

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

NO.CR.69/2001

BETWEEN : *REX* *Prosecution*

A N D : *HIKIFO'OU 'ULU'AVE* *Accused*

Pou'ono for prosecution

Tu'utafaiva for accused

Hearing : 12 November 2001

Sentence : 13 November 2001

Sentence

This accused has pleaded guilty to two counts on this indictment: Manslaughter by Negligence and Drunken Driving. Both relate to the same incident and reveal a very bad case resulting from the all too common practice of "cruising" in a motor vehicle whilst consuming alcohol.

The accused left a night club with some friends in his car at about 4.00am on 3 February 2001 to drive around and, whilst doing so, they consumed a 1.125 litre bottle of spirits. They were still driving at 7.00am when the accused went off the road in Vaini. As he tried to drive back onto the road he struck a five year old child who had been sent by her mother to the nearby shop for some bread. The accused later told police he was doing about 15 kph at the time. There is apparently no other evidence of speed although the fatal injuries suffered by the little girl would suggest a very substantial impact. Her neck was broken, she had a large deep wound from the top of the right shoulder extending anteriorly to the axilla exposing the chest wall and severing the right arm and shoulder from the chest apart from a portion of the skin.

Although one of the passengers alighted from the vehicle when the accident occurred, the accused drove off without any attempt to give assistance to his victim. He tells the court that he was advised to do so by one of his

passengers. He was arrested shortly afterwards and, when examined by a doctor at 10.40am, was still under the influence of alcohol.

When the facts were opened by the prosecution, there was no up to date record of the accused's previous convictions. This court has stated many times that the prosecution has a duty to be ready with that information at the time a case is brought to the court. If, as prosecuting counsel advised the court occurred in this case, the police say they have not a complete record, they must be advised it is imperative that it is produced for the court hearing.

It has now been produced. The accused has been convicted on five previous occasions. The first was in 1995 for assault. After that he did not appear again until July 1998 for theft. He again appeared for a similar offence in March 1999 and went to prison for the first time. On 11 June 2001 he appeared in this Court and was sentenced to a total of 18 months imprisonment for housebreaking and theft concurrent but the total sentence was suspended for 2 years. He was also fined. However, on 2 October 2001, he again appeared before the magistrates' court for embezzlement and theft for which he was sentenced to 1 year in prison. What concerns this Court is that it appears the magistrate purported to implement the suspended sentence ordered by the Supreme Court and also to make it concurrent giving a total of 18 months imprisonment. That would appear to be outside the jurisdiction of the Magistrate and possibly in breach of the terms of section 24(3)(e). It is also relevant that the Supreme Court file has nothing recorded in it to show that any action has been taken on the suspended sentence order leaving the possibility of an inadvertent further order.

I do not consider, however, that it would be a proper step for me now to take any action on that order or on my original suspended sentence. I shall leave it to the prosecution to decide whether and how to appeal the magistrate's order. As it involves a Supreme Court order, that may have to be by way of appeal the Court of Appeal but I make no ruling on that point.

I pass now to sentence. The accused is 23 years old and has had the benefit of an education up to and including the National Form 7 which he attended in 1998. Before going to prison last month, he worked as a panel beater. He lived with and, no doubt, supported his mother.

Mr Tu'utafaiva tells the Court that he is extremely remorseful and I accept that is the case. He has not attempted to approach the parents of the little girl he killed with any customary apology but I also accept this may be the result of fear of their reaction more than a demonstration of lack of remorse.

He has already been to prison albeit for totally different types of offence.

Apart from his youth, the only other mitigating factor is his plea of guilty. I give credit for that but I also note that, in the face of such overwhelming evidence, his plea is largely an acknowledgment of the inevitability of conviction. It does, however, save the child's mother needing to give evidence and thus having to relive the dreadful events of that day.

Aggravating factors, on the other hand, abound. This was a deliberate case of drinking whilst driving. The way the accident occurred shows that the driver was so affected that he could not control his vehicle properly and he failed to stop and take action to help his victim. He speaks of fear and I accept that may be a factor but in any such case there is no excuse for failing to inform the police immediately.

This Court hears all too often of cases where drivers have been drinking as they drive around and innocent people have died as result. The maximum penalty for manslaughter by negligence has recently been increased to 25 years imprisonment. It is hard to imagine a case worse than this but I must accept that the Courts in Tonga have been passing sentences well below that limit.

I consider I am bound by the sentences passed previously when determining the sentence in this case but I make it plain that, in future, in cases where death occurs as a result of a person deliberately drinking alcohol whilst actually in a vehicle he is driving, the Court should and will pass sentences much nearer the maximum prescribed and no doubt intended by Parliament only two years ago.

In this case the sentence is one of four and a half years imprisonment. As I am now required to do, I state that, had it not been a plea of guilty, the sentence would have been one of five years imprisonment. That is made up as follows:

- Count 1 - Manslaughter by negligence; four and a half years imprisonment.
- Count 2 - Drunken driving; 18 months imprisonment concurrent.

The accused is disqualified from holding, obtaining or applying for a driving licence for five years.

In determining this sentence, I have assumed the accused is already serving a sentence of 18 months imprisonment and this sentence shall be consecutive to any such sentence if it is re-imposed after appeal.



CHIEF JUSTICE

NUKU'ALOFA: 13 November 2001