

PUBLIC PROSECUTOR

V

TOPLAN MALIU

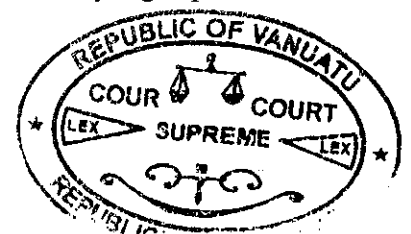
*Hearing: Friday 5 February 2016 at 10:25 am in Luganville*  
*Before: Justice SM Harrop*  
*Appearances: Ken Massing for the Public Prosecutor*  
*Jane Tari (PSO) for the Defendant*

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SENTENCE

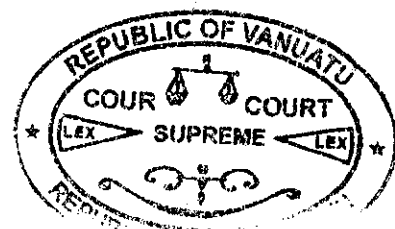
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1. Mr Maliu, you are in your late 30s and here for sentence having pleaded guilty to one count of intentional harm causing death against section 108 (c) of the Penal Code. Because death resulted the maximum penalty available is five years imprisonment. Section 108 contains three possible ways in which unintentional harm may be caused to the body of another person: through recklessness, negligence or failure to observe any law. In my view the Public Prosecutor should have included in the particulars which of these options applied but that did not occur so as a matter of fairness to you I am going to proceed on the basis of what is arguably the least serious level of criminality of fault, negligence.
2. The facts of the case are relatively briefly stated. The deceased was Mele Tamata from South Santo, he was 60 years of age when he was killed in the incident on 21 December 2015. You are from the West Coast of Santo and you own a transport vehicle; usually transport people from town to Tassiriki and back and you have a Nissan vehicle for that purpose. On the night of the 21<sup>st</sup> of December you were taking passengers from town to Tassiriki and on the way back there was heavy rainfall and you could not see the road properly but you drove at what is described in the facts as "very high speed".



It is explained that because you had cargo or freight from the passengers on board you were worried that that might get very wet. When you reached the Bettania Bible School you were shocked to see the deceased close to your vehicle on the road and when you tried to avoid him and braked you were not able to do so in time to avoid hitting him because you were traveling very fast. You hit him and he fell onto the road. When you stopped the vehicle you saw him lying on the road and you put him in your car and headed for the medical centre but on the way he lost his life. After the medical centre visit you returned to the village of the deceased with his body. You were afraid of the reaction of his family so you instructed someone else to drive the vehicle. When you were arrested and spoken to you admitted committing the offence.

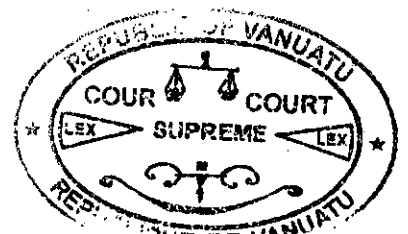
3. The first point I make is that you will have on your conscience for the rest of your life the fact that you killed this man who was an innocent pedestrian. I accept that that is a form of punishment in itself, though I am not suggesting that it is anything like the loss which his family have suffered.
4. Driving on public road is a privilege, it comes with significant responsibility. As a professional driver who carries passengers for reward you should know better than other drivers what the risks are to other roadusers and pedestrians. You must ensure that you and your passengers remain safe as well as other roadusers and pedestrians. Most importantly, you must drive according to the prevailing conditions. So one day it might be safe to drive at 60 kilometres an hour on a road but the next day the conditions might mean that only 30 kilometres an hour is a safe speed on the same road. Regard has to be had to the weather, the state of the road, the number of cars and trucks on the road and whether you are driving through an area where there are pedestrians, or likely to be.
5. Here in my view your driving clearly fell well below the standard of the reasonably prudent driver in the conditions that prevailed that night. You drove far too fast in heavy rain, the road was not sealed of course and you



simply were not able to stop without sliding within a reasonable distance when you came across the deceased.

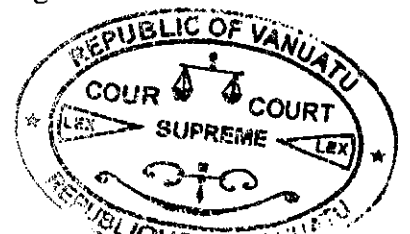
6. It might not have been him that you came across, it might have been a bullock on the road, another car coming the other way, a fallen tree across the road. When you are driving too fast for the conditions you cannot avoid the risks that you need to be able to avoid. You were speeding for what you thought was a good reason, to keep your cargo dry, but in doing so you forgot about the much more serious risk to other roadusers, pedestrians and indeed yourself and your passengers. You put all of their lives at risk.
  
7. Since I have been a Judge here in Vanuatu I have dealt with two cases which were somewhat similar to this: *PP v. Nakat* [2014] VUSC 121, a Tanna case and a local Santo case last year *PP v. Riri* [2015] VUSC 28. In the course of preparing this judgment I have also considered the judgment of Justice Spear in *PP v. Poilapa* [2012] VUSC 20.
  
8. In the course of those two judgments that I gave I observed and I repeat here that these are difficult cases to sentence because they involve the lowest level of criminal fault, negligence, but the highest level of adverse consequence, death. In both cases I quoted what the Court of Appeal said in *Newell* [1998] VUCA 2, where a 15 year old boy at Big Bay tragically fatally injured one of his close friends when they were fooling around with a rifle which accidentally went off. The court said there and it is really repeating what I have just said:

*“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 law’s terms it is a situation where death results 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 is being lost, it is unfortunate (particularly when people are grieving and hurt) that*



*sometimes there is a suggestion that the Court minimizes the value of the life which was taken when what the Court is concerned to do is to assess the criminal culpability of the wrongdoer. In cases such as this the Court cannot ignore the reality that David as a teenager faces a lifetime in which he lives with the knowledge that as a consequence of his careless act a life was taken."*

9. So my focus here is on the level of your fault and not unduly on the death which resulted. I need to assess a starting point that factors in the aspects of the offending including the aggravating features and then later to look at the personal factors that will reduce that. My conclusion here is that there is a medium to high level of fault involved here because you drove at a high speed in conditions which should have dictated that you go much more slowly. Your visibility was much reduced and you took a big risk that you would have an accident and unfortunately that came to pass. Your errors led to the death of a pedestrian who should not have died and would not if you had driven to the conditions. He and any other pedestrian was entitled to expect that you would take particular care on the road. I note you were in an area where there must have been at least an increased chance, compared with driving through the bush, that there would be pedestrians because it was near a Bible school. Obviously pedestrians are very vulnerable and any collision with a vehicle is likely to cause at least serious injury and often death.
  
10. Ms Tari has made the point that it is not clear where the pedestrian was on the road but the responsibility to ensure that there is no collision with a pedestrian rests very firmly on the driver. It is certainly common in Vanuatu as you will be well aware for people to walk on roads, and not necessarily on the side of roads, at night where it is virtually impossible to see them. As a driver you need to be driving on the basis that you may come across such a pedestrian and to choose your speed accordingly. In my view by comparison with the *Riri* case this was somewhat more serious because there, there was a contribution to the collision from the improper parking of the broken down truck which had infringed significantly onto the roadway. Here I do not see there is such a factor ameliorating the offending. So even though there were



two deaths in the Riri case that did not directly affect the level of fault, which here I find it to be somewhat greater. Obviously the two deaths did affect the overall seriousness of that case.

11. I have considered the helpful submissions of counsel and the pre-sentence report and I do not propose to go through them in great detail. In my view a short prison sentence is required to send the deterrent message to you and others in the community who are drivers that when you are driving on the road you driving a lethal weapon and it is very easy for it to cause harm through inattention especially when conditions are far less than ideal. However I am satisfied as I will explain shortly that this is a sentence which should be wholly suspended.
12. I consider that a starting point of 14 months imprisonment is appropriate and I then reduce that by 1/3 or about five months down to nine months because of your immediate guilty plea. I then reduce that further to six months taking into account your custom reconciliation offer, your absence of previous convictions, your good character, your remorse. I note that you have been willing to undertake a custom reconciliation ceremony but the victim's family have decided that only if you receive a prison sentence will they be prepared to undertake one. That is their right. I reduce the sentence by a further month because you were in custody from 23<sup>rd</sup> December to 21<sup>st</sup> of January and then granted bail. That is equivalent, when half parole is taken into account, to a two-month sentence.
13. The end result is a five-month prison sentence which I consider must be wholly suspended to reflect your overall good character. I am encouraged in that conclusion by your offer today to pay Vt 200,000 compensation to the victim's family. That in my view is a very generous offer and I will make an order accordingly.
14. Of course if for any reason the victim's family did not think that was sufficient they would have their own civil rights to pursue matters but as I say certainly from my perspective it is a generous offer and should be

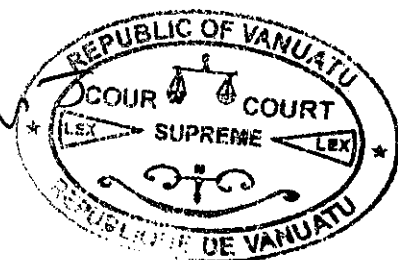
gratefully received by the deceased's family. Obviously nothing can bring him back and you are making a significant payment to try and make matters as right as you can in the circumstances.

15. In the end I impose the following sentences: you are sentenced to five months imprisonment but that is wholly suspended for a period of 12 months. You should understand that that means you will not go to prison today but if you commit an offence of any kind (whether or not it relates to driving) within the next 12 months you will be required to serve that sentence together with the sentence for the subsequent offence. I make an order for compensation in the sum of Vt 200,000 that sum to be paid within six months and payment is to be monitored by the probation officer. If for any reason that is not paid you will be liable to re-sentencing because I have factored it in, in assessing the amount of community work I think you should do as well. I have considered deferring sentencing to ensure that that compensation payment is made but I prefer to do it the other way so that the matter can be finalised now particularly because you live in West Santo.
16. I would have imposed a sentence of 150 hours community work but because of the substantial compensation offer I will order that you do **50 hours** community work instead. It is appropriate that you undertake some community work because although of course this is very much an offence against the deceased, it is also an offence against the community generally. It is appropriate that you put something back into the community and given that I expect you will not serve that suspended prison sentence that will be the only punitive consequence of this sentence.
17. If you wish to appeal against this sentence you have 14 days to do so.

**Dated at Luganville this 5<sup>th</sup> day of February 2016**

**BY THE COURT**





**SM HARROP**  
**JUDGE**

