

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

**CR NO 522/19**

**POLICE**

v

**ODETTE HEIDIMARIE STANKE**

Hearing Date: 22 and 23 April 2021 (via Zoom)

Counsel: L William for the Crown  
M Tangimama for the Defendant

Sentence: 20 July 2021 (via Zoom)

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**SENTENCING NOTES  
OF THE HONOURABLE JUSTICE PATRICK KEANE (via ZOOM)**

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[11:21:35]

[1] Odette Stanke, you appear for sentence for driving carelessly, and causing injury, on Wednesday, 14 August 2019. I held you committed that offence, after a defended hearing.

[2] That Wednesday, at about 5 pm, you were driving your Suzuki Swift car on the seaward side of the main road, in the vicinity of Arorangi, heading towards Avarua.

[3] Shortly before you had been heading home on the landward side of the main road, in the opposite direction. But as you passed the Friendly Mart Store, Akaroa, you saw that it was selling tickets for a Puaikura cultural evening, and you decided to buy tickets for your guests.

[4] You turned back, making a U-turn 150 to 200 metres further down the road, and as you did so you noted now behind you a motorcycle 'quite close', some 4 to 5 metres behind, and two tourist scooters some 20 metres further back.

[5] Your evidence, and theirs, was that all the way back to the Store you and they were travelling at or below 50 kph, and at relatively safe distances. That changed in an instant, however, when you reached a point opposite the store, which was now on the far side of the road to you.

[6] Their evidence, which I accepted, was that, apparently intending to park, you pulled over to the left, perhaps even on to the footpath, which on the police evidence was possible and commonplace. Then you changed your mind, and turned back abruptly to the right, in order instead to cross the road to enter the store carpark.

[7] I found you careless in two related ways. First, you turned right from the extreme left-hand side of the road without first checking that the way was clear; an essential precaution because you had just turned hard left. Second, you failed to signal, or you signalled far too late.

[8] I found, as a result, that the motorcyclist, Mr Cuthers, was caught completely by surprise. He was about to pass you, as he was entitled to, within your shared lane, when you pulled back right in front of him. He came off his motorcycle, which may have touched the right front of your car. Thankfully, he suffered no serious injury.

[9] I found also that the tourists on scooters, Ms Whitehead and Ms Fahey, were just as completely compromised. They too came off their scooters and, very regrettably, both suffered serious injuries, emotional harm, and compounding and continuing costs. As well as giving evidence, each has given a detailed victim impact statement.

### **Lynda Whitehead**

[10] Ms Whitehead sustained cuts and scratches to her left arm, right and left elbow, left palm, stomach and the whole of her right leg. She suffered a badly wrenched left shoulder, an injury to her left knee ligament, and a swollen left ankle. She suffered injury to her left temple, a black eye, and swelling to the left cheek.

[11] In her victim impact statement she says her left inside ankle bone and the top of her left foot became infected and ulcerated. She continues to suffer related nerve damage. Her left knee rupture will require surgery, and she has wider leg injuries. Her left shoulder injury is also extensive and she now suffers a compressed neck disc.

[12] On her return to New Zealand she had a number of days off and she has been under the care of orthopaedic and plastic surgeons, who are at a significant distance from where she lives. She faces the prospect of further costs.

[13] She says she has suffered constant pain. Her sleep has been disrupted. She has become socially nervous. She is no longer able to live an active and sporting life. Her family life has suffered. The Crown confirms that she has provided receipts for medical treatment and costs totalling \$3,300.

### **Deborah Fahey**

[14] Ms Fahey, who landed on her left side, hit her head on the road, rendering her dazed and nauseated. She suffered a gash to the forehead, which required five stitches. She suffered bruising to her right shoulder and left thumb, and grazes to both arms and legs.

[15] In her victim impact statement she says she has scarring where her sunglasses gashed her forehead. Her left wrist and right shoulder are still painful and require osteopathy and acupuncture. As a result of whiplash, she has a tight neck, which disturbs her sleep. She is constantly tired and irritable.

[16] She is very self-conscious about the scars to her forehead. She is conscious that customers look away from her or stare straight at her forehead. Plastic surgery would be prohibitively expensive. She intended at the date of her statement to attempt non-invasive treatment.

[17] She still suffers flashbacks and, like Ms Whitehead, is still angry that their shared family holiday, in which they had invested so much, was so abruptly cut short with such drastic effects on their health and wellbeing. On sentence, the Crown confirms, she has so far incurred costs totalling \$1,479.

**Presentence report**

[18] Your presentence report confirms that you appear for the first time for any offence, and how at odds with your life this present offence is. You are a German national. You were educated to a tertiary level there. You hold here, and have since 2012 held here, positions of responsibility.

[19] Your report confirms, equally, that you and your husband are modestly placed. Up until the date of your report, under the COVID regime applying, your gross income weekly was \$320, and your monthly outgoings, principally your mortgage and living expenses, came to \$2,000. Your gross income has recently increased to \$450. But you are still evenly poised. At the date of your report your savings were \$11.85.

[20] Your report confirms, finally, that you now accept you were at fault as I found in my decision, though you still deny you drove right on to the left hand footpath. You admit and much regret your error of judgment. You are in principle, as your counsel confirms, willing to make phased reparation (\$50 weekly) as long as you remain in work.

[21] That, as your report says, is your anxious concern. You are only able to retain your primary source of income if you remain able to drive. Your primary employer has said that absent that ability he will not be able to retain you.

[22] Your report recommends a sentence of probation, 12 months, subject to the following conditions:

- 1) You are to attend any training or workshop directed.
- 2) You are not to leave the country without the approval of this Court.
- 3) You are to pay the reparation sought by the Crown.

**Guideline decision**

[23] The sentence I impose on you must be consistent with the guidelines the Court of Appeal outlined in *Boyle v Crown*<sup>1</sup>, and the sentence level it there endorsed in a case with features similar to yours.

[24] In that case, as the prosecution submits, the appellant made a momentary error of judgment. He turned right into the driveway leading into his home without first checking to see whether there was oncoming traffic. His victim suffered serious injuries.

[25] The appellant was sentenced to probation for 12 months, the first three months on community service. He was also to make reparation to meet the damage to the bike, and emotional harm, amounting to \$5,000. He was disqualified for nine months.

[26] On the appeal, the Court recognised that offences may differ widely as to driving fault, and as to the seriousness of the injury resulting, and at that sentences may differ as widely. The sentencing Judge may also take into account an early guilty plea, reparation, remorse and personal circumstances.

[27] In that case, the Court said, while the appellant had no previous convictions he had not expressed any remorse, and he had not offered any reparation. The sentencing Judge had imposed a sentence ‘well within the range of appropriate penalties’<sup>2</sup>.

[28] The Court also concluded that the nine month period of disqualification the Judge imposed, within the three year maximum, was also well within the range available for the offence<sup>3</sup>. And to be complete, I should also add this.

[29] In the sentence this offence calls for the decisive concern is the degree of driving fault, not the resulting injury. In New Zealand, as Williams J noted in *Bassett v Police*<sup>4</sup>, carelessness causing death, a more serious offence than yours, typically attracts a maximum primary sentence of 200 hours community work in cases of low to moderate fault.

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<sup>1</sup> *Boyle v Crown*, CKCA, CRN 423/16, 24 November 2017.

<sup>2</sup> At [36].

<sup>3</sup> At [37].

<sup>4</sup> *Bassett v Police* [2014] NZHC 2018.

[30] In *R v Skerrett*<sup>5</sup>, moreover, the New Zealand Court of Appeal, adopting earlier English authority, held that driving fault may be either aggravating or mitigating; and set in the latter category:

A momentary reckless error of judgment (such as briefly dozing off at the wheel or failing to notice a pedestrian on a crossing).

[31] These two decisions are consistent with the parameters set in *Boyle v Crown*; and they too must inform the sentence I am to impose on you.

### **Submissions**

[32] The prosecution contends for a sentence of probation with a 12 month starting point. Your counsel realistically accepts that such a sentence is open in principle.

[33] The prosecution contends for a distinct sentence of community service. Your counsel opposes that increment, because it could frustrate your ability to retain employment and to make reparation, which the prosecution also contends for.

[34] The prosecution contends for a period of disqualification, of at least six months. Your counsel opposes that increment for the same reasons that she opposes a sentence of community service, but subject to this qualification.

[35] You should be able to retain your primary employment from which you derive half of your income, if you can drive for four hours each working day, Monday to Saturday inclusive, between 8 am and 12 noon. She applies for a partial exemption limited to those hours and that sole purpose<sup>6</sup>.

[36] Finally, your counsel requests the Court to permit you to leave the Cook Islands on or about 30 September 2021 to undergo surgical review in Germany. You have undergone surgery in the past to excise an acoustic neuroma (a benign tumour originating in the balance and hearing nerves supplying the inner ear). The review is to establish whether there has been any regrowth.

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<sup>5</sup> *R v Skerrett*, CA 236/86, 9 December 1986.

<sup>6</sup> s 34, Transport Act 1966.

[37] You are likely to be away for four weeks. But that will be contingent on the medical certificate on 23 October 2021.

### **Conclusion**

[38] As I said, when I began these remarks on sentence, until you reached the point opposite the store, you drove carefully and safely, as I accept you typically do. You then made a critical error of judgment.

[39] If you had chosen to pull right over to the left hand side of the road to park, as I found you first intended to do, there would have been no accident. If, instead, you had chosen to turn right, to enter the store car park on the far side of the road to you, and signalled your intent immediately, again there would have been no accident.

[40] Your error lay in deciding to do the first, and then, immediately changing your mind, and electing to do the second. That instant shift of mind caught Mr Cuthers, who was riding competently and carefully behind you, and was about to pass you as he was entitled to, completely by surprise. And it completely compromised Ms Whitehead and Ms Fahey also.

[41] Ms Whitehead and Ms Fahey suffered significant and lasting injury, as I have said, and considerable costs. That is a highly material factor on sentence. What is decisive finally, however, is your degree of fault, which was significant but momentary, your belated remorse, which I accept is genuine, and your willingness to make reparation to the extent you are able.

[42] I sentence you to supervision on probation for 12 months on the three conditions recommended. To ensure that you remain in work, and retain some ability to pay reparation, I will not sentence you to community work, as I would normally. I must however disqualify you.

[43] You must, I consider, be disqualified from driving for nine months, to mark the seriousness of your offence. But, once again, to ensure that you remain in work and retain some ability to pay reparation, as well as support yourself and meet your liabilities, I grant you by consent a partial exemption between 8am and 12 noon on Mondays to Saturdays (inclusive), solely for the purposes of your work.

[44] I order you to pay reparation at the rate of \$50 per week for two years as from today, to be divided between Ms Whitehead as to two-thirds (\$27.00) and Ms Fahey as to one-third (\$13.00). This weekly sum is to be remitted to them monthly by the Registrar.

[45] The obligation to make weekly payments is not to apply while you are absent from the Cook Islands for the purpose of the surgical review, the issue to which I am about to refer. The period during which you are away for that purpose is therefore to be added to the two year period, when you return and the obligation resumes.

[46] Finally, I grant you permission by consent to leave the Cook Islands on or about 30 September 2021 for the surgical review in Germany. Initially that is to be for a four-week period, but that will be subject to the 23 October 2021 medical certificate.

[47] If you are to be absent from the Cook Islands for longer than four week, as presently anticipated, your counsel is to file a memorandum and serve it on the prosecution. The prosecution is to respond by memorandum within two working days. I will then issue a minute.



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**Patrick Keane, J**