

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 171 of 2017

STATE

V

JESONI TALEMAIMACUATA

Counsel : Ms. L. Latu for the State.
: Ms. N. Sharma for the Accused.

Date of Submissions : 17 May, 2021
Date of Sentence : 14 October, 2021

SENTENCE

1. The accused is charged with the following offence as per the information filed by the Director of Public Prosecutions dated 17th November, 2017:

Statement of Offence

MANSLAUGHTER: Contrary to section 239 (a), (b) and (c) (ii) of the Crimes Act 2009.

Particulars of Offence

JESONI TALEMAIMACUATA, on the 28th day of August, 2017 at Nadi in the Western Division engaged in conduct namely drove an unregistered tractor, dangerously and without due care and attention and the said

conduct caused the death of **LUSIANA MARIAN GRACE RAVITIKULA** and the said **JESONI TALEMAIMACUATA** was reckless as to the risk that the said conduct will cause serious harm to **LUSIANA MARIAN GRACE RAVITIKULA**.

2. On 13th December, 2017, the accused pleaded not guilty when his plea was taken. After numerous adjournments and going through Pre Trial Conference this matter was assigned a hearing date for Monday 1st February, 2021.
3. However, on Friday 29th January, 2021 the accused informed the court through his counsel that he wished to change his plea from not guilty to guilty. On this date plea was taken again and the accused pleaded guilty to the charge in the presence of his counsel.
4. On 14th October, 2021 the accused admitted the further amended summary of facts read by the state counsel. The summary of facts is as follows:

On 28th August, 2017 after 5pm the father of the victim Joseva Koroi came home from work when he saw the accused driving an unregistered tractor owned by the owner of the farm he was working for. On his way to the garden Joseva heard the accused calling the victim to join him on the tractor. The victim went to the accused, she was 5 years and 11 months at the time.

The victim and the accused were cousins, Awa Naviri a witness was washing clothes outside the house when she saw the accused driving the tractor with the victim seated on the left side of the tractor on top of the left rear tyre guard.

5. The victim waved at the witness, Awa then saw the tractor reverse near the cliff, when she did not see the tractor she ran towards the cliff. At the cliff Awa saw the tractor had overturned and was about 10 meters down the slope. The accused was standing beside the rear tyre of the tractor with the victim lying underneath. The victim's father also ran towards the cliff after he heard the sound of a falling tractor.

6. The accused was trying to pull the victim out, at this time the victim was breathing and blood was coming out of her mouth and nose. With the help of others present at the scene the victim was rushed to the Nadi Hospital but was pronounced dead on arrival. A post mortem was conducted which revealed the following:
 - (a) The leading cause of death was:
 - (i) Multiple skull fractures.

 - (b) Antecedent causes:
 - (i) Severe traumatic head injury; and
 - (ii) History of fall from moving tractor.

7. The tractor was examined by the Land Transport Authority and it was confirmed that all steering components were in good condition and no faults were evident, specifically the rear brakes were intact.

8. An investigation was carried out by the police the accused was arrested and caution interviewed. The accused admitted that he had driven the tractor on the day in question, he had never driven a tractor before and was not authorized to do so on this occasion. Furthermore, the accused did not have a driver's licence to drive a tractor yet he decided to drive it that day with the victim.

9. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview, this court is satisfied that the accused has entered an unequivocal plea of guilty on his freewill. This court is also satisfied that the accused has fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted by the accused satisfies all the elements of the offence of manslaughter as charged.
10. In view of the above, this court finds the accused person guilty as charged and he is convicted accordingly.
11. Both counsel filed written sentence and mitigation submissions for which this court is grateful.
12. The counsel for the accused eloquently presented the following mitigation and personal details about the accused:
 - (a) The accused is a first offender;
 - (b) He was 20 years of age at the time;
 - (c) Is a subsistence farmer;
 - (d) Is educated up to year 12;
 - (e) He accepts full responsibility for his actions and is genuinely remorseful;
 - (f) Regrets what he has done;
 - (g) Seeks the forgiveness of the court and he has sought forgiveness from the deceased parents who have forgiven him (but there is no confirmation of this);
 - (h) Cooperated with the police during investigations;
 - (i) Has had to live with the guilt of his wrong doing;

- (j) Had assisted in transporting the deceased to the hospital.

TARIFF

13. The maximum penalty for the offence of manslaughter is 25 years imprisonment. The accepted sentencing regime for the offence of manslaughter is a sentence between 5 years to 12 years imprisonment, depending on the circumstances of the offending with the powers of a suspended sentence available to the sentencing court under section 26 (2) (a) of the Sentencing and Penalties Act (*see Samuela Vakaruru vs. The State, criminal appeal no. AAU 094 of 2014 (17 August, 2018)*). At the present time there is no tariff for homicide by motor vehicle.

AGGRAVATING FACTORS

14. The following aggravating factors are obvious:
- a) Driving without a driver's licence
The accused knew he did not have a driver's licence to drive a tractor yet he drove the tractor that day.
 - b) Total disregard to the safety of the deceased
The accused had called the deceased to sit with him in the tractor without regard for her safety.
15. Considering the objective seriousness of the offence committed, I select 5 years imprisonment (lower range of the tariff) as the starting point of the offence. For the aggravating factors, I increase the sentence by 3 years. The interim sentence is 8 years imprisonment.

16. The accused is a first and a young offender who has come to court with a clean record hence he receives a discount for good character and other mitigating factors. The fact that the accused had also assisted in transporting the victim to the hospital is a positive factor as well. The accused receives a discount of 1 year and 6 months for his good character and mitigation. The sentence is now 6 years and 6 months.
17. The accused pleaded guilty after more than 3 years of the incident on Friday before the trial proper was to have started on Monday 1st February. In *Gordon Aitcheson vs. The State*, criminal petition no. CAV 0012 of 2018 (2 November, 2018) the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:
18. [14]. In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

*In ***Mataunitoga -v- The State*** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:*

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse,

witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

19. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (see *Manoj Khera v The State*, CAV 0003 of 2016 (1 April, 2016).
20. This court does not believe that the accused has shown genuine remorse when he pleaded guilty (on Friday before the hearing on Monday). The date of allegation is August, 2017 and the accused did not plead guilty until 29th January, 2021.
21. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt the timing of the guilty plea is very late and that prosecution had a strong case against the accused.

22. Nevertheless, by pleading guilty the accused saved the court's time and expenses and also prevented the victim's parents from reliving a horrific experience in court. Bearing this in mind, the accused ought to receive some reduction for his guilty plea. The sentence is therefore further reduced by 6 months, the interim sentence is now 6 years imprisonment.
23. From the court file it is noted that the accused has been in remand for 3 months and 19 days. In accordance with section 24 of the Sentencing and Penalties Act I deduct 4 months as a period of imprisonment already served. The final sentence is 5 years and 8 months imprisonment.
24. Counsel for the accused has urged this court to consider a suspended sentence unfortunately, considering the circumstances and the seriousness of the offence committed, including the culpability of the accused a suspended sentence will not meet the ends of justice.
25. Having considered section 4(1) of the Sentencing and Penalties Act and the serious nature of the offence committed compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
26. Under section 18 (1) of the Sentencing and Penalties Act, I impose 3 years and 8 months as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in all the circumstances of this case.

27. The non-parole period is below the tariff due to the age of the accused, an out of character offence has been committed, assisting in taking the victim to the hospital and cooperating with the police during investigation.
28. Mr. Talemaimacuata you cannot be forgiven for what you have done your recklessness has resulted in the loss of an innocent life, a family has lost a dear child because of your stupidity.
29. This court will be failing in its duty if a custodial sentence is not imposed, think of the pain and suffering of this child before she succumbed to her injuries and that of the grieving family – a lifelong scar and regret for the family. This tragedy would have been avoided had you exercised restraint and common sense. No amount of regret or repentance will bring back the victim.
30. In summary the accused is sentenced to 5 years and 8 months imprisonment for one count of manslaughter with a non-parole period of 3 years and 8 months to be served before the accused is eligible for parole.
31. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

14 October, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.