

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CRN 322/07, 323/07, 772/07,
773/07, 771/07**

BETWEEN

THE POLICE

Plaintiff

AND

TEVITA VAKALALABURE

Defendant

JUDGMENT OF WESTON J

Judgment as to Sentence: 18 June 2009 (New Zealand time)

- [1] After a hearing on 5, 6 and 7 November 2008, I found the defendant guilty (in terms of section 25(2) Transport Act 1966) in a written judgment of 27 November 2008. The relevant offences were those charged in CRN 322/07 and 323/07.
- [2] Because my judgment was written after I left the Cook Islands, the question arose as to how sentencing should be handled. The defendant requested that I impose sentence. Accordingly, on 9 April 2009, Williams CJ issued a minute confirming that his request would be granted and that I would impose sentence. The Chief Justice set out a timetable. In terms of that timetable written submissions have been filed and neither party has asked for a telephone hearing. I therefore proceed to give my judgment as to sentence.
- [3] In my judgment at paragraphs [12] – [22] I set out the core facts as follows:
- “[12] The essential facts are not in dispute and I find them to be as follows. Equally, where items are in dispute I will note that and reserve them for subsequent analysis.
- [13] The Police set up a checkpoint in the early hours of Saturday morning, 23 June 2007, to check for drivers

affected by drink or drugs. The checkpoint was in place on the main road passing in front of the Bond Store, Avatiu and on that half of the road leading away from town in the direction of the airport. The checkpoint was located at the point the double lane terminates into a single lane. The Police had closed off the right-hand lane with reflectorised cones. This configuration forced on-coming traffic into the left-hand lane where each driver (whether of a car, motorcycle or otherwise) was assessed. During the course of the checkpoint some 40 to 50 vehicles passed through it.

- [14] The quality of the lighting at the checkpoint area was put in issue and will be discussed in more detail below. I have been assisted in reaching my conclusions by the site visit I made to this area and which I have mentioned above. I also note that Georgina Matutu's deposition contained uncontroverted evidence that the lighting was good in the area.
- [15] The incident which has resulted in the various charges involved four motor vehicles in total: two motorcycles and two cars. At approximately 2am Sergeant Matapo, who was operating as points-man, flagged down the two motorcyclists. One of these was Georgina Matutu, one of the victims. The other motorcyclist was Amy Auora (she did not give evidence at the trial). Police officers spoke to both of the motorcyclists who were then allowed to proceed on their way. In the meantime, a black Honda driven by Jerry Varinava had stopped behind the motorcycles. The Police beckoned him forward and he started to move his car towards the Police Officers.
- [16] As he did so, the car driven by Mr Varinava was hit from behind by a green Nissan convertible. The Police allege the defendant was driving this car. The defence case is that the defendant's wife (Lavenia Rokoika) was the driver. The prosecution case is that she was a passenger in the rear seat of the car at the time of impact.
- [17] The evidence establishes that the green Nissan was travelling at approximately 40kmh shortly prior to the impact. It may have braked at the last minute but the speed of impact was still reasonably substantial. Photos put in evidence showed the damage to both the green Nissan and the black Honda. In each case, it was reasonably significant.
- [18] Following the collision, the black car shot forward, ultimately stopping some 20 or 30 metres further on beside a lamp-post beyond the Bond Store. Mr Varinava said that the shock of the impact resulted in him putting his foot on the accelerator so that the car shot forward. The black car knocked over the two motor cyclists.
- [19] All evidence, except that of the defendant, was consistent with the black car shooting forward in this way. The defendant said that following the impact the green Nissan stopped in its tracks and all occupants of the car got out. Some seconds later the black car then accelerated away and ended up by the lamp-post beyond the Bond Store. While other defence witnesses supported his evidence that the occupants of the green car got out of it following the

impact, Mr Vakalalabure was the only one to say there was a period of time following the collision before the black car shot forward. I return to this below.

[20] Although the defence witnesses said that the occupants of the green car got out of it immediately following the collision, the Police witnesses gave evidence to different effect. With some minor inconsistencies, which I will discuss below, the Police witnesses said that the occupants of the green car remained in it until the defendant was directed to drive it off the road and on to the shoulder beside the Bond Store. It is common ground that the defendant drove the car at that point but the charges do not relate to that act of driving. Rather, they focus on the driver at the time of impact.

[21] Once the collision had occurred, and the green car was driven to the side of the road, Sergeant Matapo approached Ms Rokoika to speak to her. Sergeant Matapo gave evidence that Ms Rokoika did not say anything. Sergeant Matapo said that Ms Rokoika was sitting in the rear seat of the green car at that time. Constable Makara said the same.

[22] The defendant was then taken back to the Police Station in Avarua and charged with drunken driving as a holding charge. This charge was subsequently withdrawn and replaced by the five charges mentioned at the outset of this Judgment. Ms Rokoika and a Mr Naibalu (who had been a passenger in the green car) then walked back to the Police Station and waited in its foyer for the defendant to be processed and released on bail."

[4] In paragraph [74] I found that all five elements of drunken driving had been established and I said the following:

"[74] As noted at the outset, Counsel accepted there were five elements that needed to be proved before the offence of drunken driving causing injury was established. The identity of the driver was the first one. I have already found that that element has been proved. I now turn to the other four elements. I note that none of these elements was seriously contested by the defence.

[75] The second element requires that the defendant was driving while under the influence of drink or drugs. Something about this has already been said above. On the evidence before me, I have found that over a period of some six hours the defendant consumed 15 cans of beer. I uphold Sergeant Matapo's evidence that his walking was unsteady, his eyes were bloodshot and his speech was slurred. She gave evidence about recognising drunkenness and her experience in doing so which I accept. I find this element is made out.

[76] Thirdly, the defendant while under the influence of drink must have been incapable of having "proper control" of the vehicle. The Police argued that this was satisfied essentially on the same basis as carelessness. That is, the prosecution must prove beyond reasonable doubt that the defendant did not meet the requisite standard of care and attention that a reasonable and prudent driver would

exercise in the circumstances. In *Stratford v MOT* [1992] 1 NZLR 486 the Chief Justice, at page 490, referred to the civil law doctrine of *res ipsa loquitur* as providing an analogous thought-process. That is, an inference might be drawn from proved facts which are so strong as to admit of no other conclusion. In the present case, I am satisfied this third element has been met. There was plenty of evidence from witnesses before the Court that the checkpoint was well lit and highly visible. I can draw an inference from the fact that some 40 or 50 vehicles passed through it that night, all without collision (except for the defendant), as evidence of that. The black car had its red tail lights on. The Police truck had flashing lights. The Police were in reflectorised vests and the cones also had reflector patches on them. The only conclusion in all the circumstances was that the defendant was so incapacitated that he did not see what was in front of the car. I find the defendant was incapable of properly controlling the green Nissan car. Thus, the third element is proved.

[77] The fourth element is that the defendant did or failed to do something. In this case, the defendant failed to stop the car prior to the checkpoint. This element is made out.

[78] The fifth element is that the defendant caused injury to someone. Here, there is no doubt that two people were injured, albeit not badly. The first was Mr Varinava who was in the black car which was directly hit by the green car. The second was Georgina Matutu who was knocked over by the black car as it shot ahead following the collision. I am satisfied there is sufficient causal relationship between the other elements of the offence and their injuries. I uphold this fifth element as well.

[79] As a consequence, I find all five elements of the charge of drunken driving causing injury in breach of section 25(2), Transport Act to be made out. Consequently, I find the defendant guilty of those offences charged in CRN 322/07 and 323/07. The other charges are all alternatives and, on the basis of my findings as above, I dismiss those other charges."

[5] In the course of my judgment I was required to consider certain evidence put forward by the defendant to the effect that he was not the driver of the car. I found at paragraph [55] that the defendant had fabricated this evidence. I gave my reasons for that conclusion in paragraphs [55] – [63].

The legislative provisions

[6] The defendant was convicted of two offences in relation to section 25(2) Transport Act 1966. That provides:

"(2) Every person commits an offence who, while under the influence of drink or a drug or such an extent as to be incapable of having proper control of the vehicle, is in charge of a motor vehicle and by an act or omission in

relation thereto causes bodily injury to or the death of any person."

- [7] The relevant penalty for such an offence can be found in subsection (3) as follows:

"(3) Every person who commits an offence against this section is liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred pounds."

- [8] In addition, section 31 provides there shall be mandatory disqualification in terms of subsection (1) which is in the following terms:

"(1) Every person commits an offence who causes bodily injury to or the death of any person by the driving of a motor vehicle recklessly or at a speed or in a manner which, having regard to all the circumstance of the case, is dangerous to the public or to any person."

- [9] There is provision for a limited licence to be granted. I refer to sections 31(3) and 31(4) as follows:

"(3) Subject to the provisions of subsection (1) of section 31 of this Act, on the making of an order of disqualification or at any time thereafter, the Court, on the application of the person in respect of whom the order is made, may, if it is satisfied that the order of disqualification has resulted or will result in undue hardship whether to the applicant, or to any other persona, make an order under this section authorizing him to obtain immediately or after the expiration of such period as the Court may specify, a driver's licence authorizing him to drive such kind of motor vehicle, and no other, for such purpose, and for no other purpose, and to such extent being at least extent that is necessary to alleviate that hardship as the Court specifies in that order:

Provided that no order shall be made under this subsection authorizing the applicant to obtain a driver's licence authorizing him to drive in connection with his occupation or employment, unless the Court is satisfied that such a licence is essential for the purposes of his occupation or employment and arrangements to obtain the services of another driver cannot conveniently be made."

"(4) Where the order of disqualification was made upon conviction for an offence in contravention of section 25, section 28 or subsection (2) of section 32 of this Act, no application may be made for an order under this section before the expiration of six months after the date of order of disqualification."

- [10] The offending predates the effect of the Transport Amendment Act 2007 (which came in to force on 12 November 2007). This increased the penalty for the offence to ten years imprisonment and a fine not exceeding \$10,000. This provision reflects the seriousness with which the legislature regards

such offending. For the avoidance of doubt, however, I cannot, and do not, take this amendment into account in sentencing the defendant.

Submissions

- [11] I have carefully considered the Crown's submissions on sentence of 31 March 2009 as well as the victim impact statements of Georgina Matutu and Jerry Varinava.
- [12] The Crown submissions accepted that a non-custodial sentence was appropriate. The Crown suggested that community service with a substantial period of disqualification and a significant monetary fine would serve to denounce and deter and make the prisoner accountable for his conduct. The Crown also sought an order for reparation in an amount of \$758.
- [13] The victim impact reports summarise the physical injuries suffered by the two victims and their subsequent fears of driving as a result of the incident that lead to these convictions.
- [14] I have also had the advantage of a report from the Probation Office. That report recommended "a *hefty fine*" and reparation to be paid to the victims.
- [15] The defendant's submissions argue that there should be a fine together with mandatory disqualification. It seems to be suggested that the historic range of fines for similar offending falls within \$120-\$250 although it is not clearly submitted (as I read the submissions) that any fine in this case should fall within that range. The defendant submits that disqualification should be for a term of three months.
- [16] The defendant also seeks a limited licence in terms of section 31(3).
- [17] The defendant denies the claim for reparation.

The Court's decision

- [18] This is not a case where imprisonment is sought nor is it a case where such a penalty is appropriate. Equally, I do not believe that community service is appropriate although I can understand why the Crown would have sought such a penalty. I believe the matter can be dealt with by way of an appropriate fine.

- [19] The maximum fine on each charge is £500. For the purposes of this Judgment I proceed on the basis that this is an equivalent of \$1000 per charge.
- [20] I believe the offences are at the serious end of the scale for which a fine is appropriate. The fact that the two victims were not more seriously injured seems to be a happy coincidence and not something for which the defendant can claim any credit.
- [21] The defendant's actions in fabricating his evidence, as I found, appears to me to be an aggravating factor. As the Crown submits, there do not appear to be any real mitigating factors. The defendant has referred to his drinking problems but I do not believe there should be any discount representing such a consideration. It is commendable that he is seeking assistance now but, for the purposes of this sentencing, that comes too little too late.
- [22] Mr Vakalalabure has been convicted on two charges but they essentially arise out of the one incident. I need to have regard to that in considering the overall impact of any fine. I also need to have regard to any order for reparation in arriving at an appropriate figure. Taking all of these factors into account I believe that Mr Vakalalabure should be fined \$600.00 on each charge.
- [23] I then consider the question of reparation. I have noted the defendant's submissions but I do not accept them. I order that he pay the sum of \$758.00 to Tom Tangimetua, the owner of the motorcycle driven by Ms Matutu.
- [24] The defendant is disqualified for two years in relation to each offence. For the avoidance of doubt, the two periods of disqualification are not cumulative. The overall effect is that the defendant will be disqualified for two years from the date of this sentence.
- [25] I do not believe I have jurisdiction to order a limited licence prior to the expiry of six months from today's date and I decline that invitation.
- [26] Accordingly I enter convictions on both of those charges described in paragraph [1] above. I sentence the defendant as follows:
- [a] the defendant is fined \$600.00 on each of the two offences;

- [b] the defendant is ordered to pay Mr Tom Tangimetua the sum of \$758.00 by way of reparation;
- [c] the defendant is disqualified from holding or obtaining a drivers licence for a term of two years from the date of this sentencing;
- [d] the defendant is ordered to pay Court costs in the sum of \$30.00 on each of the two convictions.

[27] The defendant is a practising lawyer. I direct that the Registrar supply a copy of this judgment and that of 27 November 2008 to the Chief Justice so that the Chief Justice may consider what action, if any, is appropriate under Sections 15-20 of the Law Practitioners Act 1994 as amended in 2008.

Weston J

