

IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NEIAFU REGISTRY

CR 143 of 2018

BETWEEN: **REX**

- **Prosecution**

AND: **LOSELI TONGA**

- **Defendant**

Counsel: **Mr 'A Kefu SC and Miss J Sikalu for the Prosecution**
 Mrs L Kuli for the Defendant

Date of Hearing: **22 March 2019**
Date of Ruling: **22 March 2019**

SENTENCING REMARKS

The charges

- [1] Mr Tonga pleaded guilty on indictment to three counts of reckless driving causing death contrary to s. 25(5) of the Traffic Act; three counts of reckless driving causing grievous bodily harm contrary to s. 25(4) of the Traffic Act and two counts of reckless driving causing bodily harm contrary to section 25(3) of the Traffic Act.
- [2] The maximum penalty for the offence of reckless driving causing death is 15 years imprisonment.
- [3] The maximum penalty for the offence of reckless driving causing grievous bodily harm is 7 years imprisonment or a fine of \$25,000 or both.

- [4] The maximum penalty for the offence of reckless driving causing bodily harm is 3 years imprisonment or a fine of \$10,000 or both.

The facts

- [5] The facts are not in dispute and are tragic. The summary of facts is accepted in its entirety. I summarise its contents in the following paragraphs in so far as they are relevant to sentence.
- [6] On 13 October 2017, Mr Tonga was drinking at home in Leimatu'a with another man from about 2pm. They went to a nightclub around 9 or 10pm in Mr Tonga's father's pick-up truck. He drove despite having been drinking and not being the holder a full driver's licence. They stayed at the nightclub until it closed at around 1am the next morning. Whilst there, they met up with some others and Mr Tonga drove the group to a lookout spot known as Li-'o Mata'aho at Leimatu'a where they continued to drink. There they were joined by more revellers who also took part in the drinking party.
- [7] At around 7am they all got into or onto the pick-up to drive into town to get more alcohol. There were 7 men (including Mr Tonga) inside the cab of the pick-up and 5 men outside on the tray.
- [8] Mr Tonga was intoxicated and was driving extremely fast and was sleepy. The pick-up swerved hard to the left and threw three men from the tray. It then skidded and flipped a number of times coming to halt in an upright position inside a bush patch facing the left side of the road.
- [9] Three men who had been on the tray were thrown and killed either immediately or very soon after the crash. It is only proper that I acknowledge them. They were 'Ulaea Havea of Leimatu'a, 'Anitelu Tufunga Katoa (also known as Semisi Katoa) of Leimatu'a and Kasete Kivalu Latu of Makave. Three others suffered serious injuries; one a serious head injury and the other two broken bones (a tibia and right clavicle). Two others suffered less serious injuries in the form of lacerations and abrasions.
- [10] Mr Tonga was also injured and despite being brought before the Court promptly the Police inquiries were put on hold for a number of months until he was fully recovered. Mr Tonga was co-operative with the Police and when he appeared

before the Court on arraignment he pleaded guilty to all of the charges at the first opportunity.

The material before me

[11] I have been provided with and considered the following:

- (a) The Prosecution's sentencing submissions;
- (b) Submissions filed on behalf of Mr Tonga by Mrs. Kuli; and
- (c) A pre-sentence report.

[12] I have also heard oral submissions from counsel.

The Prosecution's submission

[13] The Prosecution submits that Mr Tonga's offending has the following significant aggravating features namely:

- (a) The disregard Mr Tonga displayed for the safety of his passengers;
- (b) His intoxication;
- (c) Driving at excessive speed;
- (d) That he did not have a licence to drive; and
- (e) That the incident resulted in 3 deaths and injuries to 5 others.

[14] The Prosecution submits that it is relevant that Mr Tonga has previous convictions. He has a conviction dating back to 2009 for wilful damage but most concerning for present purposes is that he was convicted in the Magistrates' Court on 15 January 2019 for careless driving and for being in charge of a motor vehicle under the influence of drink and sentenced to a period of imprisonment. This offending occurred well after the events that are the subject of these charges and whilst Mr Tonga was waiting to come before this Court to answer them.

[15] The Prosecution accepts that Mr Tonga is entitled to credit for his co-operation and early guilty plea.

[16] I was referred to some useful recent cases, although none of them involved the death of more than one person or such a large number of other victims. Nor did the offending in those cases have such a confluence of aggravating features as are present in this case.

[17] Mr Kefu submitted today that the appropriate starting point for sentencing purposes is 10-12 years imprisonment, that Mr Tonga is entitled to discounts for remorse and his early guilty plea but that no part of the sentence should be suspended.

Defence submissions

[18] Mrs. Kuli referred to the mitigating factors referred to above and also asked me to regard Mr Tonga as a first time offender (when these offences were committed) and that he has assisted the victims' families (including with funeral costs) and made peace with them in the customary way. She also asked me to take into account that Mr Tonga is an only son and his father is a widower and needs his support.

[19] Mrs Kuli referred to the case of *R v Latu* (Unreported, Supreme Court, CR 92 of 2018, 24 August 2018 Paulsen LCJ) and accepted that because of the number of victims the starting point for sentencing purposes should be higher than the 5 years and 6 months adopted in that case. She submitted that all sentences imposed should be concurrent and some part of the sentences suspended.

Pre-sentence report

[20] Mr Tonga is a single 28 year old and comes from a good family and did well at school but then withdrew from 'Atenisi University for financial reasons. He is a self-employed farmer and supports his father. It appears that whilst he is active in the Church and well regarded there, he has difficulty with civil authorities and that a poor peer group and a significant alcohol problem are the cause of his offending and community difficulties.

[21] It is suggested that Mr Tonga does take responsibility for his actions by admitting to these offences, in providing for the victims and their families and in his acknowledgement that a lengthy prison sentence is inevitable. The report writer expressed concern that he had committed other driving offences associated with

alcohol use since these events occurred and that he had failed to mention this offending during his interview.

Discussion

- [22] This case is unusual in both the degree of Mr Tonga's recklessness and in the number of victims, including three young men who have died. Mr Tonga has admitted that he was seriously reckless by the fact of his guilty plea.
- [23] It has been recognised overseas (*Gacitua v R* [2013] NZCA 234) that sentencing in cases in which death has been caused by dangerous or reckless driving is highly fact specific. Much will depend in each case on the particular circumstances of the offending.
- [24] The maximum sentence for reckless driving causing death is 15 years imprisonment reflecting the seriousness of the offence and 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 Fannua* [2016] Tonga LR 208, Cato J).
- [25] The Courts must give effect to the Legislature's intentions which includes recognition that a penalty near to the maximum sentence prescribed for an offence is appropriate and should be imposed if the offending is near to the most serious of cases for which the penalty is prescribed (*Begg v Police* [2016] NZHC 2639, Nation J).
- [26] In *Fannua* 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.
- [27] I agree with that statement but note also that deterrence is but one of the relevant considerations which the Court has to take into account when imposing sentence. Other considerations include holding the accused personally accountable for the harm he has done to his victims and to the community, to promote in him a sense

of responsibility for his actions, to denounce his conduct and also promoting the rehabilitation and reintegration of the offender.

- [28] In *Fanna* the accused was convicted of one count of reckless driving causing death when he had tried to overtake a minibus in a manner that caused it to overturn resulting in the victim being thrown from the minibus and killed. Cato J found that excessive speed was a contributing factor. He also held that the starting point for sentencing purposes for the offence of reckless driving causing death should be 4 to 5 years imprisonment but that:

In cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased...

- [29] *Fanna*, was a case where the accused's recklessness was to my mind at the lower end of the scale but Cato J adopted a starting point of 4 years and 6 months which was 4 years plus an additional 6 months imposed because the accused chose to drive without a licence.
- [30] In *R v 'Aisea* (Unreported, Supreme Court, CR 160 of 2018, 15 February 2019, Paulsen LCJ) the accused had caused the death of one young girl and injured her sister when he had been forced to drive off a busy road while undertaking an unsafe passing manoeuvre. I adopted a starting point of 4 years imprisonment because I considered the accused's recklessness to be only moderate as there were no elements of very excessive speed or alcohol use and the accident occurred due to the exercise of poor judgment when making the passing manoeuvre. The circumstances were so markedly different from the present case that it offers little assistance.
- [31] The case of *Latu* is more relevant. It involved more serious offending than in *'Aisea* or *Fanna*, but certainly less serious offending than in the present case. The accused was charged with one count of reckless driving causing death and one count of reckless driving causing grievous bodily harm. He had been driving intoxicated and at excessive speed despite others in the car telling him to slow down. I adopted a starting point for sentencing purposes of 5 years and 6 months imprisonment. I considered this lenient at the time and said so in my sentencing remarks.
- [32] In this case, the charges fall into three distinct categories. Clearly the charges of reckless driving causing death are the lead offending. The approach that I take is to

arrive at an appropriate starting point for sentencing purposes on those charges reflecting the aggravating and mitigating features of the offending. I will then adjust that starting point for mitigating and aggravating factors relevant to the accused before applying a discount for his guilty plea. I then consider whether having regard to the totality principle the sentence arrived at is consistent with the gravity of Mr. Tonga's offending. Finally I will consider whether any part of Mr Tonga's sentence should be suspended.

- [33] This offending occurred after Mr Tonga had spent many hours drinking first at his home, then at a nightclub and then at the lookout. He chose to drive despite the fact that he did not have a full licence and despite his intoxication. He had no business at all being behind the wheel of any vehicle. He drove not only himself but he took one man to the nightclub, more from the nightclub to the lookout and then on the drive back into town even more passengers either in the cab or on the tray of the pick-up. He was driving back to town to get more alcohol to carry on the party. The pick-up had too many passengers. There were 5 men in the back seat alone and 5 on the tray. Mr Tonga was putting all of them at risk but most particularly those who could not sit in the vehicle and were on the tray. There was an extreme risk that in an accident they would be thrown from the tray and this occurred leading to three deaths. In addition, Mr. Tonga drove at excessive speed and despite being sleepy after his many hours of partying.

- [34] The aggravating features of the offending therefore were:

- (a) Mr Tonga was intoxicated;
- (b) Mr Tonga chose to drive others in his intoxicated state, not once but on three separate occasions;
- (c) On the final occasion Mr Tonga was driving not to return home but to get further alcohol to continue the drinking party;
- (d) Mr Tonga had an excessive number of passengers so that 5 had to sit on the tray and were especially at risk of harm;
- (e) Mr Tonga drove at excessive speed;
- (f) Mr Tonga drove while he was sleepy;

- (g) Mr Tonga had no full licence to drive the vehicle;
- (h) Three young men lost their lives;
- (i) Three others suffered significant injuries including broken bones; and
- (j) Two others suffered less serious injuries.

[35] I can see nothing in the circumstances that could be considered a mitigating factor of the offending and none was suggested to me. The offending is clearly at the very higher end of the scale requiring a commensurate response from the court by way of sentence. I do accept that the offending could have been even worse had, say, Mr Tonga had a previous history of offending for this type of offence or had the victims included pedestrians or persons who were not part of his party or had even more of Mr Tonga's passengers suffered serious harm or death.

[36] As noted, in *Latu* I adopted a starting point of 5 years and 6 months imprisonment but this is far more serious offending. The additional aggravating features of the offending in this case include the excessive number of passengers, that some passengers were particularly at risk on the tray, that Mr. Tonga was driving whilst sleepy, that he did not hold a full licence and the number of victims.

[37] I had initially considered that a starting point of 10 years imprisonment was appropriate but reflecting on the submissions of counsel I have decided to add 3 ½ years to the starting sentence in *Latu* to reflect the additional aggravating factors (particularly the number of victims) and arrive at a starting point of 9 years imprisonment. I have added 3 years to the starting point in *Latu* due to the additional number of deaths and injured victims and a further 6 months for the additional aggravating features.

[38] That Mr Tonga is a dutiful son and that his father needs his support are not relevant factors in sentencing for an offence such as this. Mr Tonga is entitled to credit for his cooperation with the Police. I am prepared to accept that he should be treated as a first offender (even though he has since re-offended) and that he has shown some remorse reflected in the steps he has taken to assist the victims' families. I would usually discount his sentence by up to 12 months for these matters but I must also take account of the fact that he has re-offended which indicates a lack of both

awareness and accountability or, as the pre-sentence reports states, that he has not learned his lesson. Weighing these matters I discount his sentence by 9 months.

[39] Mr Tonga is also entitled to credit for his early guilty plea but I must take account of the fact that given the circumstances of the case the prospects of Mr Tonga ever successfully defending the charges were remote. I have taken what I consider a very generous approach and discount his sentence by a further 18 months to arrive at a sentence of 6 years and 9 months imprisonment. I note that in all Mr Tonga has had his sentence reduced by 25% to reflect the mitigating factors and his guilty plea.

[40] I now stand back and consider whether this sentence is consistent with the totality of the gravity of Mr Tonga's offending. My assessment is of course largely a matter of impression. The sentence is higher than has been imposed in other cases for the same offence but this is only to the extent that it reflects the much more serious offending. My impression is that a strong case could be made for a higher sentence and that perhaps in line with my original view the starting point I have adopted is too low. Upon reflection over the last 4 days, since Mr Tonga entered his guilty plea, I have concluded that I should not increase the sentence which I have arrived at on a principled basis in line with the authorities. It is within the range of sentences that could be imposed balancing the gravity of the offending and relevant sentencing considerations to which I have referred. I have also had regard to Mr Tonga's age and circumstances and whilst the sentence is lengthy it is not crushing on his future prospects.

[41] I agree with Mrs Kuli (based on the principles in *R v Mo'unga* [1998] Tonga LR 154) that Mr Tonga is entitled to have some part of his sentence suspended. Clearly in a case where the degree of criminality of the offending is high and the consequences so terrible any suspension can only be partial. I am concerned at Mr Tonga's reoffending which combined with his alcohol dependency may indicate that he may be resistant to rehabilitation. On the other hand, I consider that society will be best served should he be released at the end of his sentence subject to conditions that allows him to acquire life skills, deal with this addiction and re-establish his life.

Result

[42] The sentences I impose are as follows:

- (a) On the offences of reckless driving causing death (counts 1, 2 and 3) Mr Tonga is sentenced to 6 years and 9 months imprisonment:
- (b) On the offences of reckless driving causing grievous bodily harm (counts 4, 5, and 6) Mr Tonga is sentenced to 2 years and 6 months imprisonment:
- (c) On the offences of reckless driving causing bodily harm (counts 7 and 8) he is sentenced to 1 and 6 months imprisonment:
- (d) The above sentences of imprisonment are to be served concurrently:
- (e) The last 15 months of Mr Tonga's sentence shall be suspended subject to the following conditions:
 - (i) He will commit no offences punishable by imprisonment during the period of suspension;
 - (ii) He will be placed on Probation during the period of suspension and is to live where directed by his Probation Officer;
 - (iii) He is not to consume alcohol or any illicit drug during the period of his suspension; and
 - (iv) He is to undertake and successfully complete within 6 months of his release both a Life Skills and a Drug and Alcohol Abuse course with the Salvation Army or some other suitable provider as directed by his Probation Officer.

[43] In addition to the above pursuant, to s. 29(1) of the Traffic Act I disqualify Mr Tonga from obtaining any driver's licence for a period of 3 years from today.

NEIAFU: 22 March 2019.




O.G. Paulsen
LORD CHIEF JUSTICE

cc Probation
Salvation Army