

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

CR NO's 766-767/2020

POLICE

v

DOMINIQUE ELISA

Hearing date: 18 August 2020

Counsel: Ms M Okotai for the Crown
Mr K Ahsin for the Defendant

Sentence: 18 August 2020

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[10:47:42]

[1] Mr Elisa, at the age of 44 you appear in Court for the first time having pleaded guilty on 12 March 2020 to two charges, first, dangerous driving in a manner threatening to the public and causing injury to a person, and secondly, driving with excess breath alcohol. Both took place on 20 December 2019.

[2] The seriousness of the offences is shown by the maximum sentence on the dangerous driving charge of 10 years imprisonment or a \$10,000 fine and discretionary disqualification for up to three years. And on the excess breath alcohol, imprisonment for 12 months is the maximum or a \$1000 fine with a mandatory disqualification of a year.

[3] It has now been about five months since you pleaded guilty, with the delay being caused by the Covid-19 pandemic.

[4] The facts are that you participated in a work function shortly before Christmas and, contrary to your being teetotal for about a decade, drank a great deal of alcohol. You then chose to get behind the wheel of your pick-up truck and drive along the road.

[5] You say you fell asleep, but, in any case, you veered to the wrong lane while you were driving, swerved back, veered across the centre line again, there was a near-collision and then you collided with a van which was just behind the vehicle you only just missed.

[6] When you were tested it was discovered that your breath alcohol reading was 246ml per 100ml or approximately three times the legal limit.

[7] It is clear from the victim impact statement that the driver of the van with which you collided suffered concussion and other injuries, fortunately not too serious in the circumstances. Although she went to hospital, she was not admitted. And by the date of the statement which is before me, she was back at work and seemed to be largely unharmed permanently as a result of this of what occurred.

[8] I accept that you were immediately apologetic and remorseful and that those factors remain very strongly with you today. There was apparently some difficulty about the injured woman accepting your letter of apology but I accept that it was genuinely meant and any reluctance on her part was because she did not fully understand the process. But you have definitely apologised to her and you have apologised to her employer who owned the van that she was driving on that occasion.

[9] The Probation Service has given me a good deal of material concerning your early family life and Mr Ahsin on your behalf has filled in additional gaps.

[10] Your first wife died unfortunately and your child of that marriage also died. You then met and married Elsie Elisa, coincidentally also before the Court this morning for sentencing, with there being two children aged one and three. It is clear that you have had most severe marital difficulties as a result of which the two of you are separated in circumstances where it appears that her description of her activities

is such that it has caused you very considerable emotional distress for the period including when you drove on 20 December last year.

[11] It has been a really emotional struggle for you and you are to be commended for seeking assistance from counsellors, from your pastor, from your prayer group, from Mr Ahsin and others to combat the emotional strain and distress under which you are labouring.

[12] The Probation Service recommends probation and community service but they may not be aware of the authorities from the Court as to the correct approach in sentencing for these offences.

[13] The Crown, however, is aware of those authorities and recommends a short period of imprisonment plus a year's probation and mandatory disqualification.

[14] Ms Okotai, for the Crown, makes clear that it is fortunate that we are not dealing with much more serious consequences of this incident, and the Crown refers me to a number of cases, the main one of which is a case called *Timoti*¹. I have also looked at *Maunga*,² and *Teheipuarii*³ that the Crown refers me to and I have also considered the 2006 case of *Teokotai* which sets out the factors that are often to be found in relation to offences such as those to which you pleaded guilty.

[15] *Timoti* was a much more serious case than yours, but it is important to bear in mind what was said on that occasion. It is not a tariff judgment because Courts of first instance are unable to bind other Courts of first instance, but it is certainly to be regarded as a benchmark judgment which should be borne in mind by all Courts sentencing persons such as you, on the types of cases to which you have pleaded guilty.

[16] I read from paragraphs [18] onwards of *Timoti*:

“[18] Your conviction by the jury on a charge under s 25(2) of the Transport Act 1966 raises, once again, question as to what should be the starting point for the imposition of the appropriate sentence on persons who are convicted

¹ *R v Timoti*, CR 477/2016; 1 June 2016; Hugh Williams, J.

² *Police v Maunga*, 3 May 2013; Potter, J.

³ *Police v Teheipuarii*, 29 March 2012; Weston, CJ.

of or have pleaded guilty to offences under ss 25 and 26 of that Act. Generally speaking, those are reckless or dangerous driving causing injury or death, especially when the commission of the offence is associated with the drinking of alcohol. As mentioned in 2007 Parliament massively increased the maximum penalties for those serious driving offences, especially when alcohol related, doubling the maximum term of imprisonment, increasing the maximum fine by ten times and also providing for a minimum disqualification of 12 months on conviction with no maximum.

[19] Parliament's response was a principled reaction to mark its disquiet at the prevalence of cases coming before the Courts of serious injury or death caused by the most serious driving offences especially those involving alcohol coupled with injury or death. That was a plain indication of Parliament's wish to deter and denounce such conduct.

...

[26] As this case illustrates, the time has come – and is arguably well overdue – to increase the starting point for sentencing those who have been convicted of, or pleaded guilty to, offences under ss 25 and 26. While this Court is unable to bind this or higher Courts, it is of the view that on conviction for a serious driving offence, particularly those under ss 25 and 26 where excess blood alcohol well in excess of the allowable maximum of 18mg of alcohol per 100ml of blood is involved, and where those offences result in serious injury or death to persons other than the driver, in the search for the appropriate penalty to impose on the driver the Court should as a first step adopt a starting point of at least one year's imprisonment. This of course is still only 10% of the maximum. It has been described as a first step" because, if there is no slackening in the commission of such offences having those consequences, the Courts may well be justified in the future in adopting a higher starting point.

[27] Of course, despite adoption of that starting point, the search for the appropriate level of penalty to impose on a particular driver in his or her circumstances will necessarily involve increases or reductions from the starting point resulting from the myriad of aggravating and mitigating circumstances that can apply. Jail for more than one year may well be the sentence imposed ultimately.

[28] Similarly, a reduction from the starting point may well follow but still involve an ultimate sentence of imprisonment. Realistically the pressure from offenders and their counsel will be to persuade the Court that sufficient mitigating circumstances exist to justify an end sentence not resulting in jail. Perhaps longer disqualification or a probation maybe urged and there will be cases where, exceptionally, that will be the result. But, if others follow this Court's lead, a term of imprisonment will normally follow conviction for offences under ss 25 and 26 where alcohol and injury are also present."

[17] Now Mr Ahsin, on your behalf, has strenuously argued that the circumstances in your case are such that a non-custodial sentence should be imposed. And I certainly acknowledge the vehemence of his submissions and the earnest way in which he has argued your case.

[18] In looking for the appropriate sentence, in line with *Timoti* the starting point should be approximately a year in jail. As mentioned, that is only a fraction of the maximum Parliament enacted some 13 years ago.

[19] The factors that make your offence more serious are first, the very high breath alcohol reading; secondly, the very poor driving that occurred – a moment's thought, even after drinking alcohol for the first time in a decade, would have shown you that you should never have contemplated getting behind the wheel of a vehicle. And that driving and that alcohol ingestion needs to be seen against the continued prevalence of driving, alcohol-impaired, causing injury and death which is such a feature, a regrettable feature in the Cook Islands.

[20] The features that lessen the severity of the penalty to be imposed are of course first, your very early plea of guilty and the unfortunate delay which has occurred, because of the pandemic, in sentencing; secondly, that this is the first time that you have ever been before a Court; and thirdly, that it is readily accepted that because of your remorse and the actions you have taken since 20 December 2019, it is highly unlikely you will ever appear before a Court again. Fourthly, I take into account the genuineness of your apology and the deep remorse and humiliation you feel as a result of what took place on that evening. And, although it is a matter of luck, there is also the fact that no very serious injury or persistent injury occurred.

[21] Mr Ahsin has stressed the effect on you of your family circumstances and your marital breakdown and the struggle you have had since that occurred to keep your family together, to reach a resolution of the custody issues with your wife and yourself and the difficulties you have had in maintaining your role as a father in with those highly charged and emotionally difficult circumstances. It is only with family support that you have managed to look after, particularly, the two children of your marriage.

[22] Yours is a case where the mitigating factors, those lessening the severity of the offence, are significantly more persuasive than the aggravating factors, and as a result the jail term, which must be the starting point for sentencing, can easily be halved, at least.

[23] Also, a significant reduction can be given for the delay in sentencing, for the worry, the concern, the humiliation and, throughout, your family circumstances. It is also possible, as mentioned in *Timoti*, to increase the length of disqualification to partially compensate for a reduction in the term of imprisonment.

[24] But at the end of all of that you made an exceptionally poor decision on the evening of 20 December. Not just to drink, but to drink a considerable amount of alcohol and then to get behind the wheel of your vehicle and drive in the very bad fashion you did.

[25] You will pay \$300 for the blood report plus \$50 for Court costs and \$20 for the medical report.

[26] As a result of Mr Ahsin's earnest and full submissions on your part, I have reduced the term of imprisonment that I initially contemplated. But I still think that a short term of imprisonment is inevitable on this occasion.

[27] Mr Ahsin argues that will give no help to non-drinkers such as yourself but that is illogical. The fact is that on this occasion, after a decade of being a teetotaler, you drank a very considerable amount of alcohol, got behind the wheel of a car drove very badly and caused injury.

[28] As a result of that I have reduced, as I have said, the term that I initially considered. You will go to jail for two months. You will then, on your release, serve 12 months' probation. And on the excess blood alcohol charge, you will be disqualified for 3 years from holding or obtaining a driver's licence.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ