

**IN THE SUPREME COURT  
REPUBLIC OF VANUATU  
(Criminal Jurisdiction)**

**Criminal Case No. 2992 of 2016**

**PUBLIC PROSECUTOR**

**-v-**

**PAUL KALO AWELL**

***Before: Chetwynd J***

***Counsel: Mr Young for Prosecution  
Mr Takau for the Defendant***

***Date of Hearing: 18<sup>th</sup> October 2016***

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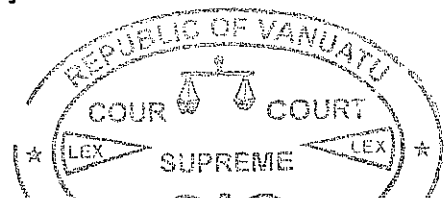
## **SENTENCE**

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1. The Defendant Paul Kalo Awell appeared before me on 6<sup>th</sup> September 2016 and entered guilty pleas to charges of causing unintentional harm leading to someone's death and careless driving. He appears today for sentence. I had the benefit of a pre-sentence report and submissions from counsel in deciding the appropriate punishment for the offences charged and accepted.

2. The facts of the case are agreed. At about 8:45 pm on the evening of 28<sup>th</sup> July 2016 Mr Awell was driving a Toyota Hiace bus in a westerly direction on the main road from Mele Golf Club towards Prima Bridge. As he approached the left hand bend near the entrance to the compound where the submarine cable comes ashore, he used his mobile 'phone to read a text message. As he was negotiating the crown of the bend he struck two pedestrians, John Yafufu Samson and Benson Nakat. Mr Samson heard a loud noise and he was struck by the bus. He woke up in hospital. Benson Nakat, who was walking behind Mr Samson, was not so fortunate. He was thrown some 25 meters. He suffered massive injuries. He had abrasions to his face and head, his second and third costochondral joints (where the ribs join the sternum or breast bone) were fractured, the left sterno clavicular joint was dislocated (where the bones of the shoulder meet the sternum), he suffered a pneumothorax (air in the chest cavity causing the lung to separate from the chest wall), he had a broken forearm, severe traumatic brain injury and internal bleeding in the abdomen. He died from those injuries.

3. The maximum sentence for unintentionally causing someone's death is 5 years. The maximum penalty for careless driving is 6 months or a fine of VT50,000. The former offence is one contrary to section 108(c) of the Penal Code [Cap 135], the latter an offence contrary section 14 of the Road Traffic (Control) Act [Cap 29]. The Defendant could have



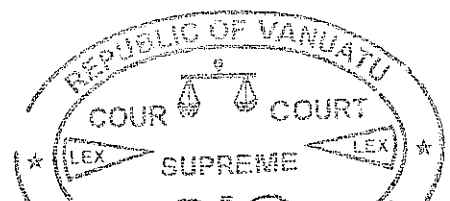
been charged under section 12 of the Road Traffic (Control) Act of causing death by reckless driving, however, the maximum sentence under both provisions is exactly the same although a fine can also be imposed under the latter.

4. The type of incident that occurred that evening was caused by what is known in police traffic divisions around the globe as a driver distraction activity. As the name suggests it is driving when the driver is not paying proper attention to actually driving the vehicle. Accidents caused by it have become very common especially since the advent of mobile telephones. It has been said in 2011 that 1.6 million accidents in the USA were caused by people who were distracted whilst driving and that the majority of those accidents involved a driver who was using a mobile 'phone. There have been campaigns in many, many countries trying to educate drivers not to use mobile 'phones when driving because the generally accepted statistic shows that someone texting on a mobile 'phone whilst driving is 23 times more likely to have an accident. Just reaching for a mobile 'phone makes it twice as likely that you will have an accident. The most staggering statistic shows that texting and/or talking on a mobile 'phone means that you are 6 times more likely to have an accident than if you were driving intoxicated. How many drivers consider using their 'phone to be 6 times more dangerous than drunk driving? Again science has established that a driver will take his eyes off the road for a minimum of 5 seconds whilst using a mobile 'phone. That is twice the amount of time it is considered safe to take your eyes off the road. The Defendant accepts he was travelling at about 80 kilometres an hour or 22 metres per second when the accident occurred. At that speed he would have travelled over 100 metres in 5 seconds.

5. I have seen calls for special legislation in Vanuatu to prohibit the use of mobile phones when driving but really further legislation is not needed. If a driver is prepared to do something which science has shown causes him or her to be 23 more times more likely have or cause an accident then that driver is a reckless driver (section 13 of the Road Traffic (Control) Act; or at the very least a careless driver.

6. The starting point in any sentence for an offence where an unintended death occurs through bad driving should be 2 years immediate imprisonment. The offence is aggravated by the use of the mobile 'phone whilst driving. I had thought that doing so at night should increase the degree of aggravation but on reflection I have concluded that using a mobile 'phone whilst driving aggravates the offence to the same degree whether it is at night or during the day. The sentence should be increased by 1 year to 3 years. The Defendant has pleaded guilty at the first opportunity and so he is entitled to a full 1/3<sup>rd</sup> discount. The final sentence is 2 years.

7. I have not mentioned mitigating factors by way of reduction of the sentence. However, there is no doubt the Defendant has shown great remorse. He has taken part in a reconciliation ceremony and he has also contributed to the burial costs of the late Mr Benson Nakat. There is no doubt he has shown true remorse. There is of course his early guilty plea. In the circumstances and bearing sections 37 and 57 of the Penal Code in



mind I will suspend the sentence for two years. Anyone who uses a mobile 'phone whilst driving and is involved in an accident which kills someone should go to prison immediately. In the exceptional circumstances of this case, and in particular the character of and degree of remorse shown by Mr Awell it is appropriate to suspend his sentence.

8. Having acknowledged the reconciliation ceremony and payments made during it I am disturbed to read in the pre-sentence report that the widow of the late Mr Nakat was not involved and that it was Mr Nakat's family which took all the payments. That maybe custom but it is sad to see such injustice. That sad state of affairs is not the fault of the Defendant. Of course the widow can (and should) sue the Defendant. Hopefully he is insured and she will recover compensation that way. Even if he is not insured she can still sue the Defendant for damages.

9. In respect of the careless driving, the Defendant's driving that night was of the worst kind of carelessness. He is sentenced to the maximum allowed under the law of 6 months. That sentence will be served concurrently with that imposed for causing unintentional death. It too will be suspended.

10. The defendant was advised of the effect of suspending the sentences. He was told that it would mean he would not go to prison immediately. If he committed no further offence within two years, the sentence of imprisonment will be deemed to have expired. If any offence were to be committed within 2 years by the Defendant the suspended sentence could take effect.

11. In addition to the sentences imposed the Defendant is disqualified from driving for a period of two years. He should surrender his driving licence to the Chief Registrar of the Supreme Court for endorsement.

12. The Defendant was advised that if he was unhappy with the sentences imposed on him then he has the right to appeal to Court of Appeal. He must lodge his appeal within 14 days of today.

**Dated at Port Vila this 18<sup>th</sup> day of October 2016 (published 20<sup>th</sup> October 2016)**

**BY THE COURT**

*Chetwynd J*

