



**IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION**

Criminal Case No. 9 of 2022

BETWEEN: THE REPUBLIC OF NAURU

PROSECUTION

AND: CAMLUC BORABEN SCOTTY

DEFENDANT

BEFORE: Resident Magistrate Mr. Vinay Sharma

DATE OF HEARING: 13 March 2024

DATE OF RULING: 3 April 2024

APPEARANCE:

APPLICANT: A Driu

RESPONDENT: V Soriano

SENTENCE

BACKGROUND

1. The defendant is to be sentenced for the offence of dangerous driving occasioning death contrary to Section 67A(1)(d) of the *Motor Traffic Act 2014* (“the Act”).
2. On 27 November 2023 the defendant was found guilty of the offence of dangerous driving occasioning death contrary to Section 67A(1)(d) of the Act after 5 days of trial from 30 October 2023 to 3 November 2023.
3. On 14 December 2023 the court ordered that the Chief Probation Officer submit a Pre-Sentence Report (“the Report”) to this court.
4. On 23 January 2024 the Chief Probation Officer submitted the Report to this court.
5. On 24 February 2024 a Victim Impact Statement was filed.
6. On 24 January 2024 the court directed the Director of Public Prosecutions (“DPP”) to file her sentencing submissions on or before 26 February 2024. The counsel for the defendant was directed to file his client’s plea in mitigation and written submissions on or before 7 March 2024. The DPP was at liberty to file and serve her reply on or before 14 March 2024. The matter was adjourned to 14 March 2024 at 10am for hearing.
7. On 14 March 2023 the parties were heard on the sentencing submissions, and the plea in mitigation.

FACTS SURROUNDING THE CIRCUMSTANCES OF THE OFFENCE

8. The following are the facts surrounding the offence which is distilled from the judgment of this court delivered on 27 November 2023:
 - i. The defendant had been a bus driver for 10 years at time of incident.
 - ii. On 27 April 2022 at around 4pm the defendant was driving a bus back from Nauru Primary School in Meneng District. The defendant did not see the bus’s speedometer but assumed that he was driving at the speed of approximately 40 – 50 kmph.
 - iii. The defendant conceded that the speed limit for the portion of road where the accident took place was 20 kmph because there is a school nearby. Further, he conceded that if he were driving at 20 kmph he would have been able to stop the bus on time.

- iv. While travelling downhill on the road the bus approached a red house on the right-hand side, and there was a playground on the left-hand side of the road. Children were playing on the playground.
- v. The child victim was running towards the road from the side of the red house. Three coconut trees were present at the front of the house. He went between the trees and was running along the road and then crossed the road at a 30-degree angle. He was not looking at the bus but was looking somewhere else.
- vi. The defendant did not accelerate while driving downhill. He saw the child victim. He also saw children playing on the playground.
- vii. When the child victim crossed the road, the bus that the defendant was driving collided with the child victim. Upon collision the defendant applied the brakes to stop the bus. At this point in time the defendant stood up when the front tire of the bus ran over the child victim. The bus continued to move forward until the back tire of the bus ran over the child victim, and then the bus came to a stop.
- viii. The defendant came out of the bus when it came to a stop. He called for an ambulance. The child victim had sustained fatal injuries but was still breathing.
- ix. There were no tire marks on the road at the place of the accident. Further, the distance between the victim child and the bus after the accident was 1.3 meters.
- x. A dent on the bumper was left after accident.
- xi. The court found that the conduct of the defendant fell below the standards required by a bus driver who drives school bus. That he should have reduced the speed to the prescribed speed limit when he saw children including the victim child on the field. The court found that the defendant failed to take precautions to ensure the safety of the children near the road.
- xii. The court also found that the defendant failed to check the speed of the bus while coming down-hill, which is expected from reasonable drivers.

VICTIM IMPACT STATEMENT

9. The Victim Impact Statements (“VIS”) of the parents of the child victim, namely Keoma Deboubu and Jeimina, was filed by the DPP.
10. Both the parents suffered great emotional pain due to the loss of their child’s life as a result of the accident caused by the defendant. They still feel the emotional pain and suffering of their loss. They miss their child very deeply. The accident has traumatized

them and they have become extra vigilant regarding their remaining children, especially near roads.

11. The birth of another child after the passing of the child victim has eased some emotional pain. However, they still miss him. They have come to terms with the passing of their child and have forgiven the defendant.

PERSONAL CIRCUMSTANCES OF THE DEFENDANT

12. The following relevant personal circumstances of the defendant is distilled from the document filed by the defendant in relation to the sentencing and the Report:
 - i. The defendant is 52 years old.
 - ii. The defendant is married to Sheeba Scotty (Nee Detageouwa) for about 21 years. They have 3 children, out of whom two are below the age of 18 years. One is 17 years old and the other is 13 years old.
 - iii. The defendant's children are close to him and rely on him emotionally and financially.
 - iv. Currently the defendant is employed as a security officer stationed at the Bendigo Bank Agency at Aiwo District. He earns minimum salary to assist his family. He is the sole bread winner.
 - v. The accused has no prior convictions.

AGGRAVATING FACTORS

13. The court finds the following aggravating factors:
 - i. The defendant was driving the bus approximately 40kmph-50kmph at a 20kmph zone.
 - ii. The defendant was a public service driver at the time of the accident.
 - iii. Other passengers were present during the accident.
 - iv. The victim child was a vulnerable road user.
14. The DPP raised loss of life as an aggravating factor. However, causing death by dangerous driving is an element of the offence, therefore, loss of life is not an aggravating factor.

MITIGATING FACTORS

15. The court finds the following mitigating factors in favor of the defendant:
 - i. The defendant has been an upstanding member of society and has no prior convictions.
 - ii. The defendant is the sole bread winner of his family.
 - iii. The defendant is genuinely remorseful and this is reflected in the Report.
 - iv. The defendant has high prospects of rehabilitation, and is engaged in paid employment. The Report indicates that loss of employment will have a negative impact on his family, especially his children.
 - v. The defendant made efforts to assist the child victim after the accident.
 - vi. The actions of the child victim and/or the lack of parental supervision of the child victim contributed to the accident.

OBJECTIVE SERIOUSNESS OF THE OFFENDING

16. The defendant was found guilty of the offence of dangerous driving occasioning death contrary to Section 67A(1)(d) of the Act.
17. Section 67A(1)(d) of the Act provides as follows:

67A Dangerous driving occasioning death

(1) A person is guilty of the offence of dangerous driving occasioning death if the motor vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the motor vehicle:

- (a) under the influence of intoxicating liquor or of a drug;*
- (b) at a speed dangerous to another person or persons;*
- (c) in a manner dangerous to another person or persons; or*
- (d) in a manner that is reckless or negligent.***

(2) A person convicted for an offence under this Section, upon conviction is liable to imprisonment for 10 years.

18. The defendant was found to be driving in a manner that was reckless or negligent. The maximum penalty under Section 67A(1)(d) of the Act is a term of imprisonment for 10 years.
19. The defendant, who was a public service vehicle driver at the time of the accident, was

driving significantly above the prescribed speed limit near schools. He failed to reduce the speed of the bus when he saw children near the vicinity of the road. The moral culpability of the defendant is in the moderate to high range.

20. In light of the aggravating factors, the mitigating factors, the personal circumstances of the defendant, and his moral culpability the court finds that the objective seriousness of the offending is at the midrange of the level of seriousness.

RANGE OF SENTENCES

21. This is the first occasion on which this court is sentencing a defendant charged under Section 67A(1)(d) of the Act.
22. The court prefers to apply the guideline judgment of the NSW Court of Criminal Appeal in *R v Jurisic Matter No 60131/98*¹ in relation to Section 52A of the Crimes Act 1900 which is almost identical to our Section 67A(1)(d) of the Act. In that case Spigelman CJ made the following guidelines:

In my opinion this Court should promulgate the following guidelines:

1 A non-custodial sentence for an offence against s52A should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment.

2 With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

I realise that the formulation I propose - does the relevant aggravating factor manifest, in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct - introduces an element of judgment on which reasonable minds may differ. Nevertheless the formulation of the issue in such a way will serve the objective of consistency of sentencing with respect to conduct that the community has indicated plainly that it wishes to deter and condemn.

The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence.

¹ [1998] NSWSC 423 (12 October 1998)

SENTENCING APPROACH AND PRINCIPLES

23. Section 278 of the *Crimes Act 2016* provides the following purposes for sentencing an offender:

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;*
 - (b) to prevent crime by deterring the offender and other people from committing similar offences;*
 - (c) to protect the community from the offender;*
 - (d) to promote the rehabilitation of the offender;*
 - (e) to make the offender accountable for the offender's actions;*
 - (f) to denounce the conduct of the offender; and*
 - (g) to recognise the harm done to the victim and the community.*
24. Section 279 of the *Crimes Act 2016* outlines the considerations that the court must take into account when sentencing a person found guilty of an offence. The considerations under this section stems from Section 278 of the *Crimes Act 2016*.
25. Section 280 of the *Crimes Act 2016* provides the sentencing considerations that must be taken into account when deciding whether a term of imprisonment is appropriate.
26. Section 281 of the *Crimes Act 2016* provides the considerations that the court must take into consideration as a far possible when deciding to impose a fine on a person found guilty of an offence.
27. Hunt CJ at CL in the Court of Criminal Appeal of NSW in *R v MacDonell*² stated that:

The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.

28. Section 278 of the *Crimes Act 2016* adopts the common law principles of sentencing as was found in *Veen v The Queen (No 2)*³ with reference to a similar sentencing provision in Australia. In that case Mason CJ, Brennan, Dawson and Toohey JJ in their judgment in the High Court of Australia made useful observations with regard to the

² (unrep, 8/12/95, NSWCCA) at [1]

³ (1988) 164 CLR 465

interaction between the different sentencing purposes:

*... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.*⁴

29. Further, the High Court of Australia in *Muldrock v The Queen*⁵ reconfirmed the common law heritage of the relevant provision:

The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [Veen v The Queen (No 2) at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in Veen v The Queen (No 2) [at 476] in applying them. [Relevant footnote references included in square brackets.]

30. Having referred to the cases above on the application of the purposes for sentencing, the court emphasizes on how the principle of proportionality as a fundamental sentencing principle guides and binds the balancing exercise of a sentencer with regard to the various purposes of sentencing referred to in Section 278(b)(c)(d)(e)(f) & (g) of the *Crimes Act 2016*. In this regard Howie J, with whom Grove and Barr JJ agreed, made the following observations in the Court of Criminal Appeal of NSW in *R v Scott*⁶:

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: R v Geddes (1936) SR (NSW) 554 and R v Dodd (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the Crimes (Sentencing Procedure) Act that one of the purposes of punishment is “to ensure that an offender is adequately punished”. The section also recognises that a further purpose of punishment is “to denounce the conduct of the offender”.

31. An example of how the principle of proportionality operates is also found in *Veen v*

⁴ *Veen v The Queen (No 2)* (1988) 164 CLR 465

⁵ (2011) 244 CLR 120 at [20]

⁶ [2005] NSWCCA 152 at [15]

The Queen (No 2), *supra* where the High Court of Australia held that a sentence should not be increased merely to protect the community from further offending by the offender if the result of which would be a disproportionate sentence. In that case Mason CJ, Brennan, Dawson and Toohey JJ made the following useful observations at [473]:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

32. Lamer CJ in the Canadian Supreme Court in *The Queen v CAM*⁷ found that retribution in sentencing represents:

...an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.

33. Howie J in the Court of Criminal Appeal of NSW in *R v Zamagias*⁸ made the following useful observations on the interaction of the various sentencing purposes and how the advancement of one purpose may achieve the goal of another:

It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation...

34. In light of the above, the court finds that all of the purposes of sentencing would need to be considered and balanced against each other to reach a sentence which conforms with the fundamental sentencing principle of proportionality. No one purpose has priority over the other. The amount of weight that would be given to each purpose would depend on the circumstances of the offending, mitigating and aggravating factors, and the personal circumstances of the offender.

PRE-SENTENCE REPORT

35. The Report highlighted the fact that the defendant was genuinely remorseful and has changed his life after the accident. He stopped drinking alcohol and started to go to

⁷ [1996] 1 SCR 500 at [80]

⁸[2002] NSWCCA 17 at [32]

church. He is no longer working as a bus driver. He is employed as a security officer.

36. The Report also provided the background of the defendant, which has been referred to in this ruling. Further, it also provides that the defendant has a good relationship with his children and that his children rely on him financially. The Chief Probation Officer recommends a non-custodial sentence in light of the children's best interest.

CONSIDERATION

37. Having considered the various sentencing principles, the court will now consider the applicable factors in its sentencing, and apply them to the sentencing principles. In doing so the court has taken account of Section 279 of the *Crimes Act 2016*.
38. The court takes into consideration that the offending caused the loss of life of a child victim. If the defendant had driven the bus within the speed limit the child victim may not have lost his life. Further, having considered Section 280 of the *Crimes Act 2016*, the court finds that this is an appropriate case in which a term of imprisonment is to be imposed.
39. The court has also considered the Report and the need to rehabilitate the defendant. The Report recommends a non-custodial sentence. In *R v Jurisic Matter No 60131/98, supra* it was held that non-custodial sentences must be imposed only in exceptional circumstances involving “*momentary inattention or misjudgment*”. This case does not involve momentary inattention or misjudgment. Therefore, a custodial sentence must be imposed on the defendant. However, the court is also mindful of the significance of suspended sentences which are custodial sentences that take into consideration the sentencing principles of deterrence together with the need to rehabilitate the defendant: see *Dinsdale v The Queen* (2000) 202 CLR 321.
40. The court condemns the taking of the child victim's life as a result of the defendant's reckless driving. For this a custodial sentence will be imposed on the defendant. This is a reminder to motorists and other road users that this court will not take lightly any offending under Section 67A(1)(b) of the Act.
41. However, in the current circumstances the court is mindful of the chances of rehabilitation of the defendant. The defendant is a first-time offender and is genuinely remorseful. He has stopped drinking alcohol and has been going to church. He is employed and is supporting his family. An immediate custodial sentence would affect his livelihood. It will also affect his family, especially his children. The court finds that these circumstances warrant a suspension of the term of imprisonment for a reasonable period of time.
42. The defendant is not a notorious and/or high-profile offender. Therefore, the principle

of general deterrence does not apply to him.

43. The defendant does not have any prior criminal record. A prior criminal record may require more weight be given to retribution, personal deterrence or protection of the community, as such criminal record may manifest a continuing attitude of disobedience: see *Veen v The Queen (No 2)*, *supra*. In light of this, there is no need for specific or personal deterrence in this case.

RECORD OF CONVICTION

44. The court has considered Section 279 of the Crimes Act 2016.
45. In light of the serious nature of the offending, the court enters a record of conviction against the defendant pursuant to Section 277(b) of the Crimes Act 2016.

SENTENCE

46. Upon careful consideration of the sentencing principles, and the relevant factors in relation to the nature of the offending, the court finds that the appropriate sentence in this case is an order for a term of imprisonment, which is to be suspended for a reasonable period of time.
47. The offending committed by the defendant is at the midrange of the level of seriousness, therefore the court's starting point of the term of imprisonment is 4 years. Upon consideration of the aggravating and mitigating circumstances of offending, the term of imprisonment is reduced to a term of imprisonment for 3 years.
48. The defendant was detained for 7 days from 28 April to 5 May 2022 pending completion of the investigation, and upon the filing of the charge he was held in remand custody for 88 days from 5 May 2022 to 1 August 2022. The defendant has spent a total of 95 days in pre-sentence custody. The said 95 days shall be deducted from the term of imprisonment of 3 years as time spent. Therefore, the defendant is to serve a term of imprisonment for 2 years and 270 days.
49. The term of imprisonment for 2 years and 270 days shall be suspended for a period of 4 years from the date of this ruling, and shall be activated if the defendant reoffends during the period of suspension of the term of imprisonment.

ORDERS

50. The following are orders of this court:

- i. That a record of conviction is entered against the defendant, namely, Camluc Boraben Scotty.
- ii. That the defendant is to serve a term of imprisonment for 2 years and 270 days, which shall be suspended for a period of 4 years from the date of this ruling.
- iii. That the term of imprisonment for 2 years and 270 days shall be activated against the defendant if he reoffends during the period of the said suspension.
- iv. That the parties to this case are at liberty to appeal the defendant's sentence within 21 days from the date of this ruling.

Dated this 3 day of April 2024.

Resident Magistrate
Vinay Sharma