

Sean + file.

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

CR 304 of 2020

REX

-v-

SIMIONE IKAHIHIFO

BEFORE HON. JUSTICE NIU

Counsel : **Mr. T. 'Aho for the Crown.
Ms. A. Kafoa for the accused.**

Plea : **Guilty, on 26 November 2020.**

Probation Report: **by Mrs. 'E. To'ia on 14 December 2020.**

Submissions : **by Mr. 'Aho on 12 January 2021.
: by Ms. Kafoa on 18 January 2021.**

Directions : **on 27 January 2021, 23 February 2021, and
23 March 2021.**

Sentencing : **13 April 2021.**

SENTENCING

The Offences

[1] Simione Ikahihifo, you now appear before me for sentence on two offences which you committed, and to which you pleaded guilty on ~~26/11~~ *August* November 2020. Those two offences are:

[Signature]
August

*Rec'd
13/4/21
+4*

- (a) that on 11 August 2020 at Sia'atoutai, you drove a Datsun van, L23267, at a speed and in a manner which, having regard to all the circumstances was or might be dangerous to the public when, whilst driving the vehicle in an easterly direction along Hihifo Road, you attempted to overtake a vehicle in front of you and you collided head on with a car driving in the opposite direction, leading to the death of 'Aisea Kaifa, and
- (b) that on 11 August 2020 at Sia'atoutai, you drove a Datsun van, L23267 at a speed and in a manner which, having regard to all the circumstances, is or might be dangerous to the public, when whilst driving the vehicle in an easterly direction on Hihifo Road, you attempted to overtake the vehicle in front of you, and in that attempt, you collided head on with a car driving in the opposite direction, thereby causing grievous harm to 'Ana Na'a.

The facts

- [2] What happened was that on that day, 11 August 2020, a Tuesday, you and a friend, Sione, were drinking liquor and after you were both already drunk, you then drove your van and you and Sione went to another friend of yours, Lakepa, who was in a tax allotment at Nukunuku with a bottle of liquor which had been mixed and you three then all drank it. It was about mid-afternoon when you three started drinking.
- [3] When that bottle was empty, you then drove and all three of you went to the next village, Fatai, and bought another bottle of liquor and you returned to the tax allotment at Nukunuku and continued drinking.
- [4] You finished drinking and you left with Sione in your van, with you driving, at about 9:45 that evening, to drive back to Longolongo in Nuku'alofa where you were living.
- [5] After you went past the village of Fatai on your way to town, you were travelling at a speed of about 80 to 100 kmph, well above the

applicable maximum speed of 70 kmph at that part of the road. You then attempted to overtake a motor vehicle travelling to town also and which was travelling at a much slower speed than that maximum speed limit, but at that precise moment another motor vehicle was travelling towards you on its lawful lane into which you had gone to overtake the vehicle in front of you.

- [6] The driver of that on-coming vehicle was 'Aisea Kaifa. He was so taken by surprise, that all he could do was shout "Oiaue!" Your vehicle and his vehicle crashed into each other. His vehicle was about parallel with the vehicle which you were attempting to overtake when your vehicle hit his vehicle.
- [7] 'Aisea Kaifa died instantly as a result of the crash. His foster daughter, 'Ana Na'a, who was sitting in the front passenger seat of 'Aisea Kaifa's vehicle suffered severe fractures to both her legs and other injuries.

The law

- [8] The offences which you have committed, and to which you have pleaded guilty, are provided for by section 25 (4) and (5) of the Traffic Act as follows:

"25. Reckless driving

(1) ...

(2) ...

(3) ...

(4) Every person who drives a motor vehicle on a road recklessly, or at a speed and in a manner which, having regard to all the circumstances, is or might be dangerous to the public, and who causes bodily harm within the meaning of S.106(2) of the Criminal Offences Act to any person whilst so driving, commits the offence of reckless driving causing grievous harm and is liable on conviction

to a fine not exceeding \$25,000 or to imprisonment for not more than 7 years or to both such fine and imprisonment.

- (5) Every person who drives a motor vehicle on a road recklessly, or at a speed and in a manner which, having regard to all the circumstances, is or might be dangerous to the public, and who causes death to any person whilst so driving, commits the offence of reckless driving causing death and is liable on conviction to imprisonment for not more than 15 years."

Probation Report

- [9] The probation officer says that you are 55 years of age and that you live alone at your parent's place at Longolongo. She says that you had lived in the United States and had attended school there with your parents and siblings but that you left school and helped with your father's "yarding" business. You got married in about 1994 and you had 2 sons born in about 1995 and 1997, but you later divorced your wife. In 2010, you were deported from the U.S. to Tonga because you were an over stayer and that you are the only one in your family who is in Tonga.
- [10] She says that you grow crops and raise livestock for your livelihood, and that your sisters send you money when you are in need. She says there were six of you children, 3 boys and 3 girls, but your two older brothers have both died and you are the only surviving male.
- [11] She says that when you were asked about the offence, you told her that you did not know what happened and that you did not remember the accident because you were sleeping behind the wheel. She says that you said that you only woke up the next morning at the hospital and that you only found out then from the nurses who treated you what had happened and that a life had been lost as a result of you. She also says you chose not to speak about what happened while you

were in police custody because, you told her, you were not in your right state of mind.

- [12] She says that you did speak directly to the daughter of 'Aisea Kaifa, the deceased, who had come from New Zealand, and that you apologised to her and sought her forgiveness for what you did. She says that the daughter did forgive you wholeheartedly, not only for herself but also for all her siblings.
- [13] She says that your sisters in the U.S. have sent their condolences and sympathies to the family of the deceased, 'Aisea Kaifa, and that your sisters have sent to them nearly US\$10,000 to help with the shipping of 'Aisea's body to and burial in New Zealand.
- [14] She says that you had visited the injured foster daughter, 'Ana Na'a, frequently with money, food and other things that could help her recovery because she says "both of her legs were paralysed from the accident."
- [15] She says that you now live with guilt and remorse and that you say that you will live with that guilt for the rest of your life, and that you are suffering emotionally and mentally because of that, and she conveys your plea for this Court's mercy.
- [16] In conclusion, she agrees that imprisonment was inevitable for you but she is of the opinion that suspension of the imprisonment, whether partly or fully, may be considered.

Crown submissions

- [17] Mr. 'Aho, counsel for the Crown, has submitted that, based on 8 cases to which he referred, the starting point for causing death by dangerous driving such as you have done, is 5 years imprisonment, and that the starting point for causing grievous bodily harm by dangerous driving is 2 years imprisonment. He submits that the two starting points be cumulative, that is, be added together to make 7 years imprisonment, because you have committed 2 separate offences, the death of 'Aisea Kaifa and the grievous bodily harm to 'Ana Na'a.

[18] He submits that from that total of 7 years, there be a deduction of 1½ years for your mitigating factors, namely your guilty plea, your remorse and apology and contribution to the funeral and to the injured girl at hospital and at home, as well as your previous good record, thereby leaving a final imprisonment sentence of 5½, and that the final 18 months be suspended.

Defence submissions

[19] Ms. Kafoa, counsel for you, has submitted that the starting point for the causing death offence is 3 years and that the starting point for the grievous bodily harm is 2 years, and that they be concurrent with each other. She bases that on the case of *R v Latu* (Cr 19/18) in which Paulsen LCJ sentenced the accused to 3 years 3 months imprisonment for causing death by dangerous driving and to 18 months imprisonment for causing grievous bodily harm and they be served concurrently.

[20] She also refers to *R v Likuhihifo* (CR77/19) in which the starting point of 3 years was reduced by 15 months for the mitigating factors and the balance of 21 months was suspended in full. She therefore submits that your sentence be suspended on condition that you be on probation, must not consume alcohol or drug, attend the Salvation Army courses on alcohol and drug and not commit any offence.

Consideration –

Sentence

[21] I have to accept that the Legislature has enacted that the maximum sentence for dangerous driving causing death be increased from 10 years imprisonment to 15 years imprisonment, and that it did that, in 2015, because of the increasing number of deaths on the road caused by dangerous driving, in particular, drunk driving. The aim of that enactment is to deter drunk and dangerous drivers from driving. The Legislature has left it to the Courts to impose sentences upon drunk drivers who have caused death with sentences that should deter them and others from drunk driving in future, so that deaths on the road would be prevented, so that lives would be saved.

[22] I am obliged to uphold and to apply that law to prevent deaths on the road. I consider that a deterrent sentence should be one that is closer to the maximum sentence than one which is farther away from the maximum sentence enacted by the Legislature for the offence. The half way mark of the maximum sentence is the point at which the sentence may be more or less deterrent. Otherwise there would be no point in the Legislature having set such a high sentence for this offence. Deaths on the road caused by drunk drivers would continue to rise, despite the effort of the enactment of 2015 to lower it. What is worse is that innocent persons, like 'Aisea Kaifa and 'Ana Na'a, have continued to be killed and maimed by drunk drivers like you. In New Zealand, where the maximum sentence for drunk driving causing death was 5 years imprisonment, the Court of Appeal held in the case of **R v Fallowfield** [1996] 3 NZLR 657, that 3 years imprisonment (or more in very bad cases) should be expected. It thereby set $\frac{3}{5}$ (three fifths) of the maximum sentence as the deterrent sentence for the offence. It stated at p.662:

“Just as the recent cases reflect an increase in the level of sentences where death has resulted, so that trend should be reflected where serious injuries result. This is the course to be expected from the Courts in recognition of a significant social problem increasingly unacceptable in the community. To the extent that harsher penalties deter potential offenders it represents support from the Courts for those who strive to reduce injuries sustained on the roads.”

[23] The people in Tonga, like 'Ana Na'a, and people who come temporarily like tourists and people like 'Aisea Kaifa, who came from the U.S. to rebuild his family home at Ha'apai, all have the right to be prospected whilst they use the roads in Tonga. They have a constitutional right to that protection. Clause 18 of the Constitution provides for that. It says, as relevant, as follows:

“18. All the people have the right to expect that the Government will protect their life liberty and property

and therefore it is right for all the people to support and contribute to the Government according to law”

All the people have supported and contributed to the Government when they pay consumption tax or sales tax for goods they buy and for the services they use. They are therefore entitled to be protected when they use the roads. And Government has, when it sits as majority in the Legislative Assembly, enacted this law in 2015 for the sole purpose of protecting the people when they use the roads.

[24] This Court is part of Government. It is the third of three parts or bodies of Government. Clause 31 of the Constitution provides for that, as follows:

“31. The Government of this Kingdom is divided into three Bodies –
1st The King Privy Council and Cabinet (Ministry);
2nd The Legislative Assembly;
3rd The Judiciary.”

This Court is as much funded by the taxes of all the people as the other two parts of the Government of this Kingdom, and it is therefore as much obliged as the other two parts to protect the life liberty and property of all the people, who have already supported and contributed those taxes.

[25] As judge of this Court, I have sworn, as required by clause 95 of the Constitution “that I will perform truly and with impartiality my duties as a judge in accordance with the Constitution and the Laws of the Kingdom”. That means I have to uphold and apply the law which Government has enacted to protect the life, liberty and property of the people who use the roads.

[26] Now that Tonga has set the maximum sentence for the offence at 15 years the deterrent sentence should be at least $\frac{3}{5}$ (three fifths) of it, namely, 9 years imprisonment. That should at least be the starting point.

[27] For the causing of grievous bodily harm, which has a maximum of 7 years imprisonment, a starting point of $\frac{3}{5}$ fifths of that maximum should be appropriate, namely, 4 years and 2 months.

[28] And because the two offences were committed together at the same instant at the same incident, both sentences should be concurrent.

[29] In mitigation, I agree that a total period of 18 months be deducted from the term of 9 years leaving a balance of imprisonment of 7½ years.

Suspension

[30] As to suspension of the whole or any part of that sentence, I do not consider that there is much to be said in your favour. Although you are a first offender, you are not a young person. You are 55 years old and you ought to have known better. Yet you knowingly drove from your place at Longolongo to Nukunuku after you knew you were already drunk with a bottle of liquor to drink at Nukunuku, knowing you would have to drive back to Longolongo. Then when you finished that bottle you drive to Fatai and got another bottle to drink and which you drank. You knew very well what you were doing, namely, that you were drunk and that you should not be driving. Yet you chose to drive and you chose to drive at excessive speed, such that you had to overtake the vehicle in front of you – knowing very well there was another vehicle causing towards you.

[31] You could not have failed to see that other vehicle because it had its lights on and you must have seen them because you were able to see the vehicle in front of you and swerved to the right to avoid hitting it. You deliberately chose to overtake that vehicle knowing that the oncoming vehicle was right up close to you and that you might collide with it. You decided to proceed knowing that.

[32] When the police asked you about what happened you chose not to say anything. You did not cooperate. You did not want to take the responsibility for your action. I consider that you have only pleaded guilty because the evidence against you were overwhelming.

[33] I consider that the mitigation and reduction of the starting point from 9 years to 7½ years have been generous to you. Any further reduction of that term by way of suspension will weaken the deterrence which can only be achieved if the actual time you serve is kept to the half way mark of 7 years 6 months. I therefore do not consider that any part of your sentence be suspended.

Sentence

[34] Accordingly, I sentence you as follows:

- (a) For dangerous driving causing death in breach of S.25(5) of the Traffic Act as charged under count 1 of your indictment, you are sentenced to 7 years and 6 months imprisonment.
- (b) For dangerous driving causing grievous bodily harm in breach of S.25(4) of the Traffic Act as charged under count 2 of your indictment, you are sentenced to 4 years and 2 months imprisonment.
- (c) Both sentences in (a) and (b) above are to be served concurrently, so that you only serve a total of 7 years 6 months imprisonment.

NUKU'ALOFA: 13 April 2021.




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