

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 354 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**MICHAEL JUNIOR MOW**

**Counsel** : Mr. M. Vosawale for the State  
Ms. S. Nasedra and Ms. N. Mishra for the Accused

**Hearing on** : 27 – 29 January 2020

**Summing up on** : 31 January 2020

**Judgment on** : 04 February 2020

**Sentenced on** : 14 February 2010

**SENTENCE**

1. Michael Junior Mow, you stand convicted of two counts of aggravated dangerous driving occasioning death and two counts of dangerous driving occasioning grievous bodily harm.
2. You were initially charged with two counts of manslaughter and two counts of dangerous driving occasioning grievous bodily harm. You pleaded guilty to the latter and indicated to court that you are willing to plead guilty to the offence of dangerous driving occasioning death instead of manslaughter in relation to the other two charges.

3. Therefore, a trial was conducted in relation to the two counts of manslaughter. Though the assessors unanimously found you guilty as charged on the said counts, this court found you not guilty of the offence of manslaughter and found you guilty of the offence of aggravated dangerous driving occasioning death instead.
4. According to the facts of the case, on 02/11/17, in the evening, you drove the motor vehicle Registration No. EP113 along the Kings Road with five passengers and you were consuming beer with four of those passengers. The other passenger was a Form 7 student. You had consumed alcohol during daytime that day and also the previous night. You were unable to negotiate the bend at Viwa, Kings Road and collided with the oncoming truck Registration No. IL915. According to your cautioned interview, the vehicle you were driving had a defect where the steering wheel was pulling to the right and you have said that at the bend where the collision took place, your vehicle was pulling to the right. The impact occasioned the death of two of your passengers and caused grievous harm to two other passengers. Upon analysing a sample of you blood, it was revealed that you had 175mg of alcohol per 100ml of blood. The legal limit is 80mg per 100ml of blood.
5. Pursuant to section 114 of the Land Transport Act 1998 ("LTA Act"), the maximum punishment for the offence of aggravated dangerous driving occasioning death is an imprisonment term of 14 years and/or \$20,000 fine and disqualification (of the driving license) for any period up to life. There is no established tariff for this offence.
6. The counsel for the prosecution drew my attention to United Kingdom Sentencing Council Guideline on the offence of causing death by dangerous driving. The maximum penalty for the said offence is 14 years' imprisonment.
7. The following tariffs are laid down in the said guideline;

Nature of offence	Starting point	Range
Level 1 The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others	8 years' custody	7 - 14 years' custody
Level 2 Driving that created a <b>substantial</b> risk of danger	5 years' custody	4 - 7 years' custody
Level 3 Driving that created a <b>significant</b> risk of danger (Where the driving is markedly less culpable for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving)	3 years' custody	2 - 5 years' custody

8. The above guideline identifies three levels of seriousness of the offence and accordingly, three sentencing tariffs are outlined. What is pertinent to note is that the maximum sentence provided by the legislature for the relevant offence is incorporated in the tariff for the most serious category or the level.
  
9. It is clear that, as far as the seriousness is concerned, the offence of aggravated dangerous driving occasioning death in Fiji is akin to 'level 1' category provided in the aforementioned guideline. That is;
 

"The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others"
  
10. The offence of aggravated dangerous driving occasioning death under section 97(1) of the LTA Act in itself is a serious form of the offence of dangerous driving occasioning death under section 97(2) and in my view, it is not possible to identify further subcategories in relation to that offence [section 97(1)] based on seriousness that would warrant separate sentencing tariffs within that offence.

11. Therefore, there should be one sentencing tariff for this offence, mainly for the purpose of identifying the lower end. Because, being persuaded by the aforementioned guideline, I have formed the view that the higher end of the sentencing range for the offence should be 14 years imprisonment; the maximum sentence the legislature has imposed.
12. Now the question is, what should be the lower end of the tariff. The lower end of the tariff for the relevant category provided in the above guideline is a term of imprisonment for 7 years.
13. I have referred to two decisions of New South Wales Court of Criminal Appeal which were submitted by the defense counsel that had dealt with sentences for the offence of aggravated dangerous driving occasioning death, contrary to section 52A(2) of the Crimes Act 1900 (NSW) which carries a maximum penalty of 14 years imprisonment.
14. In the case of *R v Hawkins* [2000] NSWCCA 380 (11 August 2000) the applicant (Hawkins) had appealed against the sentence imposed against him by the lower court for the offence of aggravated dangerous driving occasioning death upon him pleading guilty to the charge. The lower court, had imposed a minimum term of four years imprisonment, to commence on 15 June 1999 and to expire on 14 June 2003 and an additional term of one year to commence on 15 June 2003. Further, the applicant was disqualified from holding a drivers licence for not less than four years.
15. The applicant in the above case at the material time was found to have a blood concentration not less than 0.216. He had been driving at least one hundred kilometres per hour where the speed limit was seventy kilometres per hour. As a result of the collision, the driver of the other vehicle, an eighty-five year old

man, died from critical injuries received. The applicant had previous convictions for driving related offences. Dismissing the appeal, the court said;

“14 Turning then to the other ground of appeal, which is that it was manifestly excessive, in *Regina v Jurisic* (1998) 45 NSWLR 29, the guideline judgment which was thereby established, indicated that a minimum of three year custodial sentence is appropriate depending on the various factors listed by Spigelman CJ, at 231. These include mitigating as well as exacerbating factors.

15 Here the extent of the injuries, of course, were catastrophic- the degree of speed was severe; the degree of intoxication was well over four times the minimum permitted; the driving was erratic; and it is clear that the guideline intended to establish a norm of sentencing but indicated the exacerbating factors, several of which are present here.”

16. In the case of *Regina v Rayner* [2002] NSWCCA 309, the court considered an extension of time appeal against a sentence of imprisonment for six years, with a non-parole period of four years imposed upon conviction on pleas of guilty to one count of aggravated dangerous driving occasioning death, and also to one count of aggravated dangerous driving occasioning grievous bodily harm contrary to section 52A(4) of the Crimes Act which has a maximum penalty of eleven years. On the first count, he was sentenced to six years imprisonment, with a non-parole period of four years and on the second count, to a fixed term of four years imprisonment. Leave to appeal was refused in the said case. In dealing with the matter, the court considered the sentence imposed for the same offence in five other cases as follows;

“10 All of these cases must be determined on their own facts but I note in *R v Kaliti* [2001] NSWCCA 268 an appeal against a sentence of five years, with a non-parole period of three years and nine months was dismissed. That sentence was for an offence of dangerous driving occasioning grievous bodily harm and the blood alcohol reading was 0.20. The appellant there was 30 with no prior history.

11 In *R v Khan* [2000] NSWCCA 454 an appeal against a sentence of four and a half years, with a non-parole period of three years, four months and fifteen days was dismissed. The offence was a less serious offence of aggravated dangerous driving occasioning grievous bodily harm. The blood alcohol reading at the time of the accident was between 0.200 and 0.210.

12 In *R v Hill* CCA (NSW) unreported 4 December, 1998, an appeal against a sentence of six years, with a three year non-parole period on a charge of dangerous driving causing death was dismissed. The applicant was a disqualified driver and had a blood alcohol reading of 0.113. The applicant was also physically injured and was described as psychologically devastated. His disqualification was for a high range PCA offence.

13 In *R v Black* CCA(NSW) unreported 23 July, 1998, the Crown appealed against a sentence of four and a half years involving a minimum term of two years and three months for aggravated driving causing death and a concurrent fixed term of two years and three months for an offence of aggravated driving causing grievous bodily harm. The Crown appeal was allowed and the respondent was sentenced to five years, including a minimum term of three years. The Court made it plain this sentence was a lenient one, given only because it was a Crown appeal. The blood alcohol reading was in the range between 0.120 and 0.135.

14 In *R v McDonald* CCA (NSW) unreported 12 October, 1998, the Crown appealed against a sentence of five years, involving a two year minimum term on a charge of aggravated dangerous driving causing death and to a sentence of three years involving a minimum term of two years on a charge of aggravated dangerous driving causing grievous bodily harm. The respondent's blood alcohol reading was 0.195. The two victims were in another car. The respondent had prior PCA offences. The Court of Criminal Appeal substituted a sentence of six years, including a minimum term of three years on the more serious count and a fixed term of two years and six months on the other count. Spigelman CJ particularly noted that was a sentence imposed as a result of double jeopardy considerations on a Crown appeal."

17. Having considered the aforementioned sentencing guideline, the cases referred to above, the objective seriousness of the offence of aggravated dangerous driving occasioning death and the maximum penalty imposed by the legislature, I am inclined to form the view that the sentencing tariff for the offence of aggravated dangerous driving occasioning death under section 97(1) of the LTA Act, as far as the term of imprisonment is concerned, should be 04 years to 14 years. Possibly, if owing to strong mitigating factors the final term of imprisonment reached qualifies for the sentence to be suspended in terms of section 26 of the Sentencing and Penalties Act, the sentencer's discretion should

be exercised in deciding whether to suspend the sentence or not based on the facts and circumstances of the case.

18. The other two charges you are convicted of involves the offence of dangerous driving occasioning grievous bodily harm. Section 114 of the LTA Act, has prescribed a maximum penalty of 2 years imprisonment and/or \$2,000 fine and disqualification (of the driving license) for 12 months for the offence of dangerous driving occasioning grievous bodily harm under section 97(4) of the LTA Act.
19. The offences you are convicted of are founded on the same facts. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment for the four offences you have committed.
20. Section 17 of the Sentencing and Penalties Act reads thus;

*“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.”*
21. Accordingly, I would select an imprisonment term of 04 years as the starting point of your aggregate sentence.
22. Now I turn to identify the aggravating and the mitigating circumstances in this case. The aforementioned guideline outlines the following as possible aggravating factors and mitigating factors relevant to the offence of aggravated dangerous driving occasioning death;  
*Aggravating factors;*

- Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol or drugs before driving
- More than one person killed as a result of the offence
- Serious injury to one or more victims, in addition to the death(s)
- Disregard of warnings
- Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; taking a vehicle without consent; driving a stolen vehicle
- The offender's irresponsible behaviour such as failing to stop, falsely claiming that one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape
- Driving off in an attempt to avoid detection or apprehension

*Mitigating factors;*

- Alcohol or drugs consumed unwittingly
- Offender was seriously injured in the collision
- The victim was a close friend or relative
- Actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting
- The offender's lack of driving experience contributed to the commission of the offence
- The driving was in response to a proven and genuine emergency falling short of a defence

23. I consider the following as aggravating factors in this case;

- a) The fact that the accident caused the death of two persons and caused grievous bodily harm to two others;
- b) You had a form 7 student as one of your passengers and you have put the life of that student at risk;
- c) The amount of the alcohol in your blood was more than double the legal limit; and
- d) The fact that you knew there was a mechanical defect in your vehicle.

24. I would consider the following as the mitigating factors;


- a) You are a first offender;
- b) You were injured during the accident;



- c) The deceased and the two victims who sustained bodily harm were your friends and they were consuming alcohol with you at the material time where they also appear to be partly responsible for the collision;
  - d) You have traditionally apologised to the families of the two deceased; and
  - e) You have cooperated with the police.
25. You are 36 years old, married and you have three children who are currently studying. You are a farmer. You have been providing volunteer service to a religious establishment. It is submitted that your family is heavily dependent upon you for financial support.
26. Considering the above aggravating factors I would add 07 years to your sentence and would deduct 05 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 06 years.
27. The fact that you were willing to plead guilty to the offence of dangerous driving occasioning death from the initial stages should earn you a separate discount. Therefore I would deduct a further 02 years.
28. Accordingly, I hereby sentence you to a term of 04 years imprisonment. I order that you are not eligible to be released on parole until you serve 02 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Act. Your driving licence is suspended for a term of 05 years.
29. It was submitted that you were in custody for 07 days before you were enlarged on bail. Thereafter you have been in remand for the last 10 days pending your sentence. The total is a period of 17 days. Considering the substantial discount I have given you in arriving at your final sentence, I consider it appropriate not to consider those 17 days as time already served in terms of section 24 of the Sentencing and Penalties Act.

30. In the result, you are sentenced to an imprisonment term of 04 years with a non-parole period of 02 years. Your driving licence is suspended with immediate effect. However, the 05 years' suspension should run from the date of your release from the corrections centre.
31. Thirty (30) days to appeal to the Court of Appeal.



  
Vincent S. Perera  
JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused**