

IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

*Helena*  
*Copy Order & Judgment to SG*  
*and myself.*  
CR 439 of 2003  
*File.*  
*5/3/07.*

REX

v

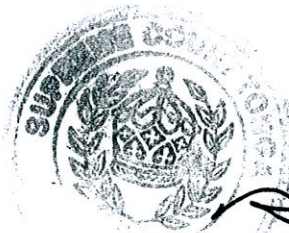
FETU'U, PETELO

BEFORE THE HON. CHIEF JUSTICE FORD

HAVING HEARD Counsel Ms Moa and Mr Tu'utafaiva.

IT IS ORDERED THAT:

1. The accused is acquitted and discharged on Counts 1 & 2.
2. The accused is convicted on the alternate charges of careless driving. He is fined \$150 to be paid within 14 days and in default 2 months imprisonment.



DATED: 26 February 2007

*[Signature]*  
CHIEF JUSTICE

*Reid 27/2/07*

**IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY**

**NO. CR.439/2003.**

---

**R E X**

**-V-**

**PETELO FETU'U**

**BEFORE THE HON. CHIEF JUSTICE FORD**

**Counsel** : Mr Sisifa for the Crown and Mr Tu'utafaiva for the accused.

**Dates of hearing** : 20 and 21 February, 2007.

**Date of judgment** : 26 February 2007.

**J U D G M E N T**

**The facts**

[1] The facts can be shortly stated. On the night of Saturday 4 October 2003, between the hours of 7 and 8 p.m., a 5 ton Mitsubishi truck being driven by the accused struck the elderly deceased as the latter was crossing the roadway to a shop in the village of 'Alakifonua. The accused is charged with one count of manslaughter by negligence contrary to sections 92 and 93 of the Criminal Offences Act (Cap 18) and, in the alternative, one count of reckless driving contrary to section 25 (2) (a) of the Traffic Act (Cap 156).

[2] The accused was also charged with other offences not falling within the jurisdiction of this Court and they have, therefore, been referred back to the Magistrates' Court. One of those charges was a count of failing to stop, ascertain injury and provide assistance after an accident.

---



[3] The particulars in relation to the manslaughter count read as follows:

"Petelo Fetu'u a.k.a. Pita Fatai of Fatumu, on or about 4 October 2003 at 'Alakifonua, you did cause the death of 'Ofa 'Okusi Tonga when you were negligent by driving the motor vehicle with registration plates J 3025 at a very fast speed and you were unable to evade 'Ofa 'Okusi Tonga and the motor vehicle hit him causing him to suffer severe head injuries and a fractured skull and eventually his death."

[4] Mr Tu'utafaiva accepted that the accused was the driver of the vehicle and that his manner of driving had caused the deceased's death. The sole issue in the case, thus became whether the Crown had proved that the accused's manner of driving could properly be described as grossly negligent.

[5] The 59-year-old accused worked for a squash company at the time of the accident as a truck driver. His job was to transport pallets of squash pumpkin from plantations around Tongatapu to a squash packing house at 'Utulau. He had been driving the same truck for two previous squash seasons.

[6] On the Saturday in question the accused had worked between 9:30 a.m. and 6 p.m. and after work he had driven to another area to collect a bag of root crops for his family's Sunday meal. He then proceeded to drive to his home at Fatumu with the bag of vegetables on the deck of his truck. He told the court that as he approached the village of Alakifonua he slowed down to between 35 and 40 mph. He had looked at his speedometer at that point. The headlights to his truck were on and around the area where the accident happened there was lighting from a blue coloured shop on the right-hand side of the road, in the accused's direction of travel, and from a streetlight on the opposite side of the road from the blue shop.

[7] The accused said that as he approached the area where the accident happened he noticed a man walking along the left-hand verge of the road up ahead of him heading in his same direction of travel. He estimated that at that point he would have been 15 to 20 m away from the man. Then when he was only 4 or 5 m away, the man suddenly turned and started walking across the road directly in front of him. The accused swerved his vehicle to his right to try and avoid the man but it appears that the front passenger side of the truck struck the deceased and the momentum of the swerving truck threw the man onto the roadway just over the centre line. He died in hospital later that same evening.

[8] The accused said that his truck kept veering to the right and drove on to the gravel parking area in front of the shop. He suddenly realised that he was heading towards a power pole and a coconut tree so he turned the

---



vehicle back onto the tar seal. At that point he heard someone shout out. He stopped the truck to find out what had happened to the man but when he looked back he saw four men running towards him. He said that he became very afraid that they might attack him and so he drove off.

[9] The accused frankly admitted that thereafter he "was not thinking straight." He drove home and the following day he was thinking of reporting the incident to the police when the police arrived at his home and arrested him. He then learned that the man struck by the truck had died.

[10] The accused was interviewed by the police. He co-operated fully and told them that he knew he had hit the man but he was unsure whether he was injured or dead. Significantly, he was not asked any questions about the speed of his truck. Nor was it put to him at any stage during the police interview that his vehicle had been travelling at an excessive speed.

[11] In his evidence, the accused was asked why he had not attempted to apply the brakes when the old man suddenly walked out in front of him. He replied: "because I knew we were very close to each other and the vehicle would not stop because there was such a short distance. I swerved to my right."

[12] I have taken the rather unusual course in this judgment of setting out the accused's version of events first because, in general, I found him to be a reliable and credible witness. Mr Sisifa submitted that his action in leaving the accident scene was a recognition of the culpable nature of his conduct. I accept, however, that the accused did stop his vehicle momentarily and then drove off again out of fear when he saw the four men running towards him. The court is sadly aware from other cases that there have been instances where the driver of a motor vehicle involved in a fatal accident has been quite viciously attacked at the scene. The accused's subsequent conduct, however, in delaying reporting the matter to the police cannot be condoned.

[13] The unfortunate victim, 'Ofa 'Okusi Tonga, was 84 years of age. His daughter described him as a fit, skinny man who still rode a bicycle to work on his plantation out by the airport. One of the witnesses, however, said that the deceased suffered from a hearing problem. As translated, he described the deceased's hearing as, "very, very much less than perfect."

[14] There were two eye witnesses for the prosecution. The first was 30-year-old Sione Manu'atu. He was standing talking to other people outside another shop approximately 30 m further along the road from the blue shop. He said that he saw the "old man" walking across the road but he denied that he had been walking along the side of the road immediately prior to then. At the very end of his evidence, in answer to a question from the Bench, the

---



witness said that the man had been waiting for a car to pass and then he walked out across the road but nowhere in his earlier examination in chief or cross examination had he made mention of a car in the area. He also made the point that had the truck kept in the left lane and not swerved to the right then it probably would not have struck the old man.

[15] I found that there were a number of inconsistencies in Mr Tonga's evidence and I am reluctant to place too much weight on his description of events prior to the impact, particularly in relation to the movements of the deceased. I am satisfied that during the period immediately prior to the accident, the witness was primarily engaged in conversing with the others in his group. He admitted in cross-examination that he did not see which part of the truck struck the deceased. I accept, however, that Mr Tonga did see the truck approaching from the West with its lights on. In examination in chief he was asked about the speed of the vehicle. He replied, "I could not confirm but it was travelling, it was travelling quite fast." In cross-examination the witness was asked, "what would you say if the accused says his speed was not even 40 km per hour?" and he replied: "I believe he was travelling at a speed over 40 km per hour."

[16] The other witness called by the Crown was 54-year-old Motekiai Lea'aetua who was the owner of the blue coloured shop. He said that he was in his shop before the accident and his son started crying. He picked him up and took him out the rear door of the shop. By the "rear door" he was referring to a door on the opposite side of the shop from the road. He explained that even though he was out the back of his shop, the rear door was open and he could see through the door over-the-counter of the shop towards the roadway.

[17] Mr Lea'aetua said that he heard the noise of the engine of the truck as it approached and then he heard the sound of the impact when it hit the deceased. He said that he then saw the truck going past the front of his shop. He was asked by the prosecutor to estimate the speed of the vehicle when he saw it and he answered: "I think, from the sound I heard, probably around 60 mph." In cross examination, the witness was asked to explain what his 60 mph estimate was based on and he replied: "As the truck went past me, the amount of dust that arose from the road as well as the sound of the engine." The unchallenged evidence was that the truck was an old vehicle with a noisy engine.

[18] The road in question had a tar seal surface. The dust the witness referred to was dust from the gravel area in front of his shop which the truck had driven onto after it had swerved off the road in the driver's unsuccessful attempt to avoid hitting the deceased. No measurements were given for the width of the tar seal carriageway itself but from the photographs it appeared

---



to be only a little wider than the width of two vehicles. In the context of a criminal prosecution, I consider that the evidence of this witness as to the speed of the truck was speculative and unreliable.

[19] I accept the sworn evidence of the accused in relation to the events immediately prior to impact as being more reliable than the evidence of the prosecution witnesses. I am satisfied that the victim had been walking along the verge of the carriageway as the accused had described but then suddenly he turned to his right and, without looking to check for oncoming vehicles, proceeded to walk across the road towards the blue shop directly in front of the oncoming truck. His hearing disability may have accounted for his precipitous action. I also accept the accused's estimate of speed. On his own evidence he would have been travelling at approximately 60 km per hour through the village which is higher than the allowable speed limit of 40 km per hour. The question is whether these findings can support a charge of motor manslaughter.

### **The relevant statutory provisions**

[20] The accused is charged with committing an offence under section 92 of the Criminal Offences Act which provides:

"92. Culpable homicide which does not amount to murder is manslaughter and if such homicide was caused by negligence the offence is only manslaughter by negligence."

Section 93 provides that the maximum penalty for manslaughter by negligence is 10 years imprisonment. Section 94 then provides:

"When a person is charged with manslaughter in connection with the driving of a motor vehicle by him and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under section 25 of the Traffic Act, he may be convicted of that offence although he was not charged with it."

[21] Section 25 of the Traffic Act (Cap 156) provides:

"25.(1) Every person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for the persons using the road is guilty of an offence against this Act, and is liable to a fine not exceeding \$200 or to imprisonment for a term not exceeding four months or to both such fine and imprisonment.

(2) Every person who

(a) drives a motor vehicle on a road recklessly, or at a speed and in a manner which, having regard to all these circumstances, is or might be dangerous to the public, or

(b)

---



commits an offence against this Act, and is liable to a fine not exceeding \$500 or to imprisonment for not more than two years or to both such fine or imprisonment."

Subparagraph (2) (b) deals with drunken driving.

### The relevant law

[22] The offence of manslaughter by negligence, often referred to as "motor manslaughter" is never an easy concept to explain to a jury in a way that can be readily understood. It has always been accepted, however, that the degree of manslaughter required to sustain such a charge must be higher than the simple lack of care type of negligence that one equates with liability in civil cases. Historically this court has approached the task of explaining the degree of negligence required in manslaughter cases by using epithets such as "gross" and "reckless".

[23] In **Fisi'inaua v R** [1995] Tonga LR 62, the Court of Appeal, in dealing with an appeal against conviction in a motor manslaughter case, referred to the wording of section 92 of the Criminal Offences Act and went on to say:

"Although the section does not refer to gross negligence, we are prepared to accept that the onus resting on the prosecution is to prove that the person accused is guilty of negligence to such a degree that justifies a finding of manslaughter. It may well be convenient to describe negligence of that degree as gross negligence."

[24] The concept of "gross negligence" has often been equated with recklessness but there are recognised degrees of recklessness. The fact that the offence of manslaughter by negligence coexists along with the lesser offence under section 25 (2) (a) of the Traffic Act of reckless driving would seem to indicate that it may be inadequate to determine the degree of negligence required in motor manslaughter cases simply by reference to the adjective "reckless".

[25] In **Brown v R** [2005] UKPC 18, the Privy Council (UK) had before it an appeal from the Court of Appeal of Jamaica arising out of a motor manslaughter case. In Jamaica, a defendant indicted for motor manslaughter may, under section 30 of the Road Traffic Act, be found guilty of one of the lesser offences of causing death by reckless driving or dangerous driving. After a detailed review of the authorities, the Board concluded that in those jurisdictions where causing death by reckless driving was a possible alternative offence to a charge of manslaughter by negligence, the definition of manslaughter had to be framed by reference to recklessness.

[26] Their Lordships concluded that in such jurisdictions judges should be ready to leave causing death by driving recklessly as an alternative offence to

---



manslaughter. They also went on to hold that in order to establish a charge of manslaughter, the prosecution would be required to prove not only recklessness in the driving of a motor vehicle but an extra element of turpitude. That extra element of turpitude was defined as a **very high risk of death from the defendant's driving**. Their Lordships made the comment that they anticipated such cases "will be rare."  
(emphasis added)

[27] In Tonga, unlike Jamaica, there is no offence of causing death by reckless or dangerous driving. In these circumstances the extra element of turpitude described in **Brown** is unlikely to have any practical bearing on the approach taken by this Court. The position is not entirely free from doubt, however, because their Lordships stated (para 25) that the approach they were advocating would apply in jurisdictions where the offence of **reckless driving** and causing death by reckless driving could be charged (emphasis added). In Tonga the offence of reckless driving can be charged under the Traffic Act but there is no offence of reckless driving causing death.

[28] Until the matter is fully argued and ruled upon, however, I consider that the statement of the Court of Appeal in **Fisi'inaua** should continue to be the benchmark in determining the appropriate measure of negligence in motor manslaughter cases. If the position was otherwise it would mean (following the approach in **Brown**) that in every case of manslaughter by negligence, the prosecution would need to prove, not only recklessness in the driving of a motor vehicle but also the extra element of turpitude spoken about by their Lordships, namely, that the risk of death being caused by the manner of the defendant's driving was, in fact, very high. If both elements could not be proved, the accused would have to be acquitted.

[29] In jurisdictions where a charge of manslaughter can be accompanied by an alternative charge of causing death by reckless driving, the failure of the prosecution to be able to establish the extra element would not be fatal. An accused facing a manslaughter charge could always be found guilty of the alternative charge of reckless driving causing death. In this jurisdiction, however, where no such alternative offence exists, it would mean that in any manslaughter by negligence case where the prosecution could not prove the extra element of turpitude, the accused would have to be acquitted of manslaughter allowing him to go unpunished in relation to the "causing death" element of his conduct. The lesser offences in the Traffic Act of reckless and dangerous driving do not refer to causing death. It is difficult to imagine that such a consequence could ever have been the intention of the legislature.

[30] I reiterate, therefore, that until such time as the matter is fully argued and ruled upon, it will be sufficient in motor manslaughter cases for the

---



prosecution to rely on the gross negligence test approved of by the Court of Appeal in **Fisi'inaua**. It must be proved that the accused's manner of driving created a very high degree of risk before it is to be classed as manslaughter.

## Conclusions

[31] Applying the foregoing principles to the facts of the present case, I am left in no doubt that the Crown has failed to establish gross negligence. The prosecutor has been unable to identify anything untoward in the accused's manner of driving apart from speed and very rarely will speed alone ever be sufficient to form the basis for a successful motor manslaughter conviction.

[32] I now turn to the alternative count of reckless driving. In **R v Lawrence** [1982] AC 510, Lord Diplock at pp 526-527 identified two elements that needed to be proved in order to establish the offence of reckless driving:

" First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road ; and

Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it."

[33] Applying this criteria to the facts of the present case, I have not been persuaded that the accused's manner of driving was such as to create an "obvious and serious risk of causing physical injury" to the victim. The accused is, therefore, acquitted on the reckless driving charge.

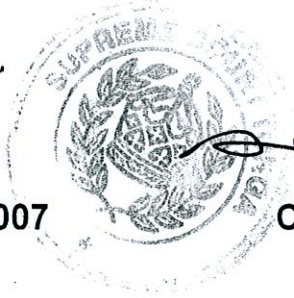
[34] I have given careful consideration as to whether, in the presentation of its case, the Crown has succeeded in proving beyond reasonable doubt the alternate charge provided for in section 25 (1) of the Traffic Act, namely, careless driving. Although he has not been charged with careless driving the court can, nevertheless, under section 94 of the Criminal Offences Act still find him guilty of such an offence. To establish such a charge the prosecution need only prove that the accused was the driver of the motor vehicle at the time and that his manner of driving was careless in that it was below the standard expected of a reasonably competent and prudent driver.

[35] On the accused's own account of the accident (which I accept) the evidence is that he saw the man walking along the verge of the roadway ahead of him. The photographs show that there was no footpath and so the deceased must have been walking along the narrow strip of gravel to the side of the tar sealed carriageway. I consider that a prudent driver, in those circumstances, would have slowed his vehicle down in recognition of the fact that he was going to be driving close to a pedestrian but there is no evidence

---



that the accused did that. I accept that the accused could not reasonably have been expected to foresee that the man would suddenly turn and start to walk across the road directly in front of him but I, nonetheless, still consider that a prudent driver would have slowed his vehicle down. For this reason, I find the accused guilty of careless driving. He is acquitted, however, on the charges of manslaughter by negligence and reckless driving.



*[Handwritten signature]*

NUKU'ALOFA: 26 FEBRUARY 2007

CHIEF JUSTICE