

POLICE

v

MAX URQUHART

Appearances: Senior Sergeant F Tararo for prosecution
Mr M Short for defendant

Sentence: 24 March 2023

SENTENCING NOTES OF TOOGOOD, J

[10:16:21]

[1] Max Urquhart, you appear for sentence having pleaded guilty to one charge of driving with excess blood alcohol under s 28(b)(1)(c) of the Transport Act, and one charge of causing bodily injury through your careless use of a motor vehicle under s 26(1) of the Transport Act.

[2] On the excess breath alcohol charge you are liable to a fine of \$1,000 and/or 12 months imprisonment and disqualification from driving for a minimum of 12 months.

[3] On the careless driving causing injury charge you are liable to 5 years imprisonment or a fine not exceeding \$5,000.

[4] The facts are these. On last Saturday, 18 March 2023, at 5.52 am you were driving a rented motor scooter on the Aratapu road near the resort where you, and your wife and three children and, I think, other members of your family were staying. You were following a motorcycle which was being ridden by Mr Joe Mokotua, who was heading along the road to go and have some breakfast. You overtook Mr Mokotua's motorbike, sped up in front of him

and a very short distance ahead you quickly turned to head over to the beach. You fell off your scooter and crashed, causing Mr Mokotua to run into you and crash also.

[5] As a result of the crash, Mr Mokotua sustained severe injuries to his left arm and upper body and he was taken to hospital for medical attention. He was found to have three broken ribs, a broken collarbone and a broken shoulder blade.

[6] It is to your credit that, after the accident, you stayed with him in his injured state. An ambulance arrived and then the police sometime after that. However, when you were breath tested at the police station, you returned a result of 540 micrograms of alcohol per litre of breath, which is more than two times the permitted limit of 250 micrograms. You admitted that you had consumed alcohol but apparently did not say anything else at that point.

[7] You are 32 years old. You are employed as a builder in New Zealand and you were on holiday here at the time of the accident. After your arrest, you spent a night in custody. Your children returned to New Zealand with their grandparents on 21 March, but you stayed here with your wife while these matters could be dealt with.

[8] I accept Mr Short's description of what has happened over the last few days as a compressing of one or two months' work into just a few days. You can be grateful to your counsel for his industry but also the Court recognises and gives you credit for the fact that you have not tried to delay this at all, and that the matters have now been brought here – although without a probation report – with sufficient information to enable me to sentence you.

[9] Importantly, you have apologised both in writing and in person to Mr Mokotua, including when you visited him in hospital. You said to him that you were a fool to get on the scooter after drinking the previous night. You were upset by a domestic issue, but you acknowledged that you had let down your family, your wife and yourself and you vowed that you would never do this again. You said that you wanted to do your best to right your wrongs and do what you could to support Mr Mokotua and to pay for the damage caused by your silly behaviour. You have paid Mr Mokotua \$1,000 in compensation and you have paid for the repairs to the motorcycle.

[10] A remarkable feature of the matters before me is that Mr Mokotua has written a very forgiving letter to the Court. He says in that letter that he does not want you to be convicted because you went and saw him in hospital with your wife to apologise and that you had paid the costs to help him get better. He then said this:

“I was angry because of the accident, but I know Max is really sorry after he came to talk to me and said sorry. Max and his wife have a young family and I don’t want them to think that Cook Islanders are unforgiving. I want to forgive Max because I was also involved in a similar traffic accident in 2018 where I was charged with careless driving causing injury. So I know the stress he is going through. We are a Christian country and I accept his apology, which was really nice because it shows he cares.”

[11] That letter is a very clear example of something that I have come to learn about this country: that people are forgiving. It is a remarkable feature of the Cook Islands culture, and it does not surprise me to see that Mr Mokotua, despite serious injury in circumstances which should never have arisen, is prepared to forgive you and seek a merciful outcome.

[12] You have no prior convictions and I have read the references from those who know you to be a devoted husband and father; a family man whom one of your referees describes as having a strong moral compass. You are actively engaged in community affairs, especially through your involvement in junior rugby league.

[13] I accept that these offences were the result of a serious but uncharacteristic lapse of judgment. I accept that you are genuinely remorseful and that it is unlikely that you will reoffend in this way. I am not surprised that the night you spent in custody was a salutary lesson for you.

[14] You present the Court with something of a sentencing dilemma, Mr Urquhart, because, as I have just said to Mr Short, the starting point in the Court’s consideration of this offending, where there is alcohol involved in the careless use of a motor vehicle causing injury, is a term of imprisonment. And there have been cases in this Court where first offenders have been sent to jail for this very combination of offending.

[15] If you were a Cook Islands resident I would probably impose a period of probation and require you to undertake a period of community service as a way of atoning to the

community, which is harmed by this type of offending. But that is not a realistic option because you are a tourist and I have concluded that it would be inappropriate to keep you in the Cook Islands.

[16] The judges of this Court and the Court of Appeal have often said that far too much offending of this type occurs and that deterrent sentences are called for, and I do not disagree with any of that. I am concerned that there may be an impression that tourists can offend here and then escape appropriate punishment simply because they do not live in the country.

[17] Although a short period of imprisonment would be open to me, sentencing you in that way would be to disrespect Mr Mokotua's views – those of your victim.¹

[18] You have suffered, I am sure, significantly through this. You were here to celebrate a special occasion and what has occurred will have affected very much the memory of what should have been a very happy holiday for you, and you will live with that.

[19] Mr Short has argued that you should be convicted and discharged. Mr Mokotua agrees with that. But that, in my respectful view, is an unrealistic proposition.

[20] The case referred to by Mr Short is of a very different calibre because, although the defendant in that case had admittedly consumed some alcohol, it was not a cause of the accident.² I have no doubt that your consumption of alcohol was a cause in this offending, and the cause of the accident.

[21] Nevertheless, there is a provision in the legislation that governs the principles of sentencing for criminal offending that says I must impose the least restrictive penalty on you that is appropriate in the circumstances.³

¹ Sentencing Act 2002 (NZ), ss 8(f) and (j).

² *Police v Rakacikaci* CRN 532/19, 534/19, Keane J, 1 September 2020.

³ Sentencing Act 2002 (NZ), s 8(g).

[22] Convictions and fines are the least of the penalties you should suffer in this case. Bearing in mind the need for deterrence, it is necessary for the Court to mark its strong disapproval as representative of the community.

[23] Mr Urquhart, would you would you go into the dock, please.

[24] On the charge of excess breath alcohol, to which you have pleaded guilty:

- a) You are convicted and fined \$350;
- b) You are disqualified from holding or obtaining a driver licence in the Cook Islands for 18 months and if you have a Cook Islands licence you must surrender immediately; and
- c) You are to pay Court costs of \$50 on that charge.

[25] On the charge of careless use of a motor vehicle causing injury:

- a) You are convicted and fined \$2,000;
- b) You are disqualified from holding or obtaining a driver licence for a period of 18 months and you must surrender any Cook Islands licence; and
- c) You shall pay medical costs of \$20 and Court costs of \$50.

[26] You are not to leave Rarotonga until the fines and costs are paid. I understand you have surrendered your passport, and that will be retained in the Court until the fines and other monetary orders are satisfied.

[27] You may stand down.


C H Toogood, J