

PUBLIC PROSECUTOR

-V-

WESLEY KAL

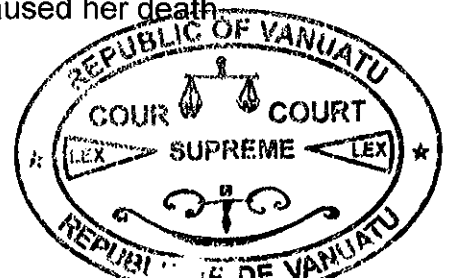
*Mr. Tevi for the State
Mr. Yawha for the Defendant*

SENTENCE

Wesley Kal, you have been convicted of two of the most serious driving offences in the Road Traffic Control Act [CAP. 29] namely, Causing Death by Reckless Driving which is an offence contrary to section 12 and carries a maximum prison term of 5 years imprisonment and Driving Under Influence of Alcoholic Liquor which is an offence contrary to section 16 and carries a maximum prison term of 1 year imprisonment. In respect of both these offences the Court may also disqualify you from driving a motor vehicle for up to 5 years.

On that Friday evening of 8th June 2007 you were driving a green Hyundai bus registration number B3498. At the request of the deceased you picked her husband Titus from Green Light Nakamal at Seaside. Thereafter the 3 of you decided to have some alcoholic drinks at Star Wharf. You drank until daylight of the following day Saturday 9th June and you then all left for the deceased's home at Eratap after buying some chicken wings. From Eratap you and the deceased drove to Vila to buy cake and returned to Eratap where you picked the deceased's husband and their 2 young children and headed back to Vila. The deceased's husband and children got off at Anamburu and you and the deceased continued on to Vila where you continued to drink alcohol until late in the evening.

After drinking you and the deceased then went and picked her husband and headed back to Eratap. On the way near the Korman Stadium, you turned the bus around and headed back to Vila in order to refuel the bus. Whilst approaching La Parisienne you drove your bus on its incorrect side of the road and collided head-on with an approaching vehicle. At the time inside the bus, besides yourself and the deceased, were no less than 4 other passengers who all suffered minor injuries as a result of the collision. The deceased however was not so fortunate. She suffered a fractured spine which caused her death.



Wesley Kal, I have listened carefully to all that has been urged on your behalf by your counsel and have read the pre-sentence report prepared by the Probation Officer. You were a relatively young single man of 26 years at the time of the accident. You lost your father at a fairly young age. You received a certificate after completing years 11 and 12 and have practical skills in welding and construction.

Since the incident you have taken on the added responsibility of a pregnant girlfriend and an adopted daughter and you have left drinking alcohol and smoking cigarettes. Although you were unemployed and you rely on your cousin for financial support you have dedicated your time to helping out with church activities especially in youth programs.

I have noted your change of plea to one of *guilty* to the charge which, although belated, nevertheless is something in your favour. It demonstrates an acceptance of responsibility on your part and as showing some remorse. You are also a first offender and, except for a month when you were remanded in custody, you have been on continuous bail since you were charged with the offence in the Magistrate's Court in July 2007. You have not re-offended whilst on bail.

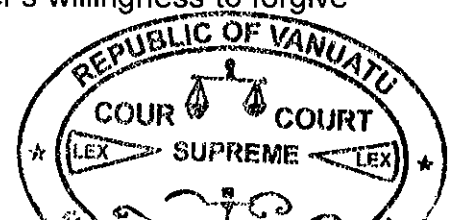
I am not unmindful that you yourself sustained serious fractures to your collar bone and knee in the accident which continues to plague you especially during cold weather. You also developed a problem with your eyesight. I note also that the probation officer considers you a person of "*low risk to the community*" and that you have expressed an interest in "*undertaking rehabilitative programs such as community work and supervision*".

I have noted in particular your expression of personal regret and apology in Court at what had happened and your willingness to pay compensation and undertake a custom ceremony of reconciliation with Jenny's family despite their rejection of a recent attempt by you and your relatives to perform a custom ceremony.

In *PP v. Robin [2005] VUSC 69 Bulu J.* (as he then was) described the significance of "*custom ceremony*" in the following terms (at paragraph 71).

"Reconciliation in line with the custom of the parties involved is an important thing in the communities as such ceremonies form the basis of ensuring that peace and order is maintained in the communities and further is a stat in the healing process between those affected and their families. The importance and the value placed on such ceremonies and what is exchanged in such ceremonies cannot be overlooked."

Plainly custom ceremony and tradition play an important part in the life of the people of Vanuatu. It serves to identify the people and helps in the re-establishment of good community relations and promotes forgiveness and allows for healing and reconciliation to occur between the parties concerned. Although acceptance of a custom ceremony is a voluntary matter, it behoves the receiver to accept it whenever it is offered as a sign of the receiver's willingness to forgive and be reconciled.



Recognizing the importance of this traditional resolution mechanism, the Court is empowered in suitable cases to promote reconciliation and encourage and facilitate customary settlements and, where such a custom ceremony has been performed, the Court is required to take that into account in determining the appropriate sentence to be imposed.

In this instance and to his credit, the deceased's father stated in Court that he would accept a customary ceremony if he was approached by the accused and his relatives. He also sought compensation.

I am grateful for the assistance provided in both counsels well written and researched submissions and for the comprehensive pre-sentence report provided by the Probation Services in a timely manner.

Wesley Kal nothing I say or do today will bring back the life of Jenny Saro, a mother of two young children who have become orphans and her husband who has been widowed. No sentence I pass will reverse the tragic personal consequences that have been inflicted on Jenny Saro's family. That is a heavy burden you must personally bear for the rest of your life knowing that you caused her death whilst driving recklessly on that fateful night and, by your own admission, whilst under the influence of alcoholic liquor to such an extent as to be unable to properly control your vehicle.

In this regard in *Jenkinson v. Public Prosecutor [2000] VUCA5* the Court of Appeal said:

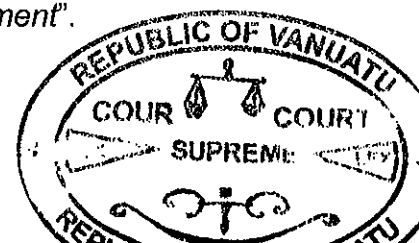
"Where it is alleged that alcohol contributed to the happening of an accident, and there is evidence that supports the allegation, that will be a serious matter of aggravation ..."

Furthermore the fact that you were the driver of a bus carrying passengers at the time is a further aggravating factor that cannot be ignored as was said by this Court in *Public Prosecutor v. Kaltang [2002] VUSC 9* (per Coventry J.):

"Drivers of buses have a special responsibility as they are carrying members of the public. Drivers who go too fast or do not keep a proper look out must expect substantial sentences from the Court. If a driver has consumed alcohol and that contributes to an accident which comes causes death or serious injury the driver must expect imprisonment"

More recently, in April this year, this Court repeated a warning it gave in November 2008 when it said in *Public Prosecutor v. Jack Joseph [2007] VUSC22* (per Dawson J.):

"... any person coming before the Court for reckless driving leading to the death of people can expect a sentence of imprisonment"



In similar vein the Court of Appeal said in *Jenkinson's* case (ibid):

"Serious driving offences causing personal injury or death will necessarily attract penalties that reflect a component of general deterrence."

Wesley Kal in light of the foregoing this Court would be failing in its duty if it considered anything other than a custodial sentence and for a term of not less than 2 years imprisonment, as the appropriate starting point for your conviction of reckless driving causing death. That figure is reduced by 6 months to allow for the mitigating factors earlier identified leaving a sentence of 18 months imprisonment.

In so far as the offence of driving under the influence of liquor is concerned I impose a sentence of 6 months imprisonment to be served concurrently with the sentence imposed for the offence of causing death by reckless driving making a total sentence of 18 months imprisonment for both offences.

I turn next to consider whether this is an appropriate case for the exercise of the Court's power to suspend the sentence under section 57 of the Penal Code. In this regard I am assisted by the observations of the Court of Appeal in the *Jenkinson's* case (op-cit) when it said:

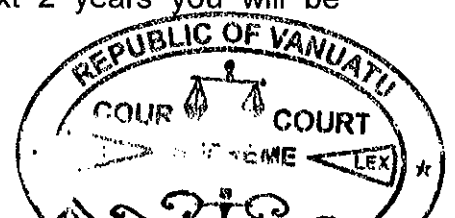
"In the case of a first offender with a long history of good driving, good character, good employment record and involvement in community affairs it is a very serious step to send that person to gaol. Suspension of the sentence, which allows the best opportunity for rehabilitation, will after (sic) be the appropriate course".

With respect these words could easily describe you Wesley Kal. You have had this case hanging over you for the last 2 years during which time you have plainly strived to rehabilitate yourself and impressed both your chief and church pastor who have written in support of you.

It also appears from the facts outlined that the deceased may have had a hand in your consumption of alcohol over the 20 odd hours that you were together before the accident and, for several hours of which her husband was absent. She was plainly a willing participant both in your drinking spree as well as in being a passenger in your bus during the many trips that you made together before the accident occurred.

Given the unusual circumstances of the case, I consider that this is an appropriate case for the exercise of the Court's discretion under section 57 of the Penal Code. Accordingly the sentence of 18 months imprisonment is hereby suspended for a period of 2 years with immediate effect.

What this means is that although you will not have to go to prison today, if however, you are convicted of any offence in the next 2 years you will be



required to serve this sentence of 18 months imprisonment in addition to any other sentence that may be imposed on you for your re-offending.


Furthermore and pursuant to section 40 of the Penal Code you are ordered to pay compensation in the sum of VT250,000 for the benefit of the husband and two young children of Jenny Saro and you are to perform a custom ceremony of reconciliation to the family of Jenny Saro.

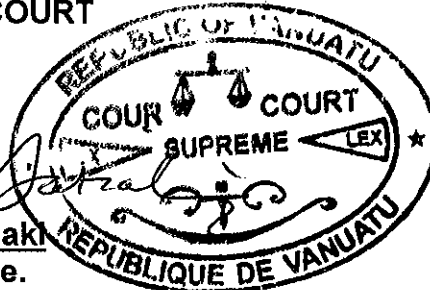
Finally, in exercise of the Court's power under section 55 (1) of the Road Traffic [Control] Act you are disqualified from driving a motor vehicle for a period of 3 years and your driving licence is endorsed accordingly.

You have 14 days in which to appeal against this sentence if you do not agree with it.

DATED at Port Vila, this 4th day of September, 2009.

BY THE COURT


D. Fatiaki
Judge.



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Mr. Tevi for the State
Mr. Yawha for the Defendant


ADDENDUM TO THE SENTENCE ON WESLEY KAL

Pursuant to Section 44 of the Penal Code the conditions of the sentence of compensation are as follows:

- (1) The total amount of compensation to be paid by Wesley Kal is VT 250,000;
- (2) The compensation is to be paid in a lump sum;
- (3) The compensation is to be paid at the same time as the custom ceremony to Jenny Saro's family is performed on a date agreed by the parties but not later than 4 months from today;
- (4) The Probation Service is to be informed of the date of the custom ceremony and a probation officer must attend and witness the custom ceremony and provide a written report to the Court within 2 weeks after the custom ceremony has been performed.

DATED at Port Vila, this 4th day of September, 2009.

BY THE COURT


D. Fatiaki
Judge.

