



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 51 of 2016

THE REPUBLIC OF NAURU

v.

ROSEN RIBAUW

Defendant

Before: Crulci J  
For the Prosecution: F. Lacanivalu  
For the Defence: R. Tagivakatini

Dates of the Hearing: 13-17, 20, 21, 24 February 2017  
Date of Sentence: 25 February 2017

**CATCHWORDS** - *Criminal Law – Dangerous Driving - Manslaughter – Grievous Bodily Harm - Young Offender – Aggravating Features - Sentence*

## SENTENCE

1. Rosen Ribauw, you pleaded guilty to the offence of dangerous driving and were found guilty after trial of four offences: manslaughter of Drexler Eobob (known as He-Anka), 22 years of age; manslaughter of Berlasha Dabwido, 16 years of age; grievous bodily harm of Elushen Hubert, 17 years of age; and grievous bodily harm of Kahiko Harris, 18 years of age.
2. The maximum penalties for these offences are as follows:
  - a) Dangerous Driving, contrary to s67(1) *Motor traffic Act 2014* - suspension of driver's licence for a period of one year and (a) a fine of \$1000; or b) imprisonment for six months; or (c) both a fine and imprisonment;
  - b) Manslaughter, contrary to ss.303 and 310 of the *Criminal Code 1899* - imprisonment with hard labour for life;
  - c) Grievous Bodily Harm, contrary to s320 of the *Criminal Code 1899* - imprisonment with hard labour for seven years.
3. On the 4 July 2015 you were 19 year of age and did not hold a driving licence. In the early hours of the morning you were driving around the island in a double cab white Mazda truck with friends. After receiving phone calls from your friends you collected them in the vehicle and continued driving around, socializing and drinking vodka and juice. You were all of a similar age ranging from mid-teens to early twenties. When you were driving in Anibare District you deliberately drove the vehicle in an exaggerated zigzagging manouvre on the road, just for fun.
4. At this time the group consisted of the following: yourself, Berlasha, Kinte, Elushen, Wendell, Kahiko and Theresa May. You drove to Wendell's house in Boe. There all of you carried on drinking vodka and juice, and were joined by John Berg and He-Anka. John Berg was not drinking. About an hour later you were told via a telephone call received by Wendell that his relative was involved in a fight at Yaren. In response, the group now including He-Anka and John Berg, boarded the vehicle with you as the driver.
5. In the passenger seat next to you was Theresa May, in the back seats were Berlasha and Wendell. In the back tray sat Kinte, Kahiko, John Berg, Elushen and He-Anka. You told the Court that when you got into the vehicle to drive to Yaren you were drunk. You turned left onto the main road and travelled from

Boe in the direction of Yaren taking the road that travels past the Nauru International Airport.

6. Your speed increased until you were driving fast and after Born Again Church using one hand you swung the steering wheel from side to side making the vehicle move in a zigzag manner on the road, going from one lane to another. The speed and manner of your driving was such to make one of your passengers sitting in the back tray hold on tightly with both hands behind him, put his head down and close his eyes out of fear.
7. What happened next is well established, your vehicle rolled three or four times coming to rest on its side about ten meters from the 'see-off' area at the Airport. The passengers of the vehicle were thrown onto the tarmac. He-Anka and Berlasha Dabwido died at the scene and Kahiko Harris and Elusion Hubert were badly injured<sup>1</sup>. The others sustained bumps and bruises.
8. At the scene you denied being the driver, and asked your friends not to say that you were the driver. When later questioned by the police, you continued with the lie, saying you didn't know who the driver was.

#### *Defence Counsel Submissions*

9. It is said on your behalf you are a first offender, and at the time of the offence you were 19 years of age, that you understand the serious nature of this offence and have accepted the Court's judgment and likely punishment. You hope to reform yourself after repaying your debt to society.
10. I am told that you contribute to the daily welfare of your family. You suffer from a medical condition which will require medical appointments and a possible operation.
11. You are remorseful and also suffer the pain caused by the injury to, and the loss of your friends. Every day you regret the events of a drinking party that went badly wrong.
12. The Court is referred to *King v The Queen*, a High Court of Australia case<sup>2</sup>. The Court notes that in this case the appellant argued that the jury direction by the judge resulted in not having the chance to be considered for a lesser

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<sup>1</sup> Judgment of *Republic v Ribauw* [2017] NRSC 11, pp6, 7

<sup>2</sup> [2012] HCA 24

charge of dangerous driving causing death<sup>3</sup>. The High Court dismissed the appeal against the convictions of culpable driving causing death<sup>4</sup>. The maximum sentence for the offence was 20 years imprisonment. The case revolved around the direction given to the jury, and is distinguished from this case.

13. Your counsel cites the matter of *State v Bulivorovor*<sup>5</sup>, where the accused's sentence on appeal was increased. That case can be distinguished from this one in that the maximum penalty for the offence is 10 years imprisonment; details of the offence are quite different involving a sober accused overtaking on a busy road in the morning and striking two children walking to school. One of the children died and the other was seriously injured. The accused entered pleas to an agreed set of facts. A tariff for these offences having been set earlier in 2005 by the Court as between 2 - 4 years.
14. Thirdly the matter of *R v Jurisic No 60131/98*<sup>6</sup> is cited for guidance. (s319(1) Crimes Act 1958 (Vic) wherein the Court reflected on a need for guidelines. This matter involved guilty pleas to three counts of dangerous driving involving grievous bodily harm; the Court held that a starting point of two or three years is appropriate with aggravating factors affecting the actual sentence.
15. To date you do not hold a driver's licence.

#### *Prosecution Counsel Submissions*

16. The prosecution outlines the maximum sentences available to the Court and notes that in *R v Mackenzie*<sup>7</sup>: "*The range of sentences in cases of manslaughter is naturally very wide because, as has often been acknowledged, so much depends on the circumstances*".
17. In Fiji there is an offence contrary to section 240 of the *Crimes Decree 2009* which states:
  240. A person commits an indictable offence if—
    - (a) the person makes an omission; and
    - (b) the omission causes the death of another person; and
    - (c) the first- Mentioned person—
      - (i) has a duty to the other person in accordance with section 241;

<sup>3</sup> s319(1) *Crimes Act 1958* (Vic)

<sup>4</sup> S318(1) *Crimes Act 1958* (Vic)

<sup>5</sup> [2014] FJHC 930

<sup>6</sup> [1998] NSWSC 423

<sup>7</sup> [200] QCA 324, at [53]

(ii) the omission amounts to a negligent breach of the duty, such omission is or is not accompanied by an intention to cause death or bodily harm.

Penalty — Imprisonment for 25 years.

18. The prosecution submits the case of *R v Kumar*<sup>8</sup> which considered this section, “the defendant was charged with s. 240 of the Crimes Decree 2009. He was driving a passenger bus when he noticed that the deceased hadn’t paid for his fare. The deceased was standing on the bus’s exit steps with door open but the defendant continued driving at full speed. Because he didn’t stop the bus, the deceased jumped off and sustained serious head injuries which later caused his death. In sentencing, the High Court maintained that the tariff for manslaughter in general despite the change of the laws (from the repealed Penal Code to the Crimes Decree 2009) is between suspended sentence and 12 years imprisonment. In the above case, he was sentenced to 4 years and 10 months imprisonment with a non-parole period of 3 years”.
19. The following are put before the Court as aggravating factors:
- There was a high level of alcohol consumption
  - There was a high level of serious injuries suffered by the victims, including the deceased, which reflects the manner of driving
  - The victims gave evidence in Court and relived the accident
  - The victims were young
20. The prosecution note the words of Thompson CJ written in 1998 in relation to an offence of Driving whilst Intoxicated; words which are as relevant now as they were written some forty years ago:
- “The number of road accidents and the deaths resulting from them, in recent years has been alarming. It is well-known to this Court, from cases which have come before the Courts, that the principal cause of very many of the accidents has been that the driver has been drinking and is under the influence of alcohol. It has been necessary, therefore, for the Courts to take a very serious view of the offence of driving under the influence of alcohol, to the extent of imposing custodial sentences even on persons who have no previous convictions.

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<sup>8</sup> [2015] FJHC 773

It is unfortunate that the appellant has spoiled his reputation and his long, period of honest and decent living in this community by this one offence. But it is a serious offence and it would not be proper to treat him otherwise than on the principles which the Courts apply to others committing offences of the same nature."<sup>9</sup>

#### *Victim Impact Statements*

21. I have before me a number of victim impact statements and they detail the effect upon the families of the victim's.
22. The first is by Fenelia Bill who is the mother of Berlasha Dabwido. She tells the Court that losing Berlasha was the saddest thing in her life and that after Berlasha died she didn't go to work for the next few months, it is like she had lost everything. They still call out her name on occasion and then realize that she's no longer with her and the family cannot get over the fact that she's gone.
23. When Mrs. Bill goes to the tarmac area she talks to her daughter and bows her head when she goes past. The case affects her when she sees Berlasha's friends and classmates who now have families of their own. She has missed the opportunity to have grandchildren if Berlasha were still alive. Her inability to let the case go has led her to falling out with her elder sister, and she wishes for justice to be done in this case.
24. Kahiko Harris tells the Court that he does not trust people trying to drive him when he is drinking; and that he also gets nightmares about the incident.
25. Elushen Hubert says she cries when she remembers her best friend Berlasha. She wishes that she could turn back time so that it didn't happen. She's frightened of getting into another accident, and has nightmares about the accident.
26. The Court is told that the lady who raised He-Anka was unable to provide her victim impact statement to the Court because she is still too distraught to recall the effects of the loss of He-Anka on her and the family.

#### *Pre-Sentence Report*

27. The Court is assisted by the provision of a Pre-Sentence Report by the Acting Chief Probation Officer<sup>10</sup>. I am informed that you're the second last of five children, and you live in Buada with your parents. You have been employed by

<sup>9</sup> *Restore v The Republic* [1978] NSRC 6

<sup>10</sup> Pre-Sentence Report by A/Chief Probation Officer Raelytta Daoc, dated 22 February 2017

the Utilities Corporation in the ICT unit. Recently you have missed a lot of work days due to Court appearances and stress.

28. You are not in a relationship and spend your spare time with family and friends; you are well liked in your community and do not have a reputation of being a troublemaker. I am told that with your family you are well mannered, kind and considerate. I note that throughout the trial your parents were in Court each day with you.
29. I am told that you are not a compulsive drinker, now only drinking on special occasions and not to excessive amounts. When speaking to the Acting/ Chief probation Officer you indicated sincere remorse for your actions, and felt regret and sadness for these actions and the consequences.

*Similar cases in Nauru and other jurisdictions*

30. Looking to published decisions in this jurisdiction the Court notes that there were a number of matters in the late 1970s.<sup>11</sup> Despite extensive research I have not been able to ascertain the sentences handed down for these matters; having said that the cases were some forty years ago and society's values and expectations can change over time.
31. The following matters are drawn from the Australian Courts and it must be noted at the outset that offences against s328A of the *Code* (with an element of aggravation) carry a maximum sentence of 14 years imprisonment, in contrast to the offence of manslaughter in this jurisdiction, which carries imprisonment with hard labour for life.
32. In *R v Nikora*<sup>12</sup> the defendant was a 19 year old man who killed two of his passengers whilst speeding in the early hours of the morning. The defendant had a blood alcohol concentration of 0.171%<sup>13</sup>. He was convicted on his plea of guilty and sentenced to 7 years imprisonment with parole eligibility set after two and a half years. This was not disturbed on appeal.
33. In *R v Sheldon*<sup>14</sup> two passengers died as a result of the appellant's driving. Holmes JA (as Her Honour was then) considered a number of grounds of appeal including whether the sentence was manifestly excessive, and she held:

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<sup>11</sup> *Republic v Adam* [1975] NRSC 11; *Republic v Tebetang* [1979] NRSC 5; *Republic v Scotty* NRSC 9; *The Republic v Robidok Detudamo*, Criminal case No. 10 of 1980

<sup>12</sup> [2014] QCA 192

<sup>13</sup> The legal blood alcohol concentration level is 0.05%

<sup>14</sup> [2014] QCA 328

*"Sentence*

[52] Even making allowance for the period of roughly a year spent on remand, a sentence of seven years imprisonment is appropriate, having regard to the aggravating circumstance of the appellant's leaving the scene knowing the other driver to have been killed or injured, and his previous conviction of dangerous operation of a vehicle. Cases such as *R v Vessey; ex parte Attorney-General*,<sup>15</sup> *R v Ross*,<sup>16</sup> *R v Hopper*<sup>17</sup> and *R v Hallett*<sup>18</sup>, all cases of dangerous operation of a motor vehicle causing death, involving sentences of seven, eight or nine years, support that view. In *Ross*, the only one of those cases with the same aggravating circumstance of leaving the scene of the incident, a sentence of eight years imprisonment was imposed without any recommendation for parole (despite a plea of guilty).

[53] The applicant should be given some recognition of his early guilty plea. His cooperation must be regarded as limited, however, given his attempt to deceive the authorities by attempting to set up a false scenario of a stolen vehicle.

34. The Court of Appeal in Samoa in *Iosua v Attorney General*<sup>19</sup> referred to a number of cases in the United Kingdom and New Zealand when considering offences which have come to be known as 'motor manslaughter'. Reference was made to the United Kingdom's Sentencing Guidelines Counsel which has published a Definitive Guide on Causing Death by Driving<sup>20</sup>.
35. In assessing the seriousness of an offence the Guidelines lists the following examples of factors that influence the decision<sup>21</sup>:
  - Awareness of risk (a prolonged persistent and deliberate course of very bad driving);
  - Effect of alcohol or drugs;
  - Inappropriate speed of vehicle;
  - Seriously culpable behaviour of the offender (e.g. driving using a hand-held mobile phone);

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<sup>15</sup> [1996] QCA 11.

<sup>16</sup> [2009] QCA 7.

<sup>17</sup> [2011] QCA 296.

<sup>18</sup> [2009] QCA 96

<sup>19</sup> [2104] WSCA 5

<sup>20</sup> Guidelines published July 2008

<sup>21</sup> *Ibid.*, p3



**Causing death by dangerous driving, Road Traffic Act 1988**

Nature of offence	Starting point	Sentencing range
<b>Level 1</b> The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others	<b>8 years custody</b>	<b>7–14 years custody</b>
<b>Level 2</b> Driving that created a <i>substantial</i> risk of danger	<b>5 years custody</b>	<b>4–7 years custody</b>
<b>Level 3</b> Driving that created a <i>significant</i> risk of danger <i>[Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving]</i>	<b>3 years custody</b>	<b>2–5 years custody</b>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> <li>1. Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol or drugs before driving.</li> <li>2. More than one person killed as a result of the offence</li> <li>3. Serious injury to one or more victims, in addition to the death(s)</li> <li>4. Disregard of warnings</li> <li>5. Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving whilst disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle</li> <li>6. The offender's irresponsible behaviour such as failing to stop, falsely claiming that one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape</li> <li>7. Driving off in an attempt to avoid detection of apprehension</li> </ol>	<ol style="list-style-type: none"> <li>1. Alcohol or drugs consumed unwittingly</li> <li>2. Offender was seriously injured in the collision</li> <li>3. The victim was a close friend or relative</li> <li>4. Actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and /or death resulting</li> <li>5. The offender's lack of driving experience contributed to the commission of the offence</li> <li>6. The driving was in response to a proven and genuine emergency falling short of defence</li> </ol>

<sup>19</sup> Ibid., p11

## CONSIDERATIONS

37. Your actions of driving in this grossly negligent manner has forever changed the lives of many people including the victims, their families, you, your family and the wider community who were related to or knew those involved through school and social contacts. It was indeed fortunate given the manner of your driving that there were not more fatalities.
38. Having considered all the evidence before the Court, the submissions made by counsel and the cases and Guidelines referred to above, I will approach sentencing by looking at the most serious offences first and then review the sentences as a whole to balance the offending behaviour with the total sentence imposed.
39. I determine that the starting point for the offences of manslaughter at eight years imprisonment.
40. I view the following as aggravating factors which increases the sentence to ten years:
- a) Two people died and two people were badly injured;
  - b) You deliberately drove at speed;
  - c) You deliberately executed zigzagging maneuvers;
  - d) You knew you were drunk when you drove the vehicle;
  - e) You knew there were passengers in the back tray;
  - f) You consistently denied being the driver of the vehicle;
  - g) You were an unlicensed driver;
  - h) The witnesses relived the accident when giving evidence.
41. I consider the following as matters in mitigation:
- a) You are a young man, 19 at the time of the offence and now 21 years;
  - b) This is your first offence before the Court;
  - c) The duration of the offending is a relatively short;
  - d) You have positive character references; these indicate you are maturing into a well-mannered and respectful member of the community;
  - e) You have expressed remorse over the incident and your prospects for rehabilitation are good.

In light of these factors I reduce the head sentence to be served to nine years imprisonment, to reflect both the gravity of the offending and to give you an opportunity to rebuild your life after your sentence is served.

ORDER

- (1) **Count 1, Dangerous driving:** 6 months imprisonment, driver's licence suspended for 12 months (Not currently holder of a licence)
- (2) **Count 2, Manslaughter:** 8 years imprisonment, concurrent with Count 1
- (3) **Count 3, Manslaughter:** 8 years imprisonment, concurrent with Counts 1 and 2
- (4) **Count 4, Grievous Bodily Harm:** 3 years imprisonment, 2 years concurrent to Counts 1, 2 and 3, and 1 year consecutive to Counts 1, 2 and 3
- (5) **Count 5, Grievous Bodily Harm:** 3 years imprisonment, concurrent to Counts 1, 2, 3 and 4

Total period of imprisonment 9 years (time on remand to count towards total sentence)

Justice J.E. Crulic

Dated this 25 February 2017

