

PUBLIC PROSECUTOR

V

JAMES WILFRED

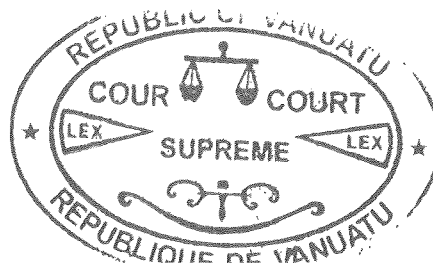
Before: *Justice D. V. Fatiaki*

Counsel: *Lenry Young for the Public Prosecutor
Andrew Bal for the Defendant*

Date of Sentence: *14 March 2019*

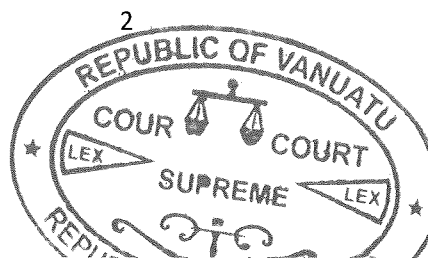
SENTENCE

1. On 11 December 2018 the defendant pleaded guilty ("*hemi tru*") and was convicted for an offence of Unintentional Harm resulting in the death of Stephen Toa (the deceased).
2. The brief facts are that just before the accident, the deceased was sitting on a bag of cement placed on top of a sheet of plywood which extended beyond the edge of the rear tray of the defendant's black Toyota twin cab truck. The accident occurred as the defendant's truck was approaching to overtake another vehicle at high speed on the stretch of road outside the Sunset Bungalow Resort at No. 2 Lagoon Port Vila. In the process, the plywood sheet and the bag of cement and the deceased were all thrown out of the back tray of the defendant's truck. The deceased landed heavily on the tarseal road and sustained severe fatal head injuries with multiple bleeding from the ears, nose and mouth and a scalp wound on the back of the head. The deceased died on the spot where he landed in the middle of the road.
3. Police attended at the scene soon after the accident and noted the covered body of the deceased, and a bag of cement on the road. There was also a plywood sheet leaning against a concrete wall at the side of the road.
4. Neither the bag of cement nor the plywood sheet are shown in the police sketch plan of the scene nor were the items weighed or the dimensions of the plywood sheet measured. Unfortunately, no attempt was made to reconstruct how the



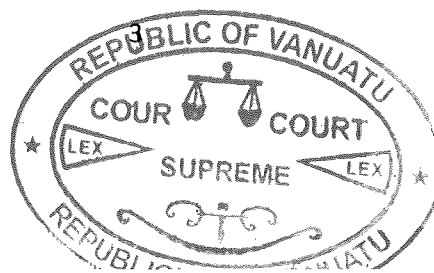
plywood sheet and cement bag were loaded on the rear tray of the defendant's truck or how the deceased was seated on them. Had this been done the cause of the accident would be more easily explained as there is no suggestion that there had been a collision or that the defendant's truck had suddenly braked or swerved to avoid a pothole before the two items and the deceased were thrown out of the back tray. I say unfortunately because photos of the defendant's truck taken at the scene soon after the accident shows the back tray to be quite fully laden with a ladder and other materials clearly visible above the top edge of the tray. Presumably these were already in that tray before the unsecured plywood sheet, cement bag and the deceased were loaded. This was an accident waiting to happen.

5. Indeed the hardware company workers who helped load the plywood sheet and cement bag onto the tray of the defendant's truck expressed their concern at the already overloaded tray and the unstable and insecure positioning of the plywood sheet and cement bag and they even offered to tie down the plywood sheet but the defendant and the deceased: "...*tufala l se l oraet nomo*" (they said it was alright). Their bravado was clearly misguided as subsequent events showed.
6. Having said that, the sole "*eye witness*" to the accident was the driver of the vehicle that the defendant was in the process of over-taking, who saw it through his side rear view mirror. In his own words he saw the plywood sheet, the bag of cement and the deceased: "...*flew off from the back...*" of the defendant's truck.
7. The investigating Police officer who attended and interviewed witnesses at the scene also formed the clear view that the accident was caused by the wind gusting against the unsecured plywood sheet and lifting and forcing it, the bag of cement, and the deceased who was sitting on the bag of cement to fly out from the rear tray of the defendant's truck. The fact that the defendant was, at the time, in the process of overtaking at speed would have added to the strength of the wind gusts and the uplift force acting on the unsecured plywood sheet would have inevitably led to the plywood sheet flying out of the tray of the defendant's truck.
8. In this case the manner in which the plywood sheet was loaded unsecured onto the back of an already loaded back tray of the defendant's vehicle was, to the knowledge of the defendant, negligent and reckless in that there was a real risk that the unsecured plywood sheet might fall from the tray and, despite the offer from the hardware employees to tie down the sheet, the defendant quite unreasonably declined and took the risk that the plywood sheet with the deceased seated on top of it might fall out of the tray of the defendant's vehicle.
9. Given that risky circumstance the defendant, instead of driving slowly, drove at a high speed in attempting to overtake a vehicle thereby causing the unsecured

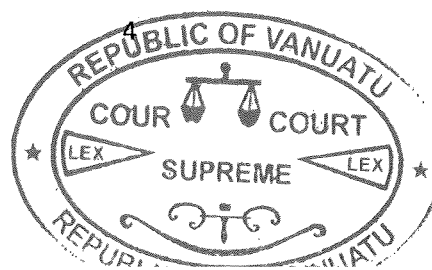


plywood sheet with the deceased seated on top to be thrown out of the back of the tray as a result of the wind lifting the unsecured sheet.

10. Undoubtedly there was an element of contributory negligence on the part of the deceased a mature man, sitting on the unsecured plywood sheet of an already fully loaded rear tray but, nevertheless, the primary ultimate responsibility to ensure the safety and security of the load on the back tray of his vehicle rested with the defendant owner/driver who was also responsible for the welfare and safety of his passenger.
11. Having said that I accept that the defendant did not intend the tragic consequences of his negligence and reckless disregard of the deceased's safety in allowing him to sit on the unsecured plywood sheet at the rear tray of his truck. The offence is aggravated in my view, by the manner in which the defendant was driving the vehicle in executing a *prima facie* unsafe manoeuvre of overtaking a vehicle at speed on his incorrect side with an unsecured load in the overloaded rear tray.
12. In considering an appropriate starting sentence in this case I am mindful of the maximum penalty of 5 years imprisonment as well as the aggravating speed of the vehicle and the defendant's manner of driving *ie.* in permitting the deceased to sit on the unsecured plywood sheet in the rear tray. I have also considered the cases of Public Prosecutor v Rosario Melsul [2016] VUSC 98 and the judgments of the Court of Appeal referred to therein and the recent case of: Public Prosecutor v Moli [2018] VUSC 98. The starting point I adopt is 3 years imprisonment before considering mitigating factors.
13. From the defendant's pre-sentence report I extract the following personal details and mitigating factors:
 - The defendant was born on 17 April 1990 and would have been 28 years of age at the time of the accident. He is the eldest of 3 sons. His father hails from Tongoa and his mother is from Ambae;
 - The defendant attended Central School and completed his year 12 at Malapoa College before going to the Philippines for 6 years of study. He returned in 2014 and enrolled in PVTc where he successfully completed 2 years of study to become a qualified electrician;
 - The defendant is considered a quiet non-assertive person. He is an active member of the SDA church with strong family and community support;
 - The defendant is in a "*defacto*" relationship with a one year old son;



- The defendant accepts full responsibility for the accident and to the probation officer, he tearfully expressed his sincere remorse and apology to the deceased's family who are close relatives on his mother's side;
 - The defendant and his extended family performed two (2) custom reconciliation ceremonies to the deceased's extended family. The first, occurred on 11 October 2018 under Ambaen custom at the Vila Central Hospital morgue before the deceased's body was removed for burial. Gift of 7 Ambaen mats and VT20,000 cash was donated and accepted by the deceased's relatives. The second, larger and more elaborate ceremony occurred under the Tonguan custom of "Vanua Nada" (Kraon blong Blad) where a small piece of land valued at VT400,000 at Teproma, South East Santo was purchased and given to the deceased's family along with traditional gifts of manioc, taro and kumala food crops; 51 mats; 45 kg rice; a sack of sugar and a bullock was donated during the ceremony. The defendant's family also under-wrote the deceased's hospital, funeral and burial expenses including return air tickets for 3 people to come from Maevo Island. In all, the defendant's family contributed a total of VT1,052,370 in cash and in kind to the deceased's family.
 - The defendant is a first offender who pleaded guilty at the earliest opportunity; he is genuinely remorseful for his actions and accepts full responsibility for the tragic consequences which he will have to live with for the rest of his life. The defendant did not attempt to flee after the accident and voluntarily surrendered himself to the police.
14. For the above mitigating factors I deduct 18 months giving an interim sentence of $(36 - 18) = 18$ months imprisonment. A further 6 months is discounted for the defendant's early guilty plea giving an end sentence of: $(18 - 6) = 12$ months imprisonment which is ordered to be suspended for a period of 2 years.
 15. This sentence means that the defendant will not have to go to prison today or at all if he remains out of trouble for the next 2 years. But if he re-offends and is convicted of any offence in the next 2 years then the defendant will be sent to prison to serve this sentence of 12 months imprisonment. Whether that happens or not is entirely in the defendant's hands.
 16. The defendant is advised that he has a right to appeal against this sentence if he does not agree with it.
 17. I have also considered whether a compensation order should be made in this case and am satisfied that the element of contributory negligence is a real impediment to any possible summary award or assessment. The deceased's family are accordingly left to exercise any rights they may have to bring a separate civil claim for any loss




or damage they have suffered as a result of the deceased's untimely and tragic demise.

18. Finally, given the very common sight of adults and even children riding or standing unrestrained and unsecured on the tray of twin cabs and trucks in this country, the frequency of fatal accident of the type that occurred in this case is also likely to rise in future unless measures are put in place to control, restrict, and regulate the carriage of persons on the open rear tray of trucks and twin cab 4x4 vehicles.

DATED at Port Vila this 14th day of March, 2019.

BY THE COURT


D. V. FATIAKI
Judge

