

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 90 of 2022

STATE

V

SIRELI TABUALEVU

Counsel : Ms. R. Uce for the State.
: Mr. P. Gade for the Accused.

Date of Submissions : 26 September, 2023
Date of Sentence : 27 September, 2023

SENTENCE

1. The accused is charged with the following offences as per the amended information filed by the Director of Public Prosecutions dated 27th September, 2023:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SIRELI TABUALEVU on the 2nd day of May, 2018 at Rabulu, Tavua in the Western Division, drove a motor vehicle registration number LR 3658

along the King's Road in a manner that caused the death of MANUHA APAI SAUAKI BESETIMOALA and at the time of driving, the said SIRELI TABULEVU was reckless as to the risk that his conduct would cause serious harm to MANUHA APAI SAUAKI BESETIMOALA.

SECOND COUNT

Statement of Offence

DRIVING MOTOR VEHICLE WITHOUT A DRIVING LICENCE: contrary to section 56 (6) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

SIRELI TABUALEVU on the 2nd day of May, 2018 at Rabulu, Tavua in the Western Division, drove a motor vehicle registration number LR 3658 along the King's Road without being the holder of a valid driving licence in respect of the said motor vehicle.

THIRD COUNT

Statement of Offence

DRIVING MOTOR VEHICLE IN CONTRAVENTION OF THIRD PARTY POLICY RISK: contrary to section 4 (1) (2) of the Motor Vehicles (Third Party Insurance) Act, Cap.177.

Particulars of Offence

SIRELI TABUALEVU on the 2nd day of May, 2018 at Rabulu, Tavua in the Western Division, drove a motor vehicle registration number LR 3658 along the King's Road without being the holder of a third party risk policy as required by the provision of the Act.

2. This matter was first called in this court on 23rd June, 2022. After numerous adjournments to allow for the filing of the information and disclosures, on 28th October, 2022, the accused pleaded guilty to all the counts when his plea was taken.
3. Thereafter when the file was called the summary of facts was not ready and long dates had to be given by the court since the accused was living in the interior of Tailevu and he had transport problems. Finally, on 23rd August, 2023 the accused in the presence of his counsel admitted the summary of facts which was read and explained to the accused in the Itaukei language. Furthermore the accused has maintained his guilty plea after the amended information was put to him today. The amendment in count three of the information does not affect the summary of facts admitted.
4. The brief summary of facts is as follows:
 - a) On 2nd May 2018, the accused was driving a motor vehicle registration no. LR 3658 along the King's Highway. He was accompanied by two others including the deceased Manuha Basetimoala 24 years.
 - b) At about 11.45 am, Sekove Kacanavatu was driving a bus past Rabulu village and travelling towards Tavua when he saw a rental car registration number LR 3658 coming from the opposite lane. As the rental car came near to the bus, Sekove saw that the car was coming on his lane.
 - c) Sekove pressed the horn and flicked the headlights to warn the driver of the rental car but the car still came straight onto his lane. Sekove turned the bus to the opposite lane but a girl was walking

on the side of the road. He applied the brakes but it was too late the rental car bumped the bus.

- d) Due to the impact the rental car spun three times and when the car came to a stop it was facing towards Tavua. Sekove tried to save the rental car by going to the left side but the car kept coming towards the bus so he swerved the bus and landed in the drain.
- e) After the impact, Sekove got up from his seat and checked the passengers inside the bus and he went to check the passengers inside the rental car. The driver of the car was stuck inside, the front passenger was injured and rushed to the hospital and the deceased who was sitting at the back seat was lying outside the car.
- f) The deceased was also taken to Tavua Hospital but he was pronounced dead. As per the medical cause of death certification the deceased died due to severe traumatic head injury due to motor vehicle accident.
- g) The accused was arrested, interviewed under caution and he admitted that on the alleged date he was driving vehicle registration number LR 3658 along King's Highway to Rakiraki. He admitted that he was driving without a driver's licence (Q.& A. 40 – 50).
- h) The accused stated that he was driving, the guest was sitting on the passenger's seat and the deceased was sitting at the back (Q. & A. 60 – 62). The accused said that he was driving and suddenly he felt sleepy and he could not recall when he slept when his hands were still on the steering wheel (Q. & A 63). The accused said he was very tired from working the night before (Q. & A 65). The accused

said that he could not recall anything as it happened all of a sudden (Q. & A 66 – 67).

- i) The accused said that he knew he was not supposed to drive without a driver's licence (Q. & A 97). When it was put to the accused that the accident happened because he was heavily intoxicated with liquor, the accused said that he did not have enough sleep (Q. & A 94). The accused was also not a holder of a third party risk policy as required under the provisions of the Motor Vehicle (Third Party Insurance) Act.
5. 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 charges and the consequences of pleading guilty. The summary of facts admitted by the accused satisfies all the elements of the offences as charged.
 6. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly for all the three counts.
 7. Both counsel filed written sentence and mitigation submissions for which this court is grateful.
 8. The counsel for the accused presented the following mitigation and personal details about the accused:
 - (a) The accused is a first offender;
 - (b) He was 35 years of age at the time;

- (c) Unemployed;
- (d) Early guilty plea;
- (e) Deeply regrets his actions and is sincerely remorseful;
- (f) Seeks the forgiveness of the court and the deceased family.

TARIFF

9. 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.
10. The maximum penalty for the offence of driving motor vehicle without a driver's licence for first offence is \$200.00 fine in default 30 days imprisonment.
11. The maximum penalty for the offence of driving motor vehicle in contravention of third party policy risk is a fine not exceeding \$400.00 or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

AGGRAVATING FACTORS

12. The following aggravating factors are obvious:
 - a) Driving without regard to road users

The accused drove the motor vehicle in a manner that had put all the road users and the passengers in the rental car at risk.

b) Fatigue

The accused was tired yet he drove the vehicle.

13. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

14. I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence for the three offences.

15. Considering the objective seriousness of the offences committed, I select 5 years imprisonment (lower range of the tariff) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors.

16. The accused is a first offender who has come to court with a clean record hence he receives a discount for good character and other mitigating factors.

17. The accused pleaded guilty at the first instance when the plea was taken. 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:

[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.

18. 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)*).
19. This court does not believe that the accused has shown genuine remorse when he pleaded guilty, however, by pleading guilty at the earliest opportunity the accused did express some remorse which is taken into account by this court as a favourable factor.
20. 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* (*see Gordon Aitcheson's case supra*). 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.
21. Nevertheless, by pleading guilty the accused saved the court's time and expenses. Bearing this in mind, the accused ought to receive some reduction for his guilty plea. The sentence is therefore further reduced for early guilty plea.
22. From the court file it is noted that the accused has not been in remand he was granted bail on his first appearance in the Magistrate's Court. In this regard no further deduction will be allowed. The final aggregate sentence is 5 years and 6 months imprisonment.
23. 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. In any event this court does not have the powers to suspend the above sentence. I also note that the accused is asking this court to consider the injuries he suffered as a mitigating factor. The injuries he suffered were his own doing hence this court has not taken this component as a mitigating factor.

24. This case is another example of carnage on the road due to someone's recklessness and failure to adhere to the rules. Here the accused was not supposed to be behind the steering wheel in the first place. His conduct shows a wanton disregard for the road users. The accused was not a fit and proper person to drive he took the risk to the detriment of others with serious consequences.
25. Whilst there is no specific tariff for homicide by a motor vehicle due to varying degree of facts and culpability, however, I am guided by the Court of Appeal in *State v Jessica Hill v. State, criminal appeal no. AAU109 of 2015 (10 August 2018)* the offender after pleading not guilty was sentenced to 7 years imprisonment with a non-parole period of 5 years.
26. In the case of *Jessica Hill* supra, the Court of Appeal upheld the sentence of 7 years imprisonment for manslaughter and made a pertinent comment from paragraphs [62] to [64] about reckless drivers:

[62]Road accidents cause immense human suffering. Every year, a considerable number of people are killed and seriously injured. This represents a serious economic burden. It is understandable that cases of serious driving offences causing death are referred to courts by the DPP in the form of Manslaughter because he considers that the prescribed sentence and tariff for Causing Death by Dangerous Driving is unduly lenient.

[63] Motor manslaughter cases cause particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm. Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by reckless driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others. Therefore, the sentencing should strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence.

*[64] A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence. [**R v Cooksley** (supra)].*

27. In another case *State v John Subramani Gounder* [2018] FJHC 33; HAC194.2016S (30 January 2018), the High Court after trial sentenced the offender to 8 years imprisonment with a non-parole period of 7 years.
28. Having considered section 4(1) of the Sentencing and Penalties Act and the serious nature of the offences 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.

29. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 4 years 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.
30. The non-parole period is below the tariff due to the age of the accused, an out of character offence has been committed, early guilty plea and due to his cooperation with the police during investigation.
31. Mr. Tabualevu you cannot be forgiven for what you have done your recklessness has resulted in the loss of an innocent life and a family has lost a dear member because of your stupidity.
32. This court will be failing in its duty if a custodial sentence is not imposed, think of the pain and suffering 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.
33. In summary the accused is sentenced to 5 years and 6 months imprisonment as an aggregate sentence for one count of manslaughter, one count of driving a motor vehicle without a driving licence and one count of driving a motor vehicle in contravention of third party policy risk with a non-parole period of 4 years to be served before the accused is eligible for parole.

34. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

27 September, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.