

Sum + file

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

CR 41 of 2021

REX
-v-
TOUTAI MAFILE'O

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs A. Aholelei for the Prosecution
No appearance by or for the Defendant
Date: 30 April 2021

The charge

1. On 18 March 2021, the Defendant pleaded guilty to dangerous driving causing grievous bodily harm, contrary to s 27(4) of the *Traffic Act*.

The offending

2. On 10 October 2020, the Defendant and the complainant were drinking alcohol at Pelehake. At around 11 AM, they drove to a Chinese shop at Lapaha to buy more alcohol. On their way back, the Defendant was driving while the complainant controlled the gear stick because the Defendant did not know how to drive a manual vehicle. The vehicle was swerving. The complainant asked the Defendant to stop the vehicle. The Defendant continued to drive at speed and continued to swerve left and right across the road. As a result, the vehicle swerved onto the left side of the road towards the Mu'a Police Station almost crashing into the Chinese shop opposite the police station. When the Defendant tried to get back on the road, he crashed the vehicle into an electric pole, causing the vehicle to spin out and land on top of a concrete foundation a few metres away from the Chinese shop.
3. Both the Defendant and the complainant sustained injuries from the crash and were taken to the hospital. The complainant suffered a fracture of the mid-shaft femur and suspected hematoma on the left thigh. The Defendant was discharged later that day and taken to Mu'a Police station for breath testing. The first test

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recorded 390 micrograms of alcohol per litre of breath. The second recorded 280 micrograms.

4. The Defendant was later questioned by police, during which, he admitted to the offending.

Crown's submissions

5. The Crown submits the following as aggravating features of the offending:
 - (a) the Defendant was intoxicated;
 - (b) he did not know how to drive a manual shift vehicle;
 - (c) he drove at an excessive speed; and
 - (d) the injuries sustained by the complainant.
6. The Crown submits the following as mitigating features:
 - (a) early guilty plea;
 - (b) first time offender; and
 - (c) co-operation with the Police.
7. The Crown relies on the following comparable sentences:
 - (a) *Charoteesha Tu'ipulotu* [2019] TOSC 17 – the Defendant pleaded guilty to one count of reckless driving causing grievous bodily harm whilst under the influence of alcohol. A starting point was set of 3 years, reduced by 15 months for mitigation, and the resulting sentence was fully suspended on conditions.
 - (b) *Mofoa'aeata Latu* [2018] TOSC 42 – the Defendant pleaded guilty to one count of reckless driving causing death and one count of reckless driving causing grievous bodily harm. He had been drinking. He was sentenced to 3 years and 3 months for the first count, with the final 15 months suspended for 2 years on conditions. For the grievous bodily harm, he was sentenced to 18 months imprisonment. His driver's licence was cancelled, and he was disqualified from obtaining one for a period of 3 years.
8. In the present case, the Crown submits that a custodial sentence should be imposed, calculated as follows:

- (a) a starting point of 3 years' imprisonment;
- (b) reduced by 9 to 12 months for mitigation; and
- (c) some suspension.

No pre-sentence report

9. At his arraignment, the Defendant was directed to attend the probation office within 48 hours to arrange an interview for the preparation of his pre-sentence report. He failed to do so. No explanation has been provided. As a result, the probation office was unable to prepare a report.
10. I expected to hear from the Defendant today. However, when his matter was called, he did not appear. This sentence was therefore delivered *in absentia*. Given the result below, I do not propose to take any further action in relation to the Defendant's failure to appear today.

Victim impact statement

11. Just prior to delivering this sentence today, the Crown filed a victim impact report. The victim, being the passenger in the vehicle, by the name of Netane Tuiono was discharged from the surgical ward on 5 February 2021 after completing 16 weeks of traction on his left lower limb and eight weeks in skeletal traction. He was initially mobilising on two crutches after his discharge but could not apply much weight to his left leg. He has more recently been moving with the aid of only one crutch but still feels pain in his left leg. His doctor has indicated that his road to recovery is still uncertain, but with time, he should recover and be able to walk unaided, albeit with a limp. Even though he and the Defendant are relatives, the Defendant has not personally apologised to the victim. Netane senses that, since the accident, their relationship has become strained. The injuries have also impacted Netane's family. In his current condition, he is no longer able to help with the family's lawn mowing services which is their source of income. Notwithstanding all that, Netane says that he holds no grudges against the Defendant and has accepted his current state and that he will have to learn to get on with his life as best he can.

Starting point

12. The maximum penalty for reckless or dangerous driving causing grievous bodily harm is a fine not exceeding \$25,000 or 7 years' imprisonment or both.
13. "The offence of reckless driving causing grievous bodily harm is a serious offence and the legislature has made it clear by the penalties that apply that serious consequences are to flow from a conviction": *R v Tu'ipulotu*, *ibid* at [20], per Paulsen LCJ. Further, in cases of reckless driving, where a serious injury results, Courts must impose sentences which deter others from driving in that manner and causing injury to others. Such 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 suffered serious injury: *R v Fanua* [2016] TOSC 13 at [6] per Cato J.
14. "The involvement of alcohol, a lack of concern for the safety of his passenger(s) who had requested that he slow the car and very excessive speed are all aggravating features": *R v Latu*, *ibid*, at [18].
15. Having regard to the seriousness of the offending, the aggravating factors, the comparable sentences and principles referred to above, I set a starting point of three years' imprisonment.

Mitigation

16. For the Defendant's early guilty plea and previous good record, I reduce the starting point by one third or one year resulting in a sentence of two years' imprisonment.

Suspension

17. In this case, all the considerations in *Mo'unga* [1998] Tonga LR 154 at 157 favour suspension. The Defendant was 22 years of age at the time of the offending. He has no previous convictions and he has demonstrated acceptance of responsibility and remorse through his co-operation with police and early guilty plea. In considering whether to suspend all or part of the sentence, the Court is obliged to have regard to the interests of the Defendant and the interests of the wider community in his rehabilitation: *Rex v Tau'alupe* [2018] TOCA 3 at [15]. I

am prepared to accept that the Defendant is likely to take the opportunity offered by the sentence to rehabilitate himself.

18. For those reasons, I am prepared to fully suspend the sentence, albeit on strict and relatively onerous conditions.

Result

19. The Defendant is convicted of dangerous driving causing grievous bodily harm and is sentenced to two years' imprisonment.
20. The sentence is to be fully suspended for a period of two years on the following conditions, namely, that during the period of suspension, the Defendant shall:
- (a) not commit any offences punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the Probation Office within the next 48 hours and at such times thereafter as his probation officer directs;
 - (d) abstain from consumption of alcohol;
 - (e) complete a course on drug and alcohol awareness as directed by his probation officer; and
 - (f) perform 100 hours of community service work including cleaning of beaches and other public spaces as directed by his probation officer.
21. Failure to comply with any of those conditions may result in the suspension being revoked, in which case, the Defendant will be required to serve his prison sentence.
22. Pursuant to s 27(4) of the *Traffic Act*, the Defendant is disqualified from holding or obtaining a driver's licence for a period of two years.

NUKU'ALOFA
30 April 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE