

IN THE COURT OF APPEAL

APPEAL CASE NO.1 OF 2000

THE REPUBLIC OF VANUATU

(Appeal Jurisdiction)

**BETWEEN: JOHN JENKINSON**

Appellant

**AND: PUBLIC PROSECUTOR**

Respondent

**Coram: Mr. Justice John W. von Doussa**

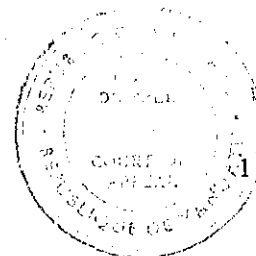
**Mr. Justice Daniel Fatiaki**

**Mr. Justice Roger J. Coventry**

**Counsel: Mr. Malcolm for the Appellant**

**Mr. Gardner for the Respondent**

**Hearing Date: 23 October 2000**



At about 7.30pm on 7 July 2000 Paul George was walking along the Mele Road towards Port Vila. He was approximately one metre from the edge of the road, with his back to the oncoming traffic. He was wearing a white and blue T-shirt.

The appellant was driving a truck in the same direction. The vehicle's lights were working properly; there is no street lighting. It was dark.

The truck hit Paul George projecting him some 4 metres into the grass at the side of the road. He was found to be dead on arrival at hospital.

A photograph of the front of the truck shows damage to the right headlight, and bodywork in that area. The appellant was arrested several hours later. He said in interview that he had stopped at the scene as he thought he had hit something. He got out of his vehicle, looked around, saw nothing and continued on his way. He said he had had two bottles of beer earlier in the evening.

The appellant was charged with an offence contrary to Section 108 Penal Code namely,

“No person shall unintentionally cause damage to the body of another person, through recklessness or negligence or failure to observe any law.

Penalty (a) ...

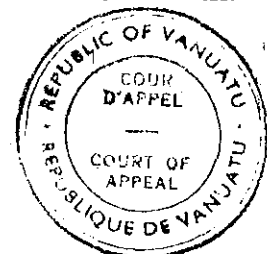
(b) ...

(c) if the damage so caused results in death, imprisonment for 5 years.”

He pleaded guilty to this offence. That plea was on the basis of “negligence” and not “recklessness ... or failure to observe any law.”

The respondent proceeded under that section, and not Section 14 Road Traffic (Control) Act which states that,

“A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable on conviction to a fine not exceeding VT50, 000 or to imprisonment for a term not exceeding 6 months or both.”



By Section 55 Road Traffic (Control) Act there is also a liability to disqualification from driving for up to five years.

There is a greater penalty available for an act resulting in death under Section 108 Penal Code than Section 14 Road Traffic (Control) Act. However, there is no power to disqualify a person from driving under the former.

A brief enactment making disqualification from driving an available penalty where any offence has been committed involving the use of a motor vehicle would be desirable.

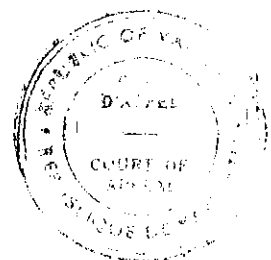
In mitigation it was urged that the appellant, a 56 year old married man with five grown up children, was employed on a local engineering construction site. This was his first offence in 40 years of driving. He suffers from asthma and high blood pressure.

The deceased had been drinking kava and was walking on an unlit road approximately a metre onto the carriageway.

The appellant had stopped at the roadside but not seen anything. When the facts came to his knowledge he was remorseful and has assisted the deceased's family above and beyond that legally required. There were references as to his good character.

The appellant pleaded guilty at the first opportunity. He had not sought to minimise his involvement, but could only say he had not seen Paul George before, at or after the moment of collision.

On 8 September 2000 the learned acting Chief Justice sentenced the appellant to 8 months imprisonment. He found aggravating factors in that the appellant failed to see the deceased on the road, disregarded whether he had hit something or a person and in an element of alcohol contributing to his negligence. The sentence to be imposed was to be 12 months imprisonment reduced to 8 months in the light of the mitigating factors.



The appeal was brought on the basis that the acting Chief Justice had failed to consider matters of mitigation and "parity of sentencing" and had taken into account matters of fact not before the court.

Two cases on the "parity" point were cited, namely Public Prosecutor v Kevin White, CRC 13 of 1999 and Public Prosecutor v Brent Wilson CRC 21 of 2000. In each of these cases the defendant caused the death of another in a road traffic accident through negligence, contrary to section 108 (c) Penal Code. In each case a heavy fine was imposed, but no imprisonment.

This is not an issue of 'parity of sentence' as between co-defendants to the same crime. The appellant's point is directed more to a question of broad consistency.

Rule 26 (3) Court of Appeal Rules 1973 states that "On an appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence ought to have been passed, quash the sentence passed at trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed..."

In our judgment this sentence should be quashed, as there are errors apparent in the exercise of the sentencing discretion. The appellant pleaded guilty on the basis that he stopped immediately after the collision. He looked about but found nothing and assured he had hit a stick or some like object that had broken his headlight.

Further there was no evidence that the appellant's admitted consumption of two beers had "contributed" to the accident. The prosecution did not urge either factor upon the court as an aggravating feature. Where it is alleged that alcohol contributed to the happening of an accident, and there is evidence which supports the allegation, that will be a serious matter of aggravation, and one which if coupled with a poor lookout could well render the piece of driving reckless and not negligent, but that was not the case here.

We are also concerned that the question of suspending the sentence was not sufficiently considered in respect of a defendant whose mitigation raised that possibility.



In the case of a first offender with a long history of good driving, good character, good employment record and involvement in community affairs, it is a very serious step to send that person to goal. Suspension of the sentence, which allows the best opportunity for rehabilitation, will after be the appropriate course.

Serious driving offences causing personal injury or death will necessarily attract penalties that reflect a component of general deterrence. Such a purpose is not lost by the imposition of prison sentence that is suspended. The defendant who receives such a penalty still suffers the stigma of a prison sentence, and for the duration of the suspension is at risk of actual imprisonment should another offence be committed.

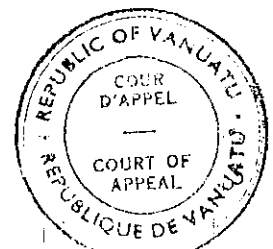
It therefore falls to this court to resentence the appellant afresh.

This was a piece of negligence by the appellant which comes at the high end of the scale. His look-out when driving the truck on that evening was grossly defective. That failure caused the death of a man. It was a serious piece of driving carrying a high risk of injury on the highway where the accident occurred. In these circumstances the starting point must be a custodial sentence, and one in the region of nine months imprisonment, before aggravating or mitigating factors are considered.

In this particular case the court looks to the mitigation set out above, particularly the appellant's age, health, long good driving record, plea of guilty and remorse. These factors would reduce the sentence to one in the region of six months imprisonment.

But for the fact that the appellant has already served part of a custodial sentence, the next question would be whether that sentence should be suspended or not. Given all the circumstances this court would have suspended the term of imprisonment for 18 months.

However, the appellant has in fact been in custody before and after sentence for a total of nearly 8 weeks. Accordingly, we think justice will now be done if we impose such sentence as secures his immediate release. There is no further penalty.

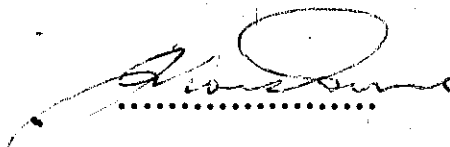


We therefore order that:

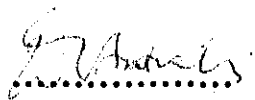
1. The sentence passed upon John Jenkinson on 8<sup>th</sup> day of September 2000 in Criminal Case 12 of 2000 is quashed.
2. Such sentence of imprisonment which permits his release today is substituted.

Dated at Port Vila, this 23<sup>rd</sup> day of October 2000

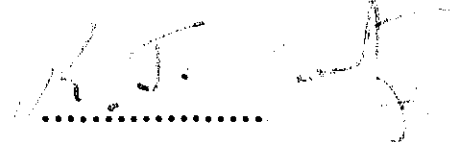
**BY THE COURT**



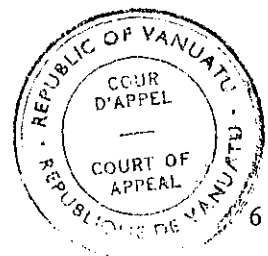
**J. von Doussa J.**



**D. Fatiaki J.**



**R. J. Coventry J.**



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*CRIMINAL*  
APPEAL CASE NO.1 OF 2000

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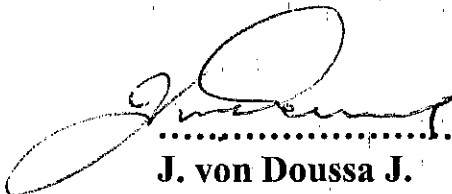
**ORDER**

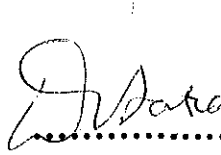
**UPON** hearing Mr. Malcolm for the Appellant and Mr. Gardner for the Respondent it is hereby **ORDERED** that: -

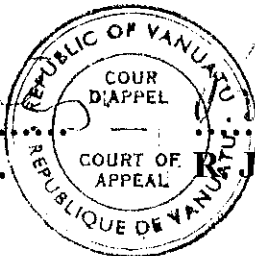
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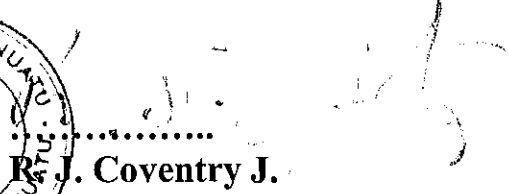
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**BY THE COURT**

  
.....  
**J. von Doussa J.**

  
.....  
**D. Fatiaki J.**



  
.....  
**R. J. Coventry J.**