

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

CR 77 of 2019

BETWEEN: R E X - Prosecution

AND: VITALINI LAFAELE LIKU'OHIHIFO - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho for the Prosecution
Mr. S. H. Tatila for the Accused

S E N T E N C E

[1] The defendant, Vitalini Liku'ohihifo, pleaded guilty being represented by counsel, Mr Tatila, at an early opportunity to one count of reckless driving causing death that carries a maximum sentence of 15 years imprisonment. The particulars of the offence for which he had pleaded guilty were as follows;

“on or about 8th September, 2018 at Nualei, Tongatapu, he did drive a motor vehicle in a speed and manner which was dangerous to the public, and he did not pay proper care and attention to all circumstances, when he was driving at a high speed along Taufa'ahau Road in an easterly direction, and he overtook two motor vehicles, and the motor vehicle he drove hit Piukala Laumana, causing him injuries which caused his death.”

[2] Ordinarily, conviction for an offence of this seriousness will in Tonga attract a significant prison sentence which generally will at best only be partly suspended. Having considered the summary of facts, I considered that it was likely that the offender would be imprisoned for a period of time, and consequently remanded him in custody under section 4A (1) of the Bail Act pending sentence. He has been remanded since the date of his guilty plea on the 14th May 2019.

- [3] This matter originally involved a charge of causing death whilst under the influence of alcohol contrary to section 26A of the Traffic Act on the 17th October 2018 but this charge was later withdrawn and the Crown proceeded on the present charge. Had the accused pleaded guilty to the original charge involving alcohol, it is extremely likely that I would not adopt the course I am going to follow today and that I would have required him to serve some part of a sentence of imprisonment albeit considering the strong mitigation that he has presented. I observe that in *Rex v Tan'alupe* [2012] Tonga LR141, at 144, the Court of Appeal observed in rather exceptional circumstances that arose there, in dismissing a Crown appeal against a fully suspended sentence where excess alcohol was involved;

“However, this judgment should not be understood as condoning a sentence on a young first offender who has brought about the death of another by driving a motor vehicle while drunk, which did not involve a period of actual imprisonment.”

- [4] The facts reveal that Mr Liku'ohihifo aged 29 had been consuming alcohol with friends for several hours at bars in Nuku'alofa and was returning to his home in Kolonga. I am satisfied that in withdrawing the original charge, the prosecution could not prove that he had consumed excess alcohol and I approach this sentence on that basis. He approached an intersection on the Taufa'ahau Road at Nualei travelling in an easterly direction in the early hours of the morning. The summary of facts which Mr Liku'ohihifo admitted records;

“As the accused was approaching the intersection turning left to Folaha he was driving an approximate speed of 50-60 kilometres per hour, and attempted to overtake two vehicles that were in front of him by driving on the right side of the road, still in an easterly direction.

At this point, the accused states that the deceased crossed from the right side of the road and was standing at about the middle of the road when the accused hit him with his motor vehicle.”

- [5] Prior to this hearing, Mr Tatila had filed a very comprehensive and helpful written submission on behalf of his client. He submitted that his client had not been travelling at excessive speed and, nor according to his client, had his visibility as to any oncoming cars been impaired. He submitted that he had little opportunity to avoid the collision and that in all likelihood, the deceased, who may have been affected by alcohol had stepped into the road in front of Mr Liku'ohihifo's car as it

was being driven on the right hand side of the road giving him little opportunity to avoid the collision. I was concerned enough about this submission to ask the Crown to clarify the basis upon which I should proceed to sentence the offender. It was not the first case I have encountered in Tonga where pedestrians under the influence of alcohol have walked out into the road and been hit by passing vehicles leading to an acquittal of the driver on a charge like this.

- [6] I was informed that the area where the collision occurred was a 70 kph area so Mr Liku'ohihifo could not be said to be travelling at a speed which was unlawful. The Crown submitted, however, that he had broken Regulation 20 para 6 of the Traffic Regulations which states that;

“No driver shall overtake or attempt to pass any vehicle proceeding in the same direction in the following circumstances-;

- (a) At an intersection or within a distance of 30 feet before an intersection;
- (b) unless the driver has a clear view of the road and the traffic thereon for a distance of at least 300 feet in the direction in which he is travelling and the road is clear of traffic travelling in the opposite direction and the driver is personally satisfied that he is able to safely comply with this provision.”

- [7] Although this regulation was not mentioned in the particulars, the particulars refer to the manner of driving being dangerous to the public, and driving with deficient care and attention. The Crown produced sketch plans of the accident area which suggests that Mr Liku'ohihifo collided with the deceased at a distance considerably less than 300 feet from the intersection. There is evidence of skid marks before the collision.

- [8] In my view, it would have been open for Mr Liku'ohihifo to have defended the charge on the basis that the deceased had stepped out suddenly in front of his vehicle and he had no opportunity of avoiding the accident which raised a defence of an inevitable accident for which the defendant was not causatively liable. The Crown pointed out that the deceased had suffered injuries on his left side and head suggesting that he had been looking to the right when the collision occurred. That said, I am also satisfied that the fact that Mr Liku'ohihifo was overtaking two vehicles at a considerable although not excessive speed at night in an area where on one side of the road there was housing, meant that there was a real risk that an

accident might occur. This is not a case where, to my mind, it could be clearly established that, in the circumstances, Mr Liku'ohihifo did not drive recklessly or in a manner dangerous to the public. In pleading guilty, Mr Liku'ohihifo has saved the prosecution having to prove the case which would have no doubt have resulted in evidence being led as the part the victim played and whether his possible intoxication and conduct played any significant part in the events. In *R v 'Alonili*, CR 50/2018, 29th March, 2019 cited to me by Mr Tatila, for example, I found the accused not guilty of the same charge where I was not satisfied that the accused had caused the death of a pedestrian who probably had been intoxicated when suddenly crossing the road and the collision, in my view, was no more than a tragic accident for which the driver was not responsible.

[9] I am satisfied that the plea was one on the evidence that I could accept and one which no doubt the accused and his counsel accepted as a better course to adopt than to defend, in all the circumstances particularly in the light of Mr Liku'ohihifo's overtaking movement of two cars, his obvious contrition and it seems acceptance that he was at fault in causing the victim's death. Having said this, however, I consider his plea of guilty in these circumstances is a further mitigating factor that I can take into account beyond that as reflected ordinarily in a guilty plea.

[10] I have read the extensive material prepared by Mr Tatila and a useful probation report. From a modest beginning, Mr Liku'ohihifo has obtained good qualifications and holds a senior accounting position in Tonga. He is a young man of considerable promise. He is a committed Christian and there are several references to this and the role he plays in the Church including a reference from Cardinal Mafi. I have no hesitation in finding he is a young man of good character, having no previous offences. Further, he stopped and rendered assistance at the scene of the accident. He did not decamp as some do in similar circumstances. His family and he played a considerable role with the deceased family in relation to funeral arrangements and providing monetary compensation and food for the family, and for the funeral. The victim's brother, Reverend Tomasi Laumanu, an older brother of the victim speaks highly of him today and provided a written reference asking for mercy. I consider this is an important factor for me to consider in mitigation. His apology has been accepted by the family. This is an important factor also when it comes to sentencing in Tonga. He is obviously contrite as further reflected in his plea and approach to it.

[11] I have, however, because of the seriousness of the charge as I explained to Reverend Laumanu, who would have preferred no penalty to follow, to impose a sentence of imprisonment to reflect the manner of driving and the fact a death has resulted. I do this, however, by imposing a starting point of three years imprisonment which is considerably less than the starting point of 4 to 5 years ordinarily imposed for such offending. This is mitigated or discounted by 15 months imprisonment, to reflect his guilty plea, remorse, apology and compensation, and his good character. Also, I take into account the fact that he has pleaded guilty in circumstances, as I have said, where there was, in my view, an arguable defence, I detect in part at least because he considered this was the right thing to do. The sentence of imprisonment I impose is accordingly one year and nine months imprisonment.

[12] I accede also to Mr Tatila's submission that his sentence should be one that is fully suspended. This is rather exceptional but, in my view, appropriate in this case for the reasons I have given. I consider that he has gone a long way already to rehabilitate himself by the actions and the attitude he has shown. I take into account, in this regard, also that he has been remanded in custody pending sentence. The conditions upon which I suspend his sentence are;

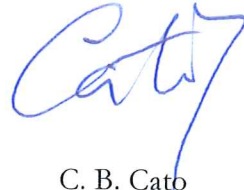
- a) He is not to commit any offences punishable by imprisonment during his suspension;
- b) He is not to drink alcohol during the term of his suspension;
- c) He is to undergo a course on alcohol abuse under the direction of probation and the Salvation Army;
- d) He is to perform 45 hours community work under the direction of probation – a suggestion being he do accounting or similar work for some suitable charitable or other organization.

[13] I have imposed a lower period of community work than in other cases involving fully suspended sentences for serious offending to reflect the fact that he was remanded in custody pending sentence for about a month. I note also that I have included conditions as to alcohol abstinence and a course on alcohol abuse because the background to this offending, I consider, suggests Mr Liku'ohihifo may benefit from some education on the perils of alcohol. Many a good career and reputation have floundered as a consequence of alcohol abuse, and he would do well to reflect upon this.

[14] He is warned that a failure to abide by these conditions may mean that he has to return to prison to complete his sentence. He is to attend the Probation office with a copy of these orders no later than Wednesday 18th June, 2019 by 3.00pm to make arrangements for his community work and course on alcohol abuse to be undertaken.



NUKU'ALOFA: 14 June 2019


C. B. Cato
JUDGE