

PUBLIC PROSECUTOR
V.
ROSARIO MELSUL

Coram: Justice D. V. Fatiaki
Counsel: Mr. L. Young for the State
Mr. E. Molbaleh for the Defendant
Date of Sentence: 19 August 2016.

SENTENCE

1. The defendant was originally charged with 2 counts – Unintentional Harm contrary to Section 108(c) of the Penal Code [CAP. 135] (**Count 1**) and Causing Death by Reckless Driving contrary to Section 12 of the Road Traffic (Control) Act [CAP. 29] (**Count 2**).
2. At the arraignment **Count 2** was not pursued. That is unfortunate as a conviction under the Road Traffic (Control) Act [CAP. 29] is necessary to trigger the power of the Court to order disqualification of a driver's licence (**see:** Section 55). Such a sentence is not available for a conviction under the Penal Code except as a special condition of a probation order [**see:** Section 48(g) of the Penal Code].
3. I am also not unmindful of the provisions of Section 112 of the Criminal Procedure Code which allows the Court to convict the defendant of offences under the Road Traffic (Control) Act where the defendant is only charged with unintentional homicide under the Penal Code if the Court is satisfied of the defendant's guilt of any road traffic offence. However the power under this provision is only exercisable, in my view, if there has been a trial and the Court has made relevant findings.
4. Be that as it may the defendant pleaded guilty to Unintentional Harm and after admitting the facts outlined by the prosecution, was convicted on his plea.
5. The brief facts of the case are that a pedestrian Michael Klem (the deceased) was struck during daylight hours by a municipal council vehicle driven by the defendant whilst walking on a formed concrete footpath on the side of the road.



The collision occurred after a slight bend on the road leading from the Vanuatu Mobile Force compound to the Vanuatu Institute of Technology (VIT) tourism school. The defendant had lost control of his vehicle which mounted the footpath. The vehicle had its roof warning lights flashing immediately before the accident.

6. Photos of the scene clearly shows that the particular stretch of road where the accident occurred was under repair at the time with a great deal of loose gravel on the road. A sketch map of the scene also shows a skid mark of 8.28m in length immediately before the point of impact. It also reveals that the defendant's car continued for a further 5.66m after the impact before coming to a rest on the footpath at right angles to the roadway next to the entrance gate to the VIT tourism school.
7. The deceased was thrown onto an iron railing fence and sustained a deep laceration on his neck, a penetrating wound over his chest, and abrasions to his lower limbs. The deceased died from his wounds a short while after he was rushed to Vila Central Hospital.
8. Section 108(c) of the Penal Code [CAP. 135] provides:

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

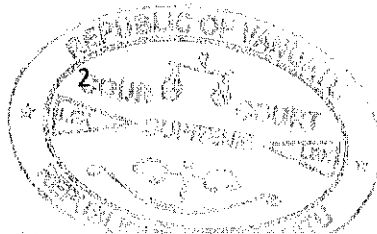
(c) if the damage so caused results in death, imprisonment for 5 years".

And section 6(4) states inter alia that:

"A person is negligent if he fails to exercise care, skill or foresight as a reasonable man in his situation should exercise".

9. In Newel v. Public Prosecutor [1998] VUCA 2 the Court of Appeal observed in the case of an accidental shooting:

*"... Dealing with cases of this sort creates some of the most difficult sentencing tasks in any Court. This is a matter which in general conversation would be described as an accident. In the laws term it is a situation where death result from an unlawful act. That in law is not an accident but is unintentional harm causing death. **A criminal court in determining sentences on this sort of charge cannot possibly put a value or an appreciation of the life which has been lost.** It is unfortunate (particularly when people are grieving and hurt) that sometimes there is a suggestion that the Courts minimise the value of the life which was taken. **What the court is concerned to do is to assess the criminal culpability of the wrong doer.** In a case such as this a Court cannot ignore the reality that (the defendant) faces a life time in which he lives with the knowledge that as a consequence of his careless act a life was taken."*



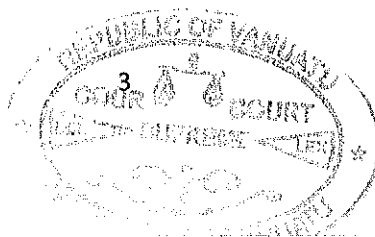
10. Furthermore in Jenkinson v. Public Prosecutor [2000] VUCA 5 which was a case involving a fatal collision with a pedestrian at night, the Court of Appeal relevantly observed:

"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 gaol. Suspension of the sentence, which allows the best opportunity for rehabilitation, will often be the appropriate course.

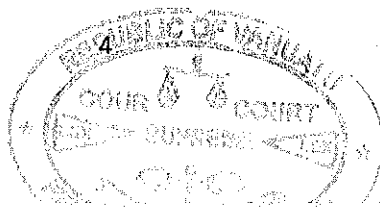
Serious driving offences causing personal injury or death will necessarily attract penalties that reflect a component of general deterrence. Such a purpose is not lost by the imposition of a prison sentence that is suspended. The defendant who receives such a penalty still suffers the stigma of a prison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

(my highlighting)

11. In the present case the speed and manner of the defendant's driving at the relevant time as observed by several eye-witnesses and having regard to the condition of the road surface and the presence of pedestrians, was clearly negligent and resulted in the accident which cause the tragic and untimely death of Michael Klem. There is no suggestion that the deceased contributed to his death in any way, shape or form. He was entirely blameless.
12. The defendant is almost 26 years of age. He completed year 13 and has a certificate in mechanical studies from New Caledonia. He is gainfully employed as a municipal warden with the Port Vila Municipal Council and was driving a municipal vehicle at the time of the accident. He is in a steady relationship and has an infant son. He obtained his driving licence in 2008 and has a clean driving record. He is a first offender and pleaded guilty at the earliest opportunity.
13. To the probation officer the defendant expressed his "sorry for the deceased and his family" which mirrored his own family and offered to perform a reconciliation ceremony to the deceased's family should they agree. The deceased was married with a 2 year old son and his family was living in rented accommodation paying VT14,000 per month.
14. Rosario Melsul the offence which you admitted and have been convicted of carries a maximum sentence of 5 years imprisonment. It is a serious offence and resulted in the loss of an innocent life. It has turned Michael Klem's wife into a widow and orphaned their young son who has now lost the love care and support of his father. Nothing I say and no sentence I impose can bring back the life of Michael Klem or replace the deep sense of loss to his young family of their husband, father and sole provider. That is a heavy burden you must bear for the rest of your life.

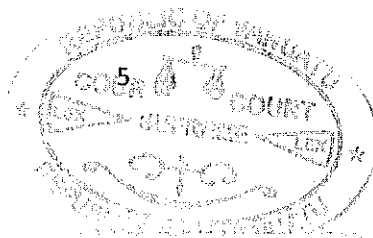


15. Prosecuting counsel proposes a starting point of 12 months imprisonment is appropriate in this case. Counsel also accepts that a one third discount should be given for your early guilty plea and a further reduction for your past good record thus leaving an end sentence of 5 – 6 months imprisonment which counsel also accepts may be suspended for 14 – 18 months if the Court considers fit.
16. Defence counsel in mitigation writes: "... *The defendant is deeply sorry for what he has done. He expresses his remorse to the Court and the family of the victim. He never had any intention to kill anyone, he is saying sorry to this Honourable Court and to the family of the victim especially the close family of the victim*". Counsel points to the defendant's early guilty plea as a sign of genuine remorse and the fact that he is a "first offender". Counsel also accepts a higher starting point of "2 years" with an end sentence of "7 to 8 months imprisonment". With any prison sentence fully suspended for a period of 12 months. Alternatively the Court might impose a non-custodial sentence of 50 to 60 hours of community work.
17. As for the possibility of a "compensation order" counsel submits that the defendant is "no longer working (suspended) and cannot afford any payment of compensation", nevertheless, counsel understands that the defendant's employer the Port Vila Municipality "has already started paying compensation to the victim's family". Nothing is said however as to any amount nor is it clear whether the defendant's suspension and/or continued employment is awaiting the outcome of the present case. By that I mean, that if the defendant is not imprisoned then he will be returned to full paid employment with his current employer but, if he is imprisoned, then his employment will naturally cease by force of circumstances.
18. Section 40 of the Penal Code [CAP. 135] which deals with compensation sentences does not expressly prohibit the imposition of such a sentence on an unemployed offender. I accept however that the Court is required to consider the "offender's sources of income" and the right available to the victim to issue civil proceedings against the defendant independently for damages for the death of their husband and father, [see: Section 40(3)(b) and 5], but equally, the Court should be conscious of the victim's financial ability and capacity to issue such proceedings as well as any possibility of reaching an amicable settlement in the matter without civil proceedings.
19. I have also received and considered a Compensation Report prepared by the probation officer which indicates that the defendant has offered a sum of VT2,000,000 by way of compensation for the deceased's family at a monthly payment of VT7,000. This offer would take 23 years to fulfil which the Court considers is inordinately long. Furthermore the monthly instalment offered would not meet the existing rental payment of the deceased's dependant



family. Equally, the compensation figure of VT15,000,000 demanded by the deceased's relatives is unacceptable to the defendant and is, in the Court's view, excessive.

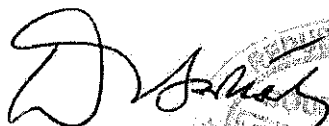
20. It needs to be said that a compensation sentence is a criminal sanction and is not intended to replace a victim's right to pursue a civil claim for damages which remains available to the deceased's family till 16 April 2019. [see: Section 46(2) of the Penal Code read with proviso (i) to Section (3)(1) of the Limitation Act [CAP. 212].
21. Although no reconciliation ceremony has been performed as the deceased's family are still in mourning, the defendant's employer generously paid for a special charter flight to carry the deceased's body to his home island of Malekula for burial.
22. Every driver of a motor vehicle, has a responsibility to ensure that his vehicle is in a road-worthy condition and is driven safely at all times and at a speed that he can maintain control of the vehicle and stop it within a safe distance. Drivers also need to be aware of the weather, visibility and road conditions including the presence of other vehicles and pedestrians. Whatsmore a careful, alert, and prudent driver would approach road works with considerable caution and in readiness for any possible emergency that might necessitate a sudden stop owing to the presence of workmen, machinery, or loose gravel on the road.
23. Rosario Melsul, your driving on this occasion fell well below the care, skill and foresight that a reasonable driver would have exercised in the circumstances you were faced with on the morning of 16 April 2016 as you approached the VIT tourism school. The 8m skid mark and the fact that the turned concrete Kerb did not stop your vehicle despite the severe impact which completely dislodged the front bumper and side fenders of your car, is testimony of the speed at which your vehicle was travelling at the time it collided with the deceased who was also attempting to get away.
24. The fact that your vehicle's warning-roof lights were seen flashing immediately before the accident in the absence of any obvious emergency is also irresponsible and may partly explain the speed of your vehicle. I need hardly to remind you that as a municipal warden responsible for the enforcement of municipal by-laws, you should be setting an example by your driving and not abusing the vehicle siren or warning lights.
25. I have considered all that has been urged on your behalf by your counsel and am satisfied that a custodial sentence is inevitable not only to mark the loss of an innocent life and the seriousness of the offence but also to act as a deterrent to other drivers.

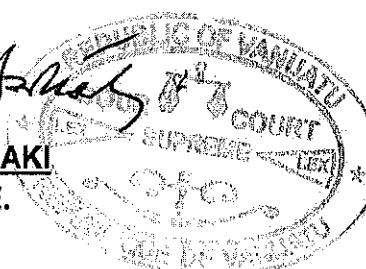


26. In your case I adopt a starting point of 18 months imprisonment. I reduce that by 6 months for your early guilty plea and a further 3 months for your hitherto unblemished personal and driving record making an end sentence of 9 months imprisonment which is suspended for 2 years. This means that although you will not go to prison today you are warned that if you re-offend and are convicted of any offence in the next 2 years you will be required to serve this sentence of 9 months imprisonment in addition to any other sentence you may receive for your re-offending. You should consider yourself fortunate that the Court has extended this leniency to you.
27. In addition, I order you under the supervision of a probation officer, to pay compensation of VT1,000,000 for the benefit of the deceased's widow and son, to be paid in monthly instalments of VT20,000 (or fortnightly – VT10,000) until fully paid up and commencing on 1st September 2016.
28. I also direct that a copy of this compensation order be served by the probation officer on the Town Clerk of Port Vila Municipal Council for his information and necessary action as the accident occurred whilst its employee (the defendant) was engaged in Council business (viz picking up staff members to assist in a joint police operation to check vehicle/bus registrations) and the defendant was driving a Council vehicle (Kia Picanto Reg. No. 14993) at the time of the accident thus rendering the Council vicariously liable for any damage or injury caused by its employee [see: Usamoli v. Nalpini and PSC [2003] VUSC 41 and the cases cited therein].
29. In the event of non-payment of any instalment, this compensation order shall be enforceable by an enforcement warrant under the Civil Procedure Rules.
30. You have 14 days to appeal against this sentence if you do not agree with it.

DATED at Port Vila, this 19th day of August, 2016.

BY THE COURT


D. V. FATIAKI
JUDGE.



The seal of the Supreme Court of Vanuatu is circular. It features the text 'REPUBLIC OF VANUATU' at the top and 'SUPREME COURT' in the center. Below the court name, there is a stylized emblem. The seal is stamped in a light grey or blue ink.