



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

**CR NO's 378-380/15**

**CROWN**

v

**MAHARA NICHOLAS**

Hearing: 22, 23, 24 and 25 November 2016  
Counsel: Ms A Mills for the Crown  
Mr N George for the Defendant  
Judgment: 28 November 2016 (Oral Judgment delivered)

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**JUDGMENT OF GRICE J (ORAL)**

**(including decision on application to invalidate trial due to defective informations)**

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[1] This case follows a tragic accident. Early on the morning of the 23<sup>rd</sup> July 2015 two motorcycles collided. The riders and each of the pillion passengers were thrown to the ground. The rider of one motor cycle was Vetina Nicholas. Ms Nicholas died of the injuries sustained in the accident some hours later at Rarotonga Hospital. The rider of the other motor cycle was the defendant Mr Mahara Nicholas. He suffered serious injuries in the crash. The two pillion passengers were also injured.

[2] As a result of the accident Mr Nicholas was charged with an offence under s. 25(2) of the Transport Act. That charge carries a maximum term of imprisonment of 10 years and a fine not exceeding \$10,000. Section 25(2) reads:

Every person commits an offence who, while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, is in charge of the motor vehicle, and by any act or omission in relation thereto causes bodily injury to or the death of any person.

[3] There is no dispute that the two riders of the respective motorcycles were Mahara Nicholas and Vetina Nicholas<sup>1</sup>. Nor is there any dispute that Mahara had been drinking during the evening leading up to the accident. There is considerable dispute as to how the accident occurred, who caused the accident, and what act or omission led to the collision. Vetina lived in the Cook Islands. Mahara lives in New Zealand and was here for the Te Maeva Nui celebrations in Rarotonga.

[4] Before considering the substantive issues I deal with a matter which was raised by Mr George for the defence at the end of his closing submissions. This relates to the informations and whether they were so defective as to be invalid.

[5] Counsel for the defendant submitted that the charges or informations were defective as they omitted a requirement of s. 25(3) that the act or omission of the defendant caused the death or injury. The information in relation to the causing death charge reads:

“... that Mahara Nicholas did drive a motor vehicle namely a black Yamaha Nuovo scooter registration number RAD714, on the main road at Ruatonga whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and thereby caused the death of Vetina Nicholas.”

[6] The information then refers to s. 25(2) and (3) of the Transport Act. Section 25(3) deals with the penalties. It was amended to increase the penalties by a 2007 Amendment.

[7] Due to this failure to refer to “the act or omission” counsel submitted that the information was so defective as to make the whole trial or hearing invalid. Presumably this would result in the trial being aborted or otherwise brought to an end. If Mr George’s submission were accepted, that would be the end of the charges.

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<sup>1</sup> I refer to them as Vetina and Mahara in this judgment. They are related.

[8] He also argued that the informations were further defective as they failed to set out or refer to s. 3 of the Transport Amendment Act 2007. This provision amended the penalty provision in s. 25(3) of the Transport Act.

[9] Mr George argued that these defects made the informations non-compliant with s. 16 of the Criminal Procedure Act. This requires every information to contain:

“...such particulars as will fairly inform the defendant of the substance of the offence with which he is charged.”

and the particulars of the alleged offence must:

“...so far as is possible, use the words of the enactment creating the offence, and may refer to any portion of that enactment, and, in estimating the sufficiency of any such information, the Court shall have regard to such words or reference.”

[10] Section 16(3) says the particulars must include:

“...the time and place of the alleged offence, and the person (if any) against whom, ... it was committed.”

The requirements of s. 16(3) are couched in mandatory terms. These requirements have been met.

[11] Section 16(4) provides:

“Except as hereinbefore provided no information shall be held to be defective for want of former substance.”

[12] Mr George submitted that failing to recite the words in the information was an important defect which prejudiced the defendant. Without those words, he says, Mahara would think that the Crown only needed to prove that he was under the influence of alcohol and that an accident occurred and so conclude that the Crown need not prove that an act or omission by him caused the injury or the death. In other words, Mr George said that the informations indicated only a temporal connection was required rather than a causative connection between the act and omission and the cause of injury or death.

[13] He submitted that as the Crown case was closed and the trial had finished it was too late to do anything about it. In response to a suggestion that the matter should have been raised earlier he said that he had only recently found the defect and had not been sitting on it for some time. Mr George also candidly agreed that he had run the defendant's case on the basis that the relevant act or omission relating to the injury or death was required. Nevertheless he said the prejudice was to the defendant personally as he did not have the full wording of the section set out for him.

[14] Mr George also submitted the fact that the defendant was under the influence of alcohol was a key issue for the Crown. This was illustrated by the pretrial matter about the admissibility of the blood alcohol evidence. Mr George said the Crown was so focussed on obtaining the evidence on the alcohol reading that this somehow indicated that the evidence of alcohol or being under the influence was the focus of the case to the exclusion of the act or omission causing the injury or death. Therefore, the submission went, Mahara was prejudiced by the defect in the informations as he would have thought he was done for and had no defence. He said this was the Crown's ulterior motive.

[15] The Crown in reply said that there was no prejudice. Ms Mills argued it was not mandatory to have the full wording of s. 25(2) of the Transport Act set out in the informations. She pointed to s. 16(4) of the Criminal Procedure Act which said that no information shall be held to be defective for want of substance. She said the omission was of minor significance and there was clearly no prejudice to the defendant.

[16] In support of her submission Ms Mills pointed out that Mr George had run his case and opened and closed it on the basis the act or omission was required. Similarly, the Crown had opened and closed its case on that basis. All elements of the charge were referred to during a pre-trial application and in the resulting decision of Hugh Williams J. Therefore, Mr George was well equipped to deal with the charges and all their elements.

[17] Ms Mills submitted that s. 18(3) of the Criminal Procedure Act allows the Court to amend a defect in the information during the trial. She noted that s. 47 allowed amendments to informations to be made by the Court. The amendment must

then be put to the accused who is asked to plead to it. It provides that any evidence already is deemed to have been given and for the purposes of the trial the charge is as amended or substituted. In that case either party has the right to recall and examine or cross-examine or re-examine any witness whose evidence had already been given in respect of the offence originally charged.

[18] Mr George said that the case had closed so the Crown could not amend the charges. The Crown relied on *R v Jones*<sup>2</sup> as authority for the proposition that the trial remained on foot. In that case the New Zealand Court of Appeal held that for the purposes of the New Zealand legislation, which is similar to that of the Cook Islands, the trial remained on foot until the completion of a reserved judgment. In this case the submissions were not yet been complete. I am of the view that the trial was not complete. If appropriate an application for amendment of the informations could properly have been made.

[19] The Crown further submitted that it did not intend to mislead the defendant. Nor did it mislead as it had opened and closed on all the elements. It was obvious that it intended to deal with all the elements of the charge.

[20] Ms Mills also referred to an earlier jury trial of *Timoti* in which Justice Hugh Williams presided in a Jury trial hearing a charge under s. 25(2) of the Transport Act. In that case the information also omitted the reference to the act or omission as in this case. Mr George appeared for the defendant in *Timoti*. There was no issue taken with the information in that case. The correct elements were put to the jury and the matter proceeded on that basis. The Crown argued this support for the fact that Mr George was fully aware of the elements of the offence. Mr George admitted that he was. He also said of course he was not misled as to the elements. He ran his case on the basis of the elements, but the fact that he knew all about it should not allow the Crown to get away with laying defective informations. He said it was not his duty to raise defects with the Crown case. He also said that if he were pressed over an amendment, and asked if he wished any witnesses recalled for re-examination in terms of s. 47, he would not wish to recall any.

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<sup>2</sup> *R v Jones*,

[21] I am satisfied that the informations sufficiently particularised the charges. The defects do not invalidate the proceedings nor do the informations require amendment. The defendant, through his counsel, was aware of the full elements of the case, and the particulars that he was facing. He was aware of this from an early stage at least from the time he instructed Mr George. This was before the pre-trial application. Mr George was well aware of all elements of the charge and ran his case on the basis that all were required to be proved. There was no prejudice at all accruing to Mahara.

[22] I am satisfied that the information contains sufficient particulars to fairly inform the defendant of the substance of the offence and they did fairly inform him. I do not have to deal with an application for an amendment or make an application by the Court. However if I was wrong I would have had no hesitation in amending the information to include the omitted words.

[23] Now I move to the substance of the case.

[24] The Crown case is that Mahara's black motorcycle collided head-on and slightly to the left front of Vetina's motorcycle. Both vehicles had pillion passengers on the back. On Mahara's motorcycle was Rewi Nuku. Vetina's pillion passenger was her friend Ngapare Noovao (Pare).

[25] The Crown says that Mahara was driving from Avarua township where he had earlier been at the Rehab Nightclub. He was travelling on the Main Road toward the airport near the Punanga Nui market. He was speeding. The speed limit in that stretch of road is 50 kilometres per hour. The road is a dual carriageway with one lane in each direction. The road leads to the airport so I will refer to the airport side and the Avarua side, although it was variously referred to in the evidence by reference to various locations and landmarks.

[26] The Crown says that Mahara travelled across to Vetina's side of the road and collided with her motorcycle. She was coming from the airport direction at a speed of something less than 40 kilometres an hour. The collision, the Crown says, occurred on Vetina's side of the roadway showing that Vetina was in the correct side of the road at the time of the accident and that Mahara had crossed over onto Vetina's side of the road.

[27] The lighting on the relevant part of the road was not good. The crash occurred on the Avarua side of the entrance to the Punanga Nui market nearest the airport. It occurred at a point where the road curves. Foliage grows on the seaward side or the Punanga Nui market side of the road. On the inland side of the road there are also hedges and foliage. There is a red shipping container on the inland side of the road near where the accident occurred. This featured in a number of the photographs.

[28] On the night the road surface was not marked with a centreline. The tar seal was relatively new, although there was no evidence of how long it had been down. The road surface now is marked with a yellow line down the centre. It is not clear when these markings were made.

[29] The Crown says Mahara was speeding in a range of 50 to 65 kilometres an hour based on the crash investigator's calculations. The crash investigator said that there was difficulty in establishing the speeds due to the likely deceleration by the vehicles before the accident.

[30] The Crown alleges that Mahara was impaired by the effects of alcohol. He had a blood alcohol reading some hours after the accident well in excess of the legal limit.

[31] Evidence was called from experts to indicate that Mahara's motor skills, judgement and risk taking behaviour would have been significantly detrimentally affected by the level of alcohol in his bloodstream. Witnesses gave evidence that he had been drinking for some hours before the accident starting on the "party bus" which left the Rehab Nightclub about 7 pm. On its return he went to the Rehab Nightclub. Subsequently with his pillion passenger he rode around the car park of the Rehab Nightclub. He was seen driving away from the Rehab Nightclub on the main road in the direction of the airport.

[32] A witness, Ms Ben, said she had seen him driving around the car park on the motorbike. She said he was weaving and driving in a sloppy manner. In addition a Rehab security guard, Duane Gokisuva, gave evidence that Mahara had had difficulty in walking and getting off the party bus in the evening and appeared to be affected by alcohol. He identified the person he observed as Mahara.

[33] Rewi Nuku, and Mahara's sister and brother had also been on the "party bus" and at the nightclub. They all had had a significant amount to drink. Ms Nuku had a high blood alcohol reading taken after the accident.

[34] On the other hand, Vetina had only a very slight trace of alcohol in her blood. Her passenger Pare had a level of 30 milligrams of alcohol per 100 millilitres of blood. This was the result of a drink Pare had taken shortly before the accident at Vetina's boyfriend's house.

[35] As will become apparent I am satisfied beyond reasonable doubt that Mahara was under the influence of drink to such an extent as to be incapable of having proper control of a motor vehicle. However I am not satisfied beyond reasonable doubt that it was Mahara who caused the act or omission that led to the injuries and death. I am not satisfied that he crossed the centreline or by virtue of his speed or otherwise caused the accident.

[36] There is a difference between proof as to the fact that his driving was impaired before the accident and that it was his act or omission that caused the collision and thereby the death and injuries alleged.

[37] Section 28 of the Transport Act is a lesser charge than those laid in this case. That charge relates to being under the influence of drink or a drug to such an extent as to be incapable of having proper control and driving or attempting to drive a motor vehicle on the road. The further elements of proving an act or omission which causes injury or death required for the present charges, are not present.

[38] For the defence Mr George submitted that the Mahara was driving toward the Avarua township from the airport. He was driving in the same direction as Vetina and she collided with him in the rear of his cycle causing the accident. This would explain, he said, why the impact according to the crash investigator occurred on the seaward side or Vetina's side of the roadway.

[39] The direction of travel of Mahara, the defence says, was supported by three witnesses. The first was off-duty police officer Tungane Lockington. She was driving from the airport into town to pick up a fellow off-duty officer at about the time of the



accident. She said that just before or at Palace Takeaways a black motorcycle with a male driver and a female pillion passenger came up from behind her and overtook her on the inside or the seaward side of her car. The motorcycle then swerved back in front of her. She came upon the accident moments after that incident.

[40] Officer Lockington struck me as a reliable witness. She appeared to have a good recollection of the evening's events. She had not been drinking that evening and had her 2 year old child in her car. She refused to speculate on who might have been riding the motorcycle. She would also have been aware that a motorcycle coming from the airport side does not assist the Crown's theory of the case. I found her to be a reliable, forthright and honest witness.

[41] Mrs Amarama a crown witness supported the defence case about the direction of the travel of Mahara's motorcycle. She worked at Palace Takeaways. This is on the seaward side of the road on the airport side of the accident. Ms Amarama struggled with establishing precise times. She did not have a watch on her. However, somewhere between 12.30 am to 1 am, she put out the rubbish. She finished work for the night and was sitting at an outside table. She then saw someone whom she thought was Mahara on a motorcycle come past her from the airport direction toward Avarua on the main road. She then got on her bike and left Palace Takeaways. She said variously that this was 10 minutes, 15 minutes, 5 or 2 to 3 minutes before the accident. She was not sure. However as soon as she left she heard and then came across the accident.

[42] Mrs Amarama said she did not know Mahara personally and had not met him. The family that owns Palace Takeaways was related to him and she had seen Mahara with them. She did not mention to the Police when she gave her statement near the time of the accident that she recognised Mahara as the driver of the motorcycle that she saw travelling toward Avarua.

[43] Another witness, Ms Tixier, gave evidence saying she was on the airport side of the accident when she was passed on the site by a black motorcycle. She also identified Mahara as the rider. I will deal with her evidence later.

[44] Mr George in his opening said that the sole or primary defence was that Mahara did not cause the accident. He said that the Police analysis of the accident undertaken around about the 23<sup>rd</sup> July was “completely and absolutely mistaken and wrong.” Mr George also pointed to the fact that the road had been recently tar-sealed and there were no centre markings on the road. He said this would have also contributed to the accident. He said that he would highlight the lack of damage in crucial areas on the bikes which went against the Crown case but supported his theory of the case. This was that the motorcycles collided while travelling in the same direction, from the airport.

[45] Mr George also said that part of the defence case was that Vetina was speeding, talking to her pillion passenger and was inattentive. This caused the accident. He also mentioned that her head injuries were a result of not wearing a helmet.

[46] I now consider the legal position.

[47] I am required to be satisfied beyond reasonable doubt on each of the elements of the charge. This was not addressed in detail by either counsel as it was submitted as being self-evident. I must be satisfied beyond reasonable doubt on each element of the charge. A reasonable doubt would be an honest and reasonable uncertainty left in my mind about the guilt of the defendant after I have carefully considered all the evidence. I note that proof beyond reasonable doubt is a very high standard and that the defendant is presumed innocent. He did not have to call evidence, but did so in this case. He does not need to prove his theory of the case, he is entitled to rely on the Crown proving the case, in all its elements, beyond reasonable doubt.

[48] The Crown also referred me to *O’Callaghan*<sup>3</sup>, a New Zealand Court of Appeal decision. In that case the Court of Appeal considered a trial direction given by a judge to a jury on a charge under s. 55(2) of the New Zealand Transport Act 1962. It is in the same terms as s. 25(2) of the Cook Islands Transport Act<sup>4</sup>.

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<sup>3</sup> R v O’Callaghan [1985] 1NZLR 198, [1984] 1CRNZ 370

<sup>4</sup> The New Zealand legislation has now been changed.

[49] The Court of Appeal reviewed various changes made to the legislation over time. It then followed the earlier Court of Appeal decision of *Wolter*<sup>5</sup>. In that case the Court held that the causal act or omission which must be found against the accused need not be negligent, but the act or omission must have been of such a character that it would not have happened if the accused had not been under the influence of the drink or drug to an extent as to be incapable of having proper control of the vehicle.

[50] In *O'Callaghan* the Court of Appeal held that a direction to the jury that the Crown need only prove that the accused did an act while his blood level was excessive and did not have to show any cause or link between the act or omission causing the death, was wrong. Each element of the offence needed to be proved beyond reasonable doubt.

[51] I now turn to the elements of the offence.

[52] From the actions of Mahara during the evening of 22<sup>nd</sup> July and early morning of the 23<sup>rd</sup> and his resultant physical state, I am satisfied that:

- (a) Mahara was in charge of the black Yamaha motorcycle.
- (b) Mahara was under the influence of alcohol to such an extent as to be incapable of being in charge of a motor vehicle.

[53] In relation to his alcohol intake and the effects it would have had on him I rely on the medical evidence.

[54] Dr Teapa was the surgical consultant on duty when the victims of the accident arrived at the hospital. He is qualified as a medical practitioner and understands the effects of alcohol on the human body. He is qualified by virtue of both training and experience. He has worked as a doctor for 10 years since graduation. Since 2013 he has worked at Rarotonga Hospital as a surgeon.

[55] The Crown also relied on the evidence of Dr Allan Stowell, a New Zealand scientist and expert on blood and breath alcohol. His evidence was read by consent

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<sup>5</sup> R v Wolter [1959] NZLR 1178

and not contested. He gave evidence as to the effects of alcohol on the body and in particular the likely effects at the blood alcohol levels showing in Mahara's blood analysis.

[56] Dr Teapa dealt with Mahara when he arrived at hospital. He was highly intoxicated and at times aggressive. The doctor said Mahara was not subject to any life threatening injuries but had reasonably serious facial injuries and injuries to the leg. Dr Teapa considered Mahara had suffered a mild concussion. This is the equivalent of a mild brain injury at the time of initial presentation.

[57] Mahara had a Glasgow Coma Score (GCS) score, of about 10 to 11. This measures the severity of the head injury, Within 4 hours that score had come up to 15 which is in the normal range. Given the speed of return to normality of the GCS score Dr Teapa was of the view that Mahara's behaviour was driven by the effects of alcohol rather than a brain injury.

[58] Dr Teapa had also noticed that Mahara smelt strongly of alcohol. The medical team could not restrain Mahara who was difficult and aggressive. They asked the ambulance drivers for assistance in order to get the x-rays completed. Dr Teapa's view was that Mahara's psycho-motor skills would have been diminished, his coordination and his ability to handle a vehicle would have been severely affected, his hand and eye coordination would have been affected and his judgment would be poor. Dr Teapa also mentioned there would be loss of orientation to his surroundings and that someone with the alcohol level that Mahara had would show erratic behaviour often leading to risk-taking.

[59] Dr Teapa also examined Vetina on arrival. She had suffered severe traumatic primary brain injury and died at 9am that morning at Rarotonga Hospital. She had no signs of brain activity when she arrived. Dr Teapa was of the view, after consulting with his colleagues, that it was futile to continue life-saving treatment for her. Severe traumatic primary brain injury was listed as the cause of death in his report to the coroner. He had also considered whether there would have been any difference if there had not been a delay of some 40 minutes before the ambulance arrived to pick Vetina up from the scene of the accident. He and his colleagues came to the conclusion

it would not have made any difference to Vetina's chance of survival as the severe brain injuries from the accident were not survivable.

[60] Dr Teapa also examined and gave evidence as to the state of Pare. She stayed overnight for neurological observation and was discharged the following morning. The main diagnosis was mild concussion. She also had a left scalp laceration with several superficial abrasions to her skin.

[61] Rewi Nuku was Mahara's pillion passenger. She was intoxicated on admission. Her injuries amounted to several abrasions or soft tissue injuries to limbs, in particular her right forearm which had a laceration slightly bigger than the rest.

[62] I now turn to Dr Stowell's evidence on Mahara's alcohol levels and the effect on Mahara's behaviour.

[63] Dr Stowell is a scientist employed by ESR in New Zealand. He is qualified as an expert in blood and breath alcohol matters and has extensive experience. He undertook post-doctoral research in blood and alcohol breath analysis and has expertise in the effects of alcohol on the human body. He has given expert evidence in all Courts in New Zealand over sixty times, mainly involving interpretation of blood or breath alcohol tests under New Zealand law.

[64] Dr Stowell had received the results of Maraha's blood alcohol test from the Rarotonga Hospital laboratory. He came to the view that the test indicated that Mahara's blood alcohol concentration at the time of the crash was likely to have been within the range of 185 to 215 milligrams per 100 millilitres of blood approximately. This could be explained by between 13.5 and 24 standard drinks. The most likely alcohol consumption being approximately 19 standard drinks. A standard drink is the equivalent of 32 millilitres of bourbon with an alcohol content of 40 percent by volume.

[65] Dr Stowell said while there was difficulty in predicting how impaired a person would be at any particular blood alcohol concentration without specific knowledge of the person's tolerance for alcohol, there was a large body of published scientific research showing the consumption of alcohol and impaired psycho-motor skills.

These are important for safe driving. He pointed to the fact that impairment can cause, for example, a degree of tunnel vision and a reduction in the ability to make quick and correct decisions in the event of an emergency. Alcohol also releases inhibitions and this can lead to risk-taking behaviour. He said that in an average person driving skills begin to be significantly impaired at blood alcohol concentrations of somewhat lower than Mahara's. Higher concentrations result in more serious impairment which has a strong association with traffic accidents. He said that chronic heavy drinkers do develop a tolerance to intoxicating liquor. However even a heavy chronic drinker would be impaired to some extent at a blood alcohol concentration level of approximately 175 milligrams per 100 millilitres of blood. His evidence was unchallenged.

[66] Therefore I have no difficulty in concluding on the evidence of particularly Dr Teapa and Dr Stowell that Mahara was under the influence of drink to such an extent as to be incapable of having proper control of the motorcycle.

[67] I also conclude from the evidence of Dr Teapa that Vetina's death and the body injuries of the two pillion passengers were caused in the accident as alleged in the information.

[68] I now turn to the events of Vetina's day leading up to the accident.

[69] Vetina had spent most of the day involved in preparation to model a costume made by her Aunty Nane Tau for a show at the Edgewater Resort. There was considerable imprecision as to the exact timing of events over the day and the evening of 22<sup>nd</sup> July. However it was clear that Vetina modelled at the show at approximately 7 to 8 pm in the evening and returned to Avarua School where she was staying with about 50 or 60 other participants at the Te Maeva Nui celebrations in Rarotonga. Those participants and people staying at Avarua School included Mahara Nicholas and his family. It is common ground that these celebrations attracted many cultural groups and overseas visitors to the island. Rarotonga was very busy during that period.

[70] Vetina's aunt Mrs Tau, was with her for a large part of the day. In the afternoon she told Vetina to have a sleep. She was not sure whether Vetina had done so. After

modelling at the Edgewater Resort, Vetina went back to Avarua School. Mrs Tau drove her there and stayed to talk to friends and have something to eat.

[71] Vetina told her aunt that she was tired and went off to bed. Mrs Tau went to say goodnight to Vetina and thank her for modelling for her at about midnight. She said Vetina was in bed lying down. Her aunt thought she was still awake as she moved. Her aunt thanked her for modelling and left her at about 12 to 12.15 am or 12.20 am.

[72] Mrs Tau did not see Pare at all during the evening. Pare said she had been with Vetina since about 10 pm. Pare had had Vetina's motorcycle earlier in the evening. Pare did not have a licence but she had ridden around on the motorcycle for some time that evening. She received a text from Vetina about 9pm. She took Vetina's motorcycle back to Avarua School. When she arrived Vetina was not back so Pare went for another ride into town. When she got back Vetina was lying in bed. Pare felt it was late but she was not carrying a watch.

[73] The times then become imprecise. Pare and Vetina, with Pare driving Vetina's motorcycle, went to see Vetina's boyfriend Rechimaier Rairoa who has a home in Ruatonga. Pare thought they went to see Rechimaier twice that evening, however Rechimaier only recalls them coming once. He thought it was about 2am as he had been in bed. His brother Marcello Rairoa, whose evidence was read, was the one who woke up Rechimaier when Vetina and Pare arrived. Marcello only recalls one visit as well.

[74] Following the discussion between Rechimaier, Vetina and Pare there was an arrangement that Rechimaier would go to Avarua School to meet up with Vetina and Pare. Rechimaier gave Pare some wine in a wine bottle. She drank this. Rechimaier then told Vetina she should drive because Pare had been drinking and he thought Pare was affected by the wine. Pare agreed that she had drunk the wine and was a little affected by it. Her alcohol intake showed up the results of the blood alcohol test administered after the accident.

[75] Given that Rechimaier and his brother both confirm that there was only one visit to Rechimaier's home, I accept that evidence. I do not accept the evidence of Pare about there being two visits. I consider Pare's memory may not be accurate in

that regard. She had had something to drink which while was only a small amount it did affect her. She also suffered from concussion following the accident. Those incidents are likely to have blurred her memory.

[76] Pare is the only one who remembers the accident. She recalled stopping at the roundabout immediately before the accident. Vetina had taken the back road and then was intending to turn into the main road and drive from the airport direction toward Avarua School. Rechimaier's house is on the back road and it was he who suggested they use the back road.

[77] Pare cannot recall much of the drive but she said she was talking to Vetina. She was leaning on Vetina's right shoulder and they were talking about Rechimaier. She could not hear easily. She thought they were riding at something above 40 kilometres an hour. She cannot remember any motorbikes passing them. She said she was not looking toward the front but was looking down. However she looked up and saw a bright light coming toward her. She remembers nothing else. She is sure that it was a motorcycle light.

[78] Under cross-examination she said that Vetina was excited that Rechimaier was coming to the school. She also confirmed she was sure that it was the one light of a motorcycle, not a car with one light coming toward them. She agreed that she was affected by the wine.

[79] I consider that Pare's evidence in parts is reliable but I do not think she has a perfect recall of the evening. Particularly I do not think she provides reliable assistance as to what happened immediately before the accident. Her memory is unreliable as to what happened around the time of the accident as is evidenced by her recollection about the number of visits made to Rechimaier's house. She may have seen a motorcycle coming toward them. It is difficult to know whether that was Mahara's motorcycle which then collided or if it was another motorcycle she saw coming toward them. She does not recall any motorcycles overtaking them. She said she did recall a motorcycle on the road coming toward them but was not sure whether that was the one which ultimately collided with them or it was another. I am also of the view that she was concentrating on a conversation trying to hear Vetina and she may well have missed seeing other vehicles on the road. I therefore do not place a



high degree of reliance on her recall of what happened immediately before the accident.

[80] I now turn to the bystanders in the vicinity of the accident.

[81] Tungane Lockington holds the rank of senior constable. As I noted above she was off duty and driving from the airport doing approximately 40 kilometres an hour and passing Palace Takeaways. It was around then that she says she was overtaken on the inside by the black scooter driven by a male with a female passenger. She did not see anyone else. It was only moments afterwards that she came across the accident. When the black scooter overtook her on the inside she could not remember if she had lost sight of it on the bend before the accident and it had taken off as she was approaching the Punanga Nui market. She would not enter any conjecture as to who it was riding the motorcycle.

[82] When she reached the accident she saw the bodies strewn across the road. She checked the defendant and smelled alcohol on him. She noticed girls lying about 2 metres from each other in the middle of the road. This would have been Vetina and Pare. She called an ambulance and checked that everyone was as comfortable as possible.

[83] When Sergeant Takai the constable arrived shortly afterwards Constable Lockington was directed to take up point duty. She saw Mrs Tixier at the accident. She did not see Mrs Amarama who was also a bystander. However she was not there to take a list of witnesses.

[84] As I mentioned earlier I found Constable Lockington's evidence to be straightforward and reliable. I accept that she saw a black motorcycle going in the same direction as she was travelling, immediately before the accident.

[85] Another witness who says she saw the black motorcycle was Mrs Amarama. As I described, she was in some confusion over the times but was adamant she saw the motorcycle. As I said it was not until she gave evidence that she said that it was Mahara that was driving the motorcycle. Nevertheless even if she was mistaken about

it being Mahara her sighting of another motorcycle travelling in the direction of Avarua corroborates Tungane Lockington's recollection of seeing a black motorcycle.

[86] Mrs Tixier was driving from the airport direction toward Avarua. She stopped at an intersection near the accident scene. She said a motorbike overtook her with two people on it. She said a man was riding the bike and a woman was the pillion passenger and they were both large. She pulled over to let them pass. She estimated the black motor cycle was travelling fast, perhaps 40 or 50 kilometres an hour. She followed the motorbike toward Punanga Nui market. She heard a crash. Mrs Tixier said in evidence that she was sure that the rider of the black motorcycle that had overtaken her was Mahara. At the site she said she recognised him lying on the road covered in blood and was there when the ambulance arrived.

[87] In a statement made to the Police shortly after the accident Mrs Tixier made no mention that it was Mahara riding the motorcycle. In evidence she made much of the fact that Mahara had a distinctive beard which she recognised. She said he looked slightly different in court now but she was definite that it was him riding the bike. In her statement Mrs Tixier had told the Police that she had seen the accident. However in her evidence she said she only "thought" she had seen it but in fact she had only heard it. She had assumed then that it was a head-on collision with two vehicles coming from different directions. However in her evidence she was of the view she was not sure about that.

[88] Mrs Tixier was not certain about times. She did not have a watch. She thought it was early morning. When she was asked in cross-examination whether she knew accident actually occurred about 1.00 am, she asked whether Ms Mills was sure about that. At one stage she said she thought it was close to dawn. I accept that Ms Tixier did see a motorcycle pass her but I have considerable reservations about whether she was able to identify Mahara. This is due to the fact that the lighting was bad, that she said the motorcycle went past quickly and that she did not mention this important fact to the Police shortly after the accident. However, the fact that she saw a black motorbike is consistent with the observations of both Tungane Lockington and Mrs Amarama.

[89] Mrs Amarama was one of the first people on the scene. She said she saw a woman coming from the hedge yelling about “her brother”. It appears likely that this was Mahara’s sister Aniwa Nicholas. Aniwa was also affected by drink and could not remember how she got to the accident site. She cannot recall the girls’ bodies in the middle of the road nor can she recall much of the evening itself. She remembers holding Mahara, It is not clear whether she moved him or was just talking to him and holding his hands.

[90] Tehina Tommy came along a bit later. She moved Vetina into a recovery position at the request of Sergeant Takai. She said she moved Vetina on to her side and straightened her up. She said someone had moved Pare while Ms Tommy was there. Ms Tommy did not notice the black motorbike nor can she recall which direction Vetina’s motorcycle faced.

[91] Sergeant Takai and Constable Ingaua were among the first to arrive the crash site. They had been attending a crash at Raro Electrical on the airport side of the Punanganui Market and were driving to attend another accident which was located near the Courthouse in Avarua. They were driving from the airport side toward Avarua when they came across this accident. They saw Officer Lockington’s car lights flashing. Sergeant Takai considers that it was about 1.14-15 am. After they arrived at the scene, the Sergeant received a call from Police communications at 1.16 am to report this accident. He said they were already there. I consider Sergeant Takai gave the most reliable estimate of the time of the accident as it was corroborated by the Police communications call and by his notes made as to the time he was at the Raro Electrical crash site.

[92] He said the two girls, Vetina and Pare, were in the centre of the road toward the inland side. Sergeant Takai was concerned about the state of the victims as a priority. He checked them all. He managed the site. By this stage there were many bystanders and a lot of traffic. Understandably he was not focussing on the cause of the accident nor preserving any markings or debris on the road that might later be needed to assist in establishing the cause.

[93] A fire truck also arrived and the fire officers helped out. Sergeant Takai moved Vetina’s bike. He said that by the time he had arrived, someone had already moved

Mahara's bike as it was standing up. Sergeant Takai was quite properly intent on helping the victims and controlling the crowd as well as the cars which were trying to get through. Later in the evening the Sgt. did a rough sketch of the scene. It is not clear exactly when he did this. There were no scale measurements on the sketches he produced. His partner at the scene, Constable Ingaua did not agree with some of the information on the sketch. She was in the view that the girl lying on the market or the seaward side of the road by the curb had her head facing the airport and her legs facing Avarua rather than as depicted on the Snr Sgt's plan. She also thought that the male victim, Mahara, should have been depicted as lying straighter than shown on the sketch.

[94] The victims were taken to hospital, having waited approximately 40 minutes for the ambulance. Sergeant Takai then arranged for the fire truck to hose down the road to clear off the blood, debris and other materials such as plastic and glass. He then allowed the traffic to go through. He arranged for Lisa Tatakura, an off duty policewoman, to take photos of the scene at about 3am. These photos were produced. One of them shows the approach to the accident. It is difficult to make out as it is taken at night looking towards the police cordon at the airport end. The other photograph is unclear but showed two jandals in the foreground in what was apparently a pool of blood. It is not clear whether the fire truck had hosed down the road by the time this photo was taken. The pool of blood did not look similar to the markings on the road which were taken the next day. The location of the jandals is not shown in any of the police sketches including the investigators scheme plans. It is likely therefore that they were hosed away after the 3am photos were taken.

[95] No measurements were taken as to where the debris lay nor were there any scale or precise markings or measurements made as to where the bodies were lying. The bodies and the bikes were moved at unknown times. Given this confusion, I cannot rely on the sketches that Sergeant Takai made at the time as a precise depiction of the scene after the accident. It was this information which the crash investigator relied on to complete his plans.

[96] The witnesses who were at the site all agreed there were a lot of people gathered by the time the ambulances arrived to take the victims to the hospital. There were also other vehicles on and near the site including the fire truck. It is not clear

where that was or whether it may have made any markings on the road. The victims were moved during the evening. It is not established exactly when but by the time Mrs Tau, Vetina's aunt, arrived Vetina's head was near the curb and her head was facing the market. This is different from the earlier descriptions of her position. One of Mrs Tau's nephews who was with the fire truck had already arrived and he was holding Vetina's hand.

[97] By the time Sergeant Takai did the sketch map the victims had gone and the debris removed. He was relying on his memory after a very busy and stressful evening. Constable Ingaua did not agree with the Sergeant's placement in two respects on the sketch plan. There was no information as to where the debris might have been the footrest from Mahara's black motorcycle which the Crown alleged had hit the ground and broken off.

[98] Given the fact that it was a serious accident Sergeant Takai's priority was to care for the victims and manage the site. In addition there were two other accidents which had been reported so the hospital was busy which this resulted in substantial delays before the ambulances arrived.

[99] Cars and vehicles used that portion of the road from the time it was reopened until the morning when the traffic accident investigator arrived. He arrived as the road was being cordoned off. He had received a call sometime about 8.30am. He came from Nikao station and arrived at the accident sometime after 9am. By that time there would have been many vehicles, cars and motorbikes over that road. Rarotonga was busy during the celebrations.

[100] In addition, the motorcycles were left on the side of the road. Snr Sgt Takai picked them up the next morning about 9.30am. The vehicles were taken back to the police station. The Snr Sgt did not think they had been interfered with. However, he agreed there was no security around them while they waited on the side of the road for the morning.

[101] I consider that the positioning of the bodies and the motorbikes on the sketch plans were not a reliable representation of where they were immediately after the accident. While it seems clear that Vetina and Pare were somewhere near the centre

of the road, I cannot rely on the exact positioning shown in the sketch plans. The pools of blood by the morning had been cleaned up and it is difficult to match the blood stains that are apparently shown in the later morning photographs with those in the photographs taken earlier taken by Constable Lisa Tatakura.

[102] I now turn to the accident investigation.

[103] Snr Sgt Teaukura is the officer who carried out the crash investigation. In his evidence he set out his training. He received specialised training in traffic law enforcement and crash investigations. This included a level 3 advanced training course in crash investigations undertaken in 2015. He prepared a report which he produced. This included two sketch plans showing the placement of the motorcycles and the bodies as well as the markings he observed on the road. He referred to photographs which were taken in the morning while he was present. He correlated the markings on his sketch maps to the photographs by use of numbers.

[104] Sgt Teaukura arrived at the scene 7 or 8 hours after the accident. Senior Sergeant Peraua was already at the scene and showed the Snr Sgt where he had been told the various bodies and motorcycles had been positioned.

[105] Sgt Teaukura said the seal on the road was new. The conditions were good at the time and he was able to see some markings on the road. He saw scratch marks and stains which he said were blood stains although there was no evidence of any analysis. He also saw a bit of a skid mark. Sergeant Takai later confirmed to Snr Sgt Teaukura where the various bodies and items had been lying. By then the road was clear by then and had been hosed down.

[106] Sgt Teaukura examined the motor vehicles but he was careful to say he did not claim expertise in the mechanical or structural state of those vehicles.

[107] While the crash investigator insisted that he was not an expert nor claim mechanical or structural expertise in relation to damage to vehicles, he did visually inspect the vehicles. He said the front of the red bikes had its forks pushed in, the left side of the fender was damaged and the headlights were pulled off. He said the footrest

on the left side was bent back. He made these comments by reference to the photographs of the bike.

[108] As to the black bike, he said the cover on the left side was coming off, the footrest on the left side was gone and the rear vision mirror was broken off on the left side. The black bike was owned by Raro Cars and Bike Rental

[109] He saw no damage to the right side of either bike.

[110] The Snr Sgt said that on the red bike the headlight compartment including the speedometer was badly damaged. This is where the front forks had been pushed to the rear. He concluded that another object had forced the red bike's front forks from the front. This he said this would have been a head on or an almost head on collision. The tyres were intact.

[111] The investigator referred to a typing mistake in his report which was not corrected until the trial. In the sketch plan the male body had been transposed with the female pillion passenger's body on the sketch plan. He could not recall how many blood stain patches there were on the road. He used a green paint spray to mark the scratch marks, a gouge mark, the skid mark as well the blood stains on the road. He then allocated numbers to the various marks on the road which co-related to the numbers on the photographs.

[112] The investigator's view was that the black bike left footrest had made a gouge on the road. This was marked on one of his sketch plans as "point of impact". On his other sketch plan this was referred to it as the "suspected point of impact". He also measured scratch marks running beyond the gouge marks which began at approximately 2.8 metres from the seaward edge of the road. These ran for approximately 10 metres in a crooked line seaward. They stopped at a point about 1.6 metres from the seaward edge of the road.

[113] The Snr Sgt drew a centre line on the road of bold broken lines on the sketch maps. He said this was for the purposes of the diagram but there were no actual markings on the road to show the centre line on the morning of the crash. Since the accident, centre lines had been marked on the road. He had returned to the accident

site recently and re-measured from the edge of the road to the painted centre lines. This resulted in a variation to his original measurements. This, he said, was a small variation so the gouge mark or the point of impact as he had described it was 700mm from the now marked centre line rather than 900mm from the estimated centre line shown in the original sketch.

[114] Neither of the two sketch plans produced were to scale. Both were based on the information provided by Snr Sgt Takai as to where the bodies and motorcycles ended up. The skid marks on the road which ran for about 30 centimetres just before the point of impact, were shown at the same place as the gouge as they were so short that they could not be depicted in a linear manner on the sketches.

[115] The investigator's conclusion was that Mahara had been driving toward the airport and veered across the centre line into Vetina's lane resulting in a head on collision. Snr Sgt Teaukura said Mahara's motorcycle footrest had caused the gouge in the road. The left side of Mahara's motor vehicle had then continued along the road coming to rest at the end of the scratch mark. He had marked the point of impact as being where the gouge marks were marked on the plan but said that it was more likely that the point of impact would have been before the gouge marks. The motorcycles would have flown into the air and landed somewhere near the middle of the road.

[116] On their face, the sketch plans suggested that the Sgt's theory of what occurred was an actual fact. For instance, instead of being marked as a gouge mark, that mark is referred to as the point of impact. However it would not have been the point given the Snr Sgt's own evidence. The sketch maps indicate that various lines which had been drawn were the actual routes of travel of the two motorcycles before the collision. However they were Sgt Teaukura's theory of where those motorcycles were travelling. It is often difficult to separate fact from inference in these cases. However, care needs to be taken in sketch plans to show that what is factual information and what is inference or theory. Otherwise it indicates that the hypothesis or a supposition is fact. There are other difficulties with the sketches. The first is as I have said, they are not to scale. It is difficult to match them to the photographs despite the correlation of the numbering shown in the photographs with those on the sketch plans. The pools of blood are not marked on the sketch plans and there is no debris.



[117] The motorcycles were not properly examined. Sgt Teaukura was careful to say that he was not an expert in the area. He had not undertaken a proper structural or mechanical inspection of the bikes. That was a proper approach in the circumstances. He could not give evidence about the brakes or what type of condition the bikes had been in before or after the accident. He said he had left that aspect to the officer in charge. He did indicate that he had made a mistake in that he missed looking at the rubber tyres on the bike so he was unable to correlate any marks on the tyres themselves to the skid mark. It is not clear from the evidence which motorcycle caused the skid marks. According to the Snr Sgt, skid marks come before the scratch marks so on his theory of the case it must have been Mahara's bike around the time the footrest on the left had side made the gouge on the road. However, he candidly accepted that he had made a mistake in not examining the tyres.

[118] The footrest might have been swept up with the debris when it was cleaned up on the night of the accident. It is always possible that the bike did not have a footrest to start with. Importantly, there were no reports on the bikes' condition, before or after the accident. The officer in charge indicated that the rental company that owned Mahara's motorcycle had carried out a report but no evidence on the contents of the report was given. He said the bikes did have current warrants of fitness but there was no evidence on the structural or mechanical condition of the motorcycles other than the observations of Sgt Teaukura and the photographs of the motorcycles.

[119] The road was opened after the accident. It was a busy night, there were lots of people about. There was a period of about 7 hours when cars were going backwards and forwards on that site. Therefore, the possibility that other cars or vehicles had caused marks during that period cannot be discounted. The road had been cleaned with a fire hose, no evidence was given as to the pressure or the extent of. Other surface markings caused in the accident might have been removed by the cleaning.

[120] There was no examination undertaken to match the tyres of the motorcycles to the skid marks nor was any detail about the nature of the skid marks. For instance, whether they had striations or otherwise which might have indicated which direction the vehicles were travelling. It is impossible to tell this from the photographs.

[121] In cross-examination Sgt Teaukura was unwilling to accept any theory of the case other than the one put forward by him. He was subjected to rigorous cross-examination in this regard but he was certain that his theory of the case was the only possibility. He was clear that he relied on the physical evidence and that the evidence of any person about what happened would have been irrelevant.

[122] It would have been useful if the Senior Sergeant had considered other theories of the case particularly given there was evidence to suggest there may have been another motorbike in the vicinity. As to the physical evidence, there were some other steps which may have assisted in assessing the likely cause of the accident. This includes measurements of the motorbikes. For instance, the height or the distance between the left foot rest relative to the height of the bike might have provided better evidence as to the cause the markings on the road. In depth evidence as to the state of the bikes would also have assisted as would a reconstruction of the accident sometimes used to show how the damage to vehicles might have occurred.

[123] Sgt Teaukura was working with limited information. I have concerns about the accuracy of the information provided to him upon which he based the sketches. He did not have the benefit of knowing the location of the debris, the road had been cleaned off presumably with some pressure, using a fire hose and he did not view the scene until seven hours after the accident. The Sgt did not have any information about the structural or mechanical assessment of the vehicles or whether they had any defects, which made his comments about the cause of the damage less reliable. He had only done a visual examination and did not look at the tyres.

[124] As indicated above, I have concerns about the crash investigation evidence. I do not consider that a high degree of reliance can be placed on that alone as to what occurred. There may have been was another motorbike travelling at speed toward the scene of the accident from the airport only moments before the collision. There is some suggestion it was Mahara's. However, whether the rider was Mahara or a third party is irrelevant. It was evidence that should have been considered as:

- (a) There was another motor vehicle which Officer Lockington said passed her at speed and undertook what appears to be a reckless manoeuvre around her vehicle.

- (b) It may have for instance clipped Vetina's motorcycle so that she swerved into Mahara's path causing him to swerve to the other side of the road.

[125] Therefore while there was no damage to the rear of either motorcycle, according to Sgt Teaukura, I cannot discount the possibility there was another motor vehicle which came from the airport direction and hit one of the other motorcycles causing one motorcycle to swerve.

[126] In addition, Vetina was chatting to Pare who was leaning on her right shoulder. Pare described Vetina as excited that Reichmaier was coming to the school. Pare says it was hard to hear. They were probably both straining to hear and their weight would have been toward the right side of the cycle. In my view, it is also possible that Vetina had crossed the centre line in a moment's inattention and it was Mahara who was swerving across to avoid her.


[127] However, it is not for the defence to prove its or indeed any alternative theory of the case. It is up to the Crown to prove all the elements of the case beyond reasonable doubt. As is clear from my judgment I have a reasonable doubt as to whether it was Mahara who caused the act or omission which led to the death of Vetina and the injury of the pillion passengers. Therefore the elements of the case are not proved beyond reasonable doubt.

[128] In those circumstances, Mr Nicholas is acquitted of all charges.

[129] There will be an order for:

- (a) the return of the bond and the passport to Mahara;
- (b) the return of the exhibits, or such of them that still exist;

[130] Mr George indicates he wishes to apply for costs. Counsel will put together a timetable application for the exchange of submissions on that issue. These should be address the law as well as the facts.



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**Justice Grice**