has no previous convictions;
  - (b) co-operated with Police;
  - (c) admitted to the offending;
  - (d) is remorseful;
  - (e) has been forgiven by the deceased's family and Pelenaise; and
  - (f) is a young offender having only just turned 21 a month before the offending.
8. The Crown relies upon the following comparable sentences:
  - (a) *Samiu Fainga'anuku* (CR 52/16, unreported, 13 June 2016) – guilty plea, sentenced to 4 years and 3 months' imprisonment, final 18 months suspended for 2 years on conditions and disqualified from driving for 3 years.

- (b) *Mafoa'aeatu Latu* [2018] TOSC 42 – guilty plea to reckless driving causing death and grievous bodily harm. The Defendant had reconciled with the deceased's family. He was sentenced to 3 years and 3 months' imprisonment, with the final 15 months suspended for 2 years on conditions and disqualified from driving for 3 years.
- (c) *Vilisoni Finau* [2019] TOSC 22 – the Defendant was found guilty of reckless driving causing death. He was sentenced to 4 years and 3 months' imprisonment with the final 12 months suspended on conditions and disqualified from driving for 3 years.
- (d) *Manoa Pahulu* (CR 2/19) – convicted, sentenced to 4 years, final 18 months suspended on conditions.
- (e) *Vitalini Lafaele Liku'ohihifo* [2019] TOSC 29 – early guilty plea to reckless driving causing death. Starting point of 3 years (said to be less than the usual 4 to 5 years, reduced by 15 months in mitigation with the remaining sentence of 1 year 9 months fully suspended on conditions (due to exceptional circumstances including an arguable defence, demonstrated rehabilitation and time in custody on remand).
- (f) *'Aisea* (CR 160/18, 15 February 2019, Paulsen LCJ) – Defendant pleaded guilty. He apologized to the deceased's family with money and goods in the customary manner and attended the funeral and was forgiven. Starting point was 4 years' imprisonment, reduced by mitigation to 2 years and 3 months.

9. The Crown submits the following as an appropriate sentence:

- (a) on the head offence, being count one, reckless driving causing death, a starting point of 4 to 5 years' imprisonment;
- (b) on count two, 2 to 2 ½ years' imprisonment;
- (c) by way of mitigation, a discount of 18 months;
- (d) partial suspension of the resulting sentence; and
- (e) disqualification from obtaining a driver's licence for 5 years.

## Pre-sentence Report

10. The contents of the presentence report may be summarized as follows.
11. The Defendant is 21 years of age. He is the sixth child of 7 children. His family relies on income from his mother's weaving. His father sometimes provides financial assistance. He was born with a medical condition affecting his lower limbs rendering him unable to stand for long periods of time. He is physically and emotionally dependent on his mother and is very attached to her. She has been his sole caregiver since his father left for New Zealand. The Defendant is unable to read or write, having only completed class 1 at school. He is described as having the mind of a child. No medical evidence was provided. His disability caused him great pain throughout his childhood. He did not had a normal teenager's life. Notwithstanding, his local parish priest and town officer reported that the Defendant is happily involved in church youth activities and is treated by his peers with understanding, as a child, in order to make him feel comfortable.
12. On the day of the offending, the Defendant's mother asked him to drive his cousin to Hahake to pick up his cousin's wife. The Defendant had never driven without his mother, but she assumed that because it was a Sunday, there would be no traffic problems.
13. The Defendant and his family made a traditional apology to the deceased's family by presenting them with Tongan artifacts and \$3,000. They also gave gifts at Christmas. The deceased's husband has recorded his family's forgiveness.
14. Pelenaise, who is the Defendant's sister-in-law, has also recorded her forgiveness and confirmed that she is on the road to recovery from her injuries.
15. The probation officer describes the Defendant as "not a high risk to the community", remorseful, a man with physical disabilities and the mind of a child. He accepts that imprisonment is inevitable and leaves the question of any suspension to the court's discretion.

## Starting points

16. The maximum statutory penalty for reckless driving causing death is 15 years' imprisonment and permanent disqualification from holding or obtaining a driver's licence. The maximum statutory penalty for reckless driving causing bodily harm is a fine a \$10,000 or imprisonment for 3 years, or both; and disqualification from holding or obtaining a driver's licence for 5 years.
17. Clearly, as the Crown submits, the head offence is count 1.
18. One of the difficulties in assessing the Defendant's degree of culpability in this case is the lack of detailed information about his driving leading up to the collision. Apart from the references to the Defendant 'speeding', losing control of his vehicle and not having a valid driver's licence, the material contains little to explain, for instance, how fast he was driving immediately prior to the collision, for how long he had been exceeding the speed limit that day, whether he was driving in any other reckless or dangerous manner, whether he had driven in a similar way on other days when he had driven with his mother in the vehicle and so on.
19. A further consideration in determining the appropriate starting point is the fact that the Legislature has seen fit, for an offence which results in death, to set a maximum penalty of 15 years imprisonment. I recently had occasion to consider this issue in *R v Manu* [2020] TOSC 82. There, the Defendant pleaded guilty to causing death while driving under the influence of alcohol. He, too, suffered from certain mental infirmities. The maximum penalty for both offences is the same. Many of the comparable sentences referred to by the Crown here were also referred to in *Manu*. Commencing at [30], it was observed:

*"I must confess to some difficulty in reconciling the starting points adopted in the above decisions of circa 5 years imprisonment (or less) against the maximum statutory penalty of 15 years and the ultimate seriousness of the result explicit in the statement of the offence itself, namely, death. The answer may lie in the nature of the mens rea involved in this type of offence. However, when compared to, for example, grievous bodily harm or manslaughter by negligence, which carry a maximum penalties of 10 years imprisonment, it is clear that Parliament intended that causing death while driving under the influence should be viewed more seriously and with more severe responses in sentencing. Another possible explanation is the general approach in the*

Kingdom, particularly for first offences, of setting a starting point at around one third of the maximum statutory penalty.

[31] Those observations pose natural rhetorical questions about the present offence, such as: In what circumstances might such an offence attract a sentence toward the upper end of the range to 15 years? Might it involve drink driving which resulted in the deaths of a number of persons in one or possibly more incidents? The measure can hardly be determined by the concentration of alcohol involved which is prescribed in the Act as anything over 250 micrograms. Another possible variable may be whether the offender has previous convictions for the same offence. Yet another consideration referred to in the cases is whether the Defendant was unlicensed at the item of the culpable driving. Here, there is no evidence in relation to that one way or the other.

[32] In the decision of *R v Finau* ... [2019] TOSC 22, Paulsen LCJ stated:

'[8] The maximum sentence for this offence indicates the Legislature's intention that sentences should reflect the fact that very serious cases involving violations of traffic laws resulting in death should result in longer sentences of imprisonment (*R v Fanua* [2016] Tonga LR 208, Cato J). In *Fanua* Cato J said at [6]:

'I consider that Courts, in cases of reckless driving where a death or serious injury results must impose sentences which deter others from driving in this manner and causing death or injury to other members of the public. The sentences must serve as an example to others to ensure the security or safety of the public and to properly reflect the fact that a person has died or suffered injury.'

[33] In that case, His Honour had regard to a number of authorities in adopting a starting point of 5 years imprisonment, which was accepted as appropriate by both Prosecution and Defence.

[34] Further, in *Fanua*, Cato J held:

'[4] I was informed by the Crown that this is the first case concerning sentence by this provision of the Traffic Act as amended in 2010 for reckless driving where the elements consist of speed and driving in a manner dangerous to the public, rather than being an offence of causing death or serious injury under the influence of alcohol. Parliament imposed a 15 year maximum for reckless driving causing death, as it did for excess alcohol causing death. Formerly, cases such as this would have been the subject of manslaughter by negligence which carried a sentence of ten years imprisonment. ... In my view, this was **a clear indication by Parliament that sentences should reflect the fact that very serious cases involving violations of traffic law resulting in death should result in longer sentences of imprisonment.** In the absence of a discreet offence of careless driving causing death, the Crown may consider manslaughter by negligence to be an appropriate alternative to the more serious charges now available under the Traffic Amendment, 2010 where death arises.

*[5] I consider, by comparison with rape cases where the maximum sentence is 15 years imprisonment also and Court of Appeal has stated that the starting point should be five years, a starting point for this offending should be between 4 to 5 years imprisonment. In cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased. Here, in my view, there were aggravating features; first the driver was unlicensed and drove accordingly in wilful disregard of the law, his inexperience being I have no doubt a material factor in the accident, and secondly, he further made off from the scene without rendering assistance. Both counsel agreed with me that these were aggravating features, at least in principle. ....*

*[6] I consider that Courts, in cases of reckless driving where a death or serious injury results, must impose sentences which deter others from driving in this manner and causing death or injury to other members of the public. The sentences must serve as an example to others to ensure the security or safety of the public and to properly reflect the fact that a person has died or suffered serious injury. I accept Mr Taufateau's submission however, here that, whilst reckless (and in this case as particularised dangerous) driving was established, the circumstances of the driving was at the lower end of this offending. In my view, the starting point should be four years imprisonment with an additional 6 months imposed as an aggravating feature because he had chosen to drive without a licence. I have no doubt as I have said, that his inexperience and lack of training was a material factor in his losing control with the tragic consequences that followed.'"*

[Emphasis added. Citations omitted]

20. Having regard to the statutory maximum penalty, the comparable sentences and statements of principle referred to above, the obvious seriousness of the offending plus the fact that Defendant did not have a validly issued driver's licence and that there were other occupants in both vehicles, I consider that the appropriate starting point for count 1 is 5 years' imprisonment.

### **Mitigation**

21. Having regard to the Defendant's good previous record, his early guilty plea, demonstrated remorse and forgiveness of the Fungavaka family, I reduce the starting point by 18 months.
22. By reason of the Defendant's physical and mental disabilities, I reduce the sentence by a further 6 months, making a total discount for mitigation of 2 years.

23. The resulting sentence on count 1 is therefore 3 years' imprisonment.
24. On count 2, reckless driving causing bodily harm, I impose an approximately commensurate sentence of 1 year imprisonment, to be served concurrently with the sentence on count 1.
25. In relation to the Defendant's driver's licence, having regard to his physical and mental handicaps (particularly that he has the 'mind of a child'), it is extremely regrettable that he was ever allowed to drive a motor vehicle in the first place. I consider that in order to protect the community (and himself), the Defendant should not be permitted to drive a motor vehicle on a public road again. I therefore order that the Defendant be permanently disqualified from holding or obtaining a driver's licence.

### **Suspension**

26. Having regard to the considerations for suspension of a sentence of imprisonment discussed in *Mo'unga* [1998] Tonga LR 154, the Defendant is young, he has no previous convictions and he co-operated with the authorities. I do not consider that the sentencing objectives of denunciation, punishment, deterrence and rehabilitation would be adequately achieved by fully suspending the sentence for an offence of this kind which has resulted in the death of one person and significant injury of another. In circumstances where I have ordered the permanent disqualification of the Defendant's driver's licence, and having regard to the Defendant's congenital handicaps, it is difficult to see what rehabilitation could be achieved by suspending any part of the sentence. Nonetheless, I am prepared to order that the final 12 months of the head sentence be suspended on conditions.
27. Subject to compliance with those conditions, and any remissions, the net result is that the Defendant will be required to serve 2 years in prison.

### **Result**

28. The Defendant is convicted of:

- (a) dangerous driving causing death and sentenced to 3 years' imprisonment;  
and
- (b) dangerous driving causing bodily harm and sentenced to 1 year imprisonment, to be served concurrently with the sentence on count 1.
29. The final 12 months of the head sentence is to be suspended for a period of two years from the date of his release from prison on the following conditions, namely, that during the period of suspension, the Defendant is to:
- (a) not commit any offence punishable by imprisonment;
- (b) be placed on probation;
- (c) report to the probation office within 48 hours of his release from prison;
- (d) reside where directed by his probation officer; and
- (e) complete a life skills or other course/s as directed by the probation officer.
30. The Defendant is advised that if he fails to comply with any of the above conditions, he will likely be required to serve the balance of his prison sentence.
31. I direct that, whilst in prison, the Defendant is to receive such medical care as his physical and mental disabilities reasonably require and that he be assigned only such labour as those disabilities may safely permit.
32. Pursuant to s 27(5) of the *Traffic Act*, the Defendant is permanently disqualified from holding or obtaining a driver's licence.

NUKU'ALOFA  
8 April 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE