

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

CR: 89 - 90/2015

POLICE

v

GARY CHARLES KELLY

Date: 19 March 2015

Counsel: Ms Martha Henry for the Plaintiff
Mr Norman George for the Defendant

SENTENCING OF THE HONOURABLE MR JUSTICE HUGH WILLIAMS

[1] Mr Kelly it is customary for people being sentenced to stand in the dock but there is no need for you to either stand or to go into the dock because, for the reasons for which I will elaborate in my remarks, you are not going to go to jail.

[2] Gary Charles Kelly at the age of 66 you appear before a Court for the first time in your life having pleaded guilty on 6 March to two charges, careless driving causing death on 22 February and careless driving causing injury on the same day.

[3] As the Crown has said, the maximum sentence on each of these charges is imprisonment for five years or a fine of \$5000.00, the Cook Islands Parliament having increased the maximum sentence for these offences by twenty times in 2007 to mark its concern at the deplorable road toll that there is here in the Cook Islands.

[4] The facts of the matter, as Ms Henry for the Crown has said are that late in the afternoon on Sunday 20 February you were driving towards Muri looking for somewhere to purchase some food and you noticed an open store, indicated your intention to turn to the right, commenced that turn and the deceased lady drove into the left hand side of your car. You did not see her and it seems fairly obvious that she did not see you either. She was thrown from her motorcycle onto the road and sustained serious injuries from which she died shortly afterwards. Her son, the thirteen year old pillion passenger, was also thrown from the motorcycle and sustained much less serious injuries. Your wife, who was your passenger in your vehicle, sustained injuries also, but again, much less serious.

[5] The Probation Report reviews your Canadian citizenship and tells me that in fact you and your wife had come to the Cook Islands on this occasion to mark 46 years of your marriage. It was a trip for your anniversary. The Probation service also gives me details of a tragic family background that you have had. Those are intensely personal matters. I don't intend to rehearse them today but I do take them into account in deciding what is the appropriate sentence.

[6] Also before me are some eight testimonials from eminent citizens in Ontario who testify to your blameless record and your record of community service. They include a testimonial from your doctor of long standing, lawyer of long standing and a provincial Minister of the Crown. They are most impressive in what they say. You have a university qualification which you obtained in 1989 with further diplomas obtained in 1990 and 1996 in human resources and organisational management. You have worked and counselled with Alcoholics Anonymous since 1981 and have worked for over 8 years voluntarily in the local correctional facility, assisting people incarcerated in jail. You held office with the United Steel Workers of America for a lengthy period up to 1988. You have been an instructor at McMaster University in the School of Continuing Education helping them settle the curriculum for human resource programmes up until 1998 and have been an Executive Officer of the Ontario Compensation Employees association, again for a lengthy period up until a couple of years ago.

[7] Not only have you not been before a Court before, you have had considerable driving experience and it is noteworthy that you have taken, annually, driver training to ensure that you are safe on the road. You have had no previous accidents, no previous tickets.

[8] In the Probation Service report, I read:

“In relation to the offence, Mr and Mrs Kelly cannot express their pain and anguish they have suffered since the day of the accident. Mr Kelly understands the grief and sorrow Mr Nicholas and his family are experiencing. Their hearts and thoughts are with the deceased and her family where Mr Kelly expressed great remorse and is extremely apologetic for the loss of life and injury to the child. Mr Kelly states nothing can bring back the death of Mr Nicholas’ wife and the mother to their children. However, they are willing to compensate for the families loss.”

[9] Ms Henry for the Crown responsibly points me to two earlier decisions, *Castillo*¹ and *Clark*² where it was said that causing serious injury or death by careless or dangerous driving in the Cook Islands should in light of the massive increase in the maximum penalty in 2007, incur a starting point for sentence of a term of imprisonment.

[10] In *Castillo* the starting point was two and a half years imprisonment, in *Clark* a case that does have similarities to your own because it was an accident caused by an overseas visitor, reparation was ordered.

[11] In light of those cases I need to consider a possible jail term as a starting point at least in arriving at the appropriate sentence for you. But, as I have said, my final view is that jail term is not appropriate in this case and I will give the reasons why a little later.

[12] Mr George, acting on your behalf suggests from a witness statement that the late Mrs Nicholas may have been partly to blame in the manner of her driving, both in her inattention and in her speed. Whilst one respects witnesses’ statements to the Police, those matters are completely unproved and I can place very little weight on it.

[13] In arriving at the appropriate sentence, I need of course to reflect the obligation you have to be accountable for the harm done both to Mrs Nicholas and to her family particularly her son and to the Cook Islands community where as I said the road toll is deplorable.

¹ Police v Christopher Castillo HCCI CR 415/12, Hugh Williams J 22/6/2012

² R v Clark HCCI CR 50/12 Hugh Williams J 28/1/2012

[14] I need to try and promote a sense of responsibility on your part, but your background shows that you already have a deep-seated sense of responsibility, both to the community and particularly when you are driving.

[15] I need to provide for the interest of the victim and provide reparation – I will refer to that in a moment given your offer – and of course, I need to denounce and try and deter others from driving in this way.

[16] The aggravating factors in this case are surprisingly few in number beyond the carelessness which necessarily results from your plea of guilty and of course the fact that one doesn't want to minimise that a lady has lost her life and one of her children has been quite badly injured.

[17] But against that is that you have entered pleas of guilty at the very earliest opportunity, you have an outstanding record of contributions to your home community and you are quite plainly a very responsible driver. It's the first time you have been before the Courts in your 66 years.

[18] But what sets your case aside from *Castillo, Clarke* and the other matters I mentioned is the attitude of Mr Nicholas and his family. Quoting again from the victim impact statements and the Probation report,

“ Mr Nicholas is evidently depressed with the loss of his wife and mother to his children, they have 13 children. Six of whom are under 12 years of age, Mr Nicholas states his children are a priority, the younger children are missing their mother and continue to wake in the middle of the night crying for their mother.”

[19] Sleeplessness, and those sorts of impacts would be suffered by Mr Nicholas and his family, even if their mother and wife had not died in a motor accident but died of some other causes. But their generous nature is that they say – and it is repeated by Mr George – , that they did not want you to be prosecuted. Quoting again from the Probation officers reports:

“ The Nicholas' thoughts are with Mr and Mrs Kelly. Mr Nicholas is adamant he did not want Mr Kelly to be prosecuted and he communicated this to the Cook Islands

Police. Mr Nicholas and his father both expressed this as a terrible tragedy for both parties and hope Mr and Mrs Kelly are well despite what has occurred. Mr Nicholas does not feel the prosecution will bring back his wife or contentment; he has no animosity towards Mr Kelly.”

[20] That is what one can only term extraordinary generosity on the part of the Nicholas’ and that, coupled with your outstanding personal record of contribution to the community in which you live, are the factors which lead me to conclude that a jail term is not appropriate in your case.

[21] In the JP’s Court an Order was made for the interim suppression of your name. As I advised Mr George, I can see no justified basis for continuing that order. It will lapse as from now.

[22] I am required to disqualify you from holding or obtaining a drivers licence. I am unsure how much longer you intend to remain in the Cook Islands but I will disqualify you for 12 months which should cover the balance of your stay.

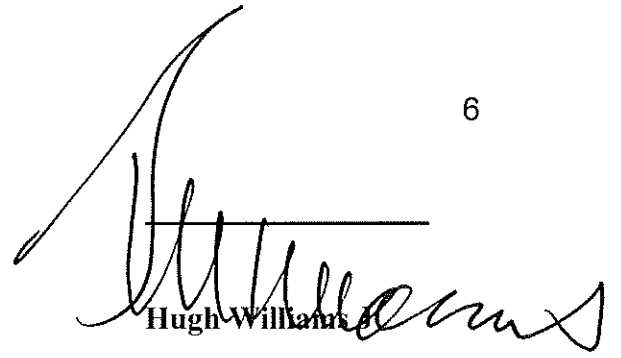
[23] In addition to the reparation of \$15,000.00, I consider that it is appropriate that the Court mark its disfavour of driving in this fashion. I will impose a fine of \$1000.00 on you.

[24] The reparation is to be payable immediately, Mr George has said that he has got a cheque for \$10,000.00. The remaining money of \$5000 will be paid just as soon as a cheque can be organised from Canada.

[25] So the ultimate result is that you are disqualified for 12 months, fined \$1000.00 and you will pay reparation in the total sum mentioned by Mr George \$15000.00.

[26] Stand down.

[27] The passport can be surrendered and released back to Mr Kelly.



Hugh Williams