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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NEIAFU REGISTRY

CR 113 of 2021

REX

-v-

Petueli Mafua He Lotu FIFTA

SENTENCING REMARKS

BEFORE : THE HONOURABLE COOPER J

Counsel : Mr. J. Fifita for the Prosecution

Mr. P. Tatafu for the defendant

Date of Sentencing : 15th October 2021

1. On Saturday 7th November 2020 at approximately 2000 hrs 81 year old Semisi Vaka was walking on the verge along side the road in Ta'anea. He was with his granddaughter, they were returning together from a local store. Mele was ahead of her grandfather.
2. The defendant was driving his motor car at this time, heading north on the same road heading towards Ha'alaufuli to drop some of his friends off.
3. He was drunk after he and his friends had been drinking spirits that afternoon.
4. As he reached the area where Mr. Vaka and his granddaughter were, his speed he was excessive and he lost control of his car and it came off the road.
5. One of Mr. Fifita's passenger's saw Mr. Vaka and called out a warning but the car struck Mr. Vaka.

6. Mr. Fifita regained control of the car, steered back on to the road and made off. He drove on to Ha'alaufuli, where he dropped off on of his passengers. He then went to drop off the other passengers, but used the Ha'alefo route to avoid coming back via the scene where he had come off the road and struck Mr. Vaka.
7. What had happened was the Mele had heard the noise of the collision and had run back to assist.
8. She found her grandfather on the ground a gravely wounded.
9. He had suffered catastrophic head injuries. She could do nothing on her own and ran to get her family's help. They returned and took Mr. Vaka to hospital.
10. He was found to have a 13 cm laceration to his scalp that was 2 cm deep. Swelling to the right side of his head suggestive of a closed skull fracture. He was also bleeding from his left ear, nose and throat.
11. He appeared to have an upper airway injury from the degree of bleeding present in his throat.
12. Tragically, two hours after admitted to Accident and Emergency he succumbed to his injuries and died.
13. Dr. Mele'ana Hu'akau's opinion was that the cause of death was severe head injury secondary to multiple skull fracture and intercranial haemorrhage, the upper airway injury possibly a contributing factor.
14. The next morning the police received information that the driver was Mr. Fifita. Acting on that they attended his home address and he was arrested and interviewed and admitted the offence.
15. In considering the correct approach to sentence I have followed the guidance of the Court of Appeal in *Ifahihifo v Crown* AC 14 of 2021.
16. In that case an approach to culpability was derived from the two New Zealand cases; *Fallowfield*; *Gacitua*¹. The starting point was to assess the culpability by reference to

¹ R v Fallowfield [1996] 3 NZLR 657; Gacitua v R NZCA 234.

four areas: standard of driving at the time; whether there was habitual sub standard driving; the outcome of the offence and whether irresponsible behaviour categories further applied.

17. Each of those four areas the court identified key features, the presence of which, when taken together then produce guidance as to the starting point once weighed against a list of mitigating factors.
18. The Court of Appeal were careful to note that these factors are guidance² and, by the same token, it stands to reason that just as these cases are “highly fact specific”³ there will be cases where other factors need to be considered and taken into account when setting the right sentence.
19. Aggravating factors; four categories
20. Mr. Fifita was drunk after a sustained period of drinking spirits.
21. His speed was greatly excessive.
22. Whilst it is a fact that his passenger called out a warning that he was going to collide with Mr. Vaka, it appears this came to late for Mr. Fifita to avoid the collision and did not amount to a disregarded warning.
23. I have no information as to whether Mr. Fifita was a habitually bad driver and so pay no heed of that category.
24. The outcome was not only the death of Mr. Vaka, but the terrible confrontation of his injuries and demise his granddaughter Mele and then her parents had to suffer.
25. Not only to loose a loved one, but to see him suddenly struck down and so grievously injured would have been horrific beyond words and no doubt caused prolonged suffering over and above the fact of his being killed.
26. It is also important to identify that both Mr. Vaka and Mele were vulnerable road users and as such this is a further aggravating feature to this case.

² Paragraph 35.

³ Paragraph 32, quoting from *Gacitua v R supra*.

27. After colliding with Mr. Vaka, Mr. Fifita drove off. He did not stop, he did not seek assistance or try to take his victim to hospital.
28. Then, as he carried on his journey with his fellow passengers after stopping at Ha'alaufuli, he deliberately avoided returning by the same route and then drove himself home. All of which is irresponsible behaviour as categorised; both failing to stop and trying to avoid detection.
29. Against that the mitigating factors to be considered are these:
30. He is young, cooperated with the police and pleaded guilty and does not have any previous criminal convictions.
31. I have paid careful attention to his pre sentence report and the report of his progress with his carpentry career and those very positive sides to his character.
32. For the purposes of calculating the right sentence, I remove the fact of the guilty plea and will calculate the tariff and then make an appropriate reduction to it for his guilty plea.
33. When I then come to consider all those factors, I consider that the proper starting point is 8 years before any possible mitigation can be considered.
34. In coming to this figure I have taken account of the reparation paid to the victim's family.
35. I have carefully considered the starting point and come to that view because of the consumption of alcohol and the excessive speed which in *Ikahihifo v R* produced a starting point of 7 years' imprisonment, here the position is further aggravated by the failing to stop and then trying to avoid detection by keeping away from the same road and slinking off to his home.
36. I also note that Mele and her family suffered more than just fact of the accident that befell her grandfather by having to discover him so terribly injured and trying to save him; something Mr. Fifita conspicuously refused to, and as such they became victims in this incident to, for the purposes of the relevant factors.
37. For his youth and lack of previous convictions I can give some credit; but drinking excessively and driving in a dangerous way, whilst not the sole province of youth, can occur only too frequently with young people.

38. Taking all that together I reduce the starting point by 1 year to 7 years.
39. In *Ikahihifo v R* the Court of Appeal noted that the penalty for this offence was increased from 10 to 15 years "...to provide greater deterrence to reduce the alarming rise in the incidence of such driving and its tragic consequences."⁴
40. I bear that in mind when arriving at the sentence I do.
41. Next I turn to what proper reduction that should be given for his guilty plea.
42. I consider that after the police received the information they did, Mr. Fifita's conviction was inevitable and so little should attract little discount, just as the Court of Appeal in *Ifahihifo v R*⁵ observed the situation to be *R v Fallowfield*.
43. Therefore I do reduce his sentence for his guilty plea, but only by 10 %, that is to say by 8 months.
44. That gives a sentence of 6 years and 4 months.

Suspension

45. Mo'unga principles. Not only is this defendant young and remorseful but he has real capacity to reform; his career prospects are sound and he shows promise.
46. Therefore I will suspend a portion of his sentence, and most unusually, because of those very positive aspects to him, I shall suspend a 2 year portion of his sentence.
47. The last 2 years shall be suspended for a period of 24 months on the following conditions:
1. He report to probation on his release.
 2. That he successfully attends a alcohol awareness course, as directed by his probation officer
 3. He commit no offence punishable by imprisonment.
48. Driving disqualification

⁴ Paragraph 30.

⁵ Paragraph 24.

49. For a driving ban to have any teeth it needs to be felt by the offender when he is at liberty. Imposing a ban during a period of custody is, in effect, meaningless.
50. Accordingly the driving disqualification I impose will be one of 2 years, to run from the date of his release from prison. As that date can be in the discretion of the Prison Governor, I do not set a specific date, but the term and its commencement will be for that duration from his being allowed back into society.
51. There must be no breach of his disqualification from driving.
52. That gives a total sentence of 6 years and 4 months, the last 2 years suspended for 24 months on the above conditions and a driving ban of 2 years to run from his release.

NEIAFU

15 October 2021

