

PUBLIC PROSECUTOR

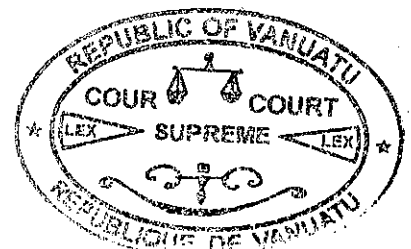
V

GUILLAUME KASTEN

Hearing: Friday March 10th 2017 at 1:30 pm
Before: Justice JP Geoghegan
Appearances: Mr Blessing for the Public Prosecutor
Mr Tagaro for the Defendant
Correctional Services

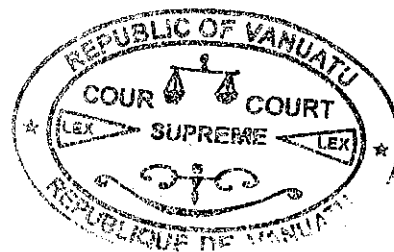
SENTENCE

1. Mr Kasten you appear today for sentencing in respect of two charges of unintentional harm causing death. Those charges having been laid pursuant to section 108 (c) of the Penal Code. The maximum penalty in respect of each offence is one of five years imprisonment. The particulars of offence as set out in the information originally laid in these proceedings refer to recklessness on your part as being the cause of this offending and I point that out simply because section 108 provides that no person shall unintentionally cause damage to the body of another person through recklessness or negligence or failure to observe any law. It is clear in this case that these charges have been laid on the basis of your recklessness leading to the tragic events on June 20th 2016 which form the basis for these charges.
2. You appear as a first time offender and I want to acknowledge those people who have come to Court today to support you. I wish also at the outset of this sentencing to extend the Court's condolences to the families of the two people who died in the accident which is at the heart of this matter. While my task today is to sentence you in respect of your offending the sad reality is that



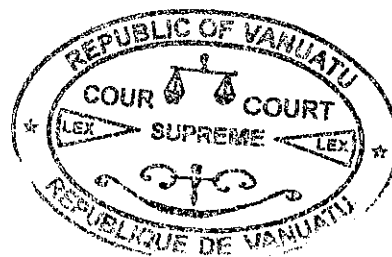
nothing that is done today can ever make up for the loss of the victims. That loss will continue to be felt by their families long after this sentencing.

3. I want to refer to the summary of facts as set out in the prosecution's brief of facts. You will have heard me spend some time discussing this with Mr Tagaro to ensure that you accepted the prosecution's brief of facts because that brief is the basis for my sentencing today. I have confirmed with Mr Tagaro that you accept that summary of facts.
4. The brief of facts tells me that you were 25 years old at the time of this incident. You were employed at that time by your father as a public transport driver. You were driving a 16 seat Toyota Hi-Ace van and that van was full at the time of the accident. You were carrying 16 passengers all of whom were passengers from a cruise ship. You were returning from the Ekusap Cultural Village at Erakor half road and you were in the course of returning your passengers to their ship at the time this accident occurred. The brief of facts tells me that as soon as you left the village you accelerated at high speed along Erakor main road towards Port Vila. You were driving at an estimated speed of 100 to 120 kilometres per hour. As you were approaching Elacbarum which is an area along the Erakor main road, you saw a couple of your friends who were walking on the opposite side of the road. You then decided to steer the vehicle directly towards them and accordingly you crossed from your side of the road onto the opposite side of the road.
5. It appears that your intention was simply to play a joke on your friends. The brief of facts tells me that you maintained the speed to which I have already referred at that time. Instead of returning to your correct lane after you steered away from your friends, you continued to drive on the wrong side of the road maintaining the speed I have referred to. The brief of facts says that at that time you were also looking in your rear vision mirror to see what the reaction of your friends was to your practical joke. While you were doing that a van driven by one of the deceased, Mr Rory was approaching on the correct side of the



road. You have looked up, you have noticed that van and you have then, instead of turning onto the correct side of the road, have turned in the same direction as the van driven by Mr Rory who at that time was steering to his right to avoid a collision. As a result of your actions there has been an head on collision with catastrophic results.

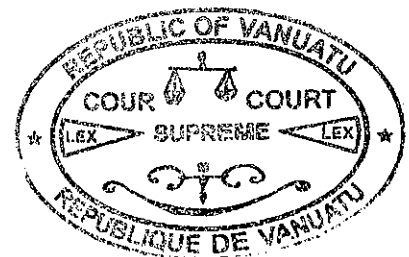
6. The consequences of your offending were very significant. Not only were there the deaths of the driver and passenger in the other vehicle but all of the passengers in your vehicle were injured, some very seriously.
7. I have enquired of Mr Blessing today why you were not charged with other offences concerning the unintentional harm caused to your passengers. The answer I have received is that because those passengers live in Australia a decision was made simply to proceed in respect of the deaths.
8. The persons who died that day were Marcelyn Mensur and Germain Rory. Mr Rory was also the driver of the passenger bus that he was in. Mr Mensur was 8 months pregnant and her baby was lost as a result of fatal injuries she suffered that day. It is important that they are mentioned by name and remembered today and are not simply referred to by the generic term, "victims".
9. The compensation report which I directed tells me that Mr Rory left behind six daughters, two sons and their widowed mother. Not surprisingly, the family is struggling with the loss of its sole bread winner. Regrettably for reasons which are unclear to me I do not have personal details regarding Mrs Mensur.
10. I have read both the pre-sentence report and the compensation report provided by Correctional Services. The pre-sentence report refers to you as a man of good character who has good relationships with your family. You are a first time offender and I accept that you are deeply remorseful for what has happened.



11. A reconciliation ceremony is still to be undertaken. As I have said, the compensation prepared regrettably only covers the circumstances of one of the victims, Mr Rory. In summary however it is clear that you do not have the financial means to be able to pay compensation. Of some promise however is the fact that the bus you were driving which belongs to your father was fully insured and it is almost certain that the victims families will be able to receive compensation by means of that insurance. Because of these factors and your personal circumstances, I do not propose to direct a payment of compensation today and hope that that is a matter that can be addressed in a reconciliation ceremony which can hopefully be held with the victims families.
12. I want to turn to the prosecution's submissions. Mr Blessing quite rightly points to the fact that there is no guideline judgment in this jurisdiction for these offences. That is because cases such as this involve a wide range of behaviour. Mr Blessing refers to decisions in the Public Prosecutor v. Newell¹ and the Public Prosecutor v. Nakat² as emphasizing the need to focus on the criminal culpability of the offender ranging as it can and does from negligence to recklessness. The consequence of fault must of course be taken into account but it is the degree of fault which is the most significant factor in determining an appropriate sentence. Mr Blessing has helpfully also referred to Australian and English authorities which emphasize also the wide range of behaviour involved in cases such as this. Those cases draw obvious distinction between momentary inattention or misjudgment on the one hand and selfish disregard for the safety of others or recklessness on the other. Both categories can involve fatal consequences but the more serious the degree of recklessness the more likely it is that a custodial sentence will be required.
13. In that regard the prosecution point to the following features of your offending:-
- 1) You drove your vehicle at an excessive speed. In this regard although it is acknowledged that there was no speed limit notice

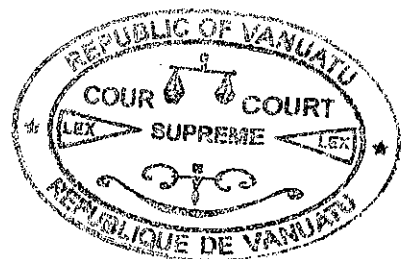
¹ [1998] VUCA 2

² [2014] VUSC 121

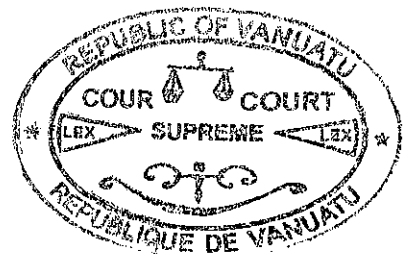


In the immediate area I accept that a speed of between 100 and 120 kilometres per hour in the circumstances was too high and certainly contributed to the accident which occurred. I acknowledge that you have said that you wanted to get the cruise ship passengers back to their ship on time. But as a passenger bus driver you must at all times be careful to ensure that your driving is consistent with the safety and security of the passengers you are carrying.

- 2) You swerved your car onto the other side of the road. In any circumstances this constitutes recklessness. In my assessment this deliberate action on your part, regardless of the motive, while you were carrying a significant number of passengers, was grossly reckless.
- 3) You continued to drive on the wrong side of the road instead of immediately returning to the correct side of the road. You also continued to look in your rear vision mirror at the reaction of your friends rather than to focus on the road ahead of you. In all of the circumstances this too, was grossly reckless.
- 4) Mr Blessing refers also to your decision after seeing the oncoming vehicle to swerve to the right thereby continuing to travel on the wrong side of the road and causing the head on impact. If you had swerved to the left you may have avoided impact. While this was certainly an error on your part I do not think that it can be properly categorized as "*reckless judgment*", as it has been by the Public Prosecutor. It was a mistake but it was one which was made in a split second in a situation where you no doubt were panicking. It could not be categorized as recklessness. I acknowledge as well your contention that your reason for taking that action was that there was an iron post on the right side verge of the road which influenced your decision.

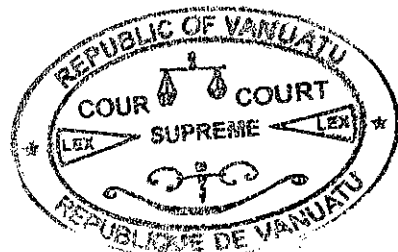


14. Mr Blessing has referred me to many authorities and has provided a table comparing the facts of this case with the facts of those other cases. He submits that an appropriate starting point is one of three years imprisonment. Clearly there are no personal aggravating factors.
15. On your behalf, Mr Tagaro identifies the aggravating factors as your driving beyond the normal speed limits because you are in a rush to get back to the ship and secondly the deaths caused together with the injuries to other passengers. The deaths caused are not an aggravating feature, they are an inherent component in the offence that you have pleaded guilty to. They are of course a factor which must be taken into account. But it will be clear to you that I consider that there were other aggravating features and I have already referred to those. In mitigation on your behalf Mr Tagaro refers to your early guilty plea, your lack of a criminal record and your co-operation with the police. He also refers to this as being a one off mistake which occurred only because you were unsuccessful in your attempt to avoid a collision.
16. With respect to Mr Tagaro's submissions I completely disagree. As I have said, there were aspects of your driving which were grossly reckless and it is that gross recklessness which caused this catastrophic accident. Mr Tagaro also submits that the offending in this case is one "*of a lower level of fault*". Again, I completely disagree. Mr Tagaro's submissions in this regard focus on your attempts to avoid a collision once that collision was apparent. They do not refer in any way to your actions in swerving to the wrong side of the road in an act of reckless bravado and in not returning immediately to the correct side of the road. The aggravating features I have referred to place this in a category of recklessness not one of momentary inattention or misjudgement. Mr Tagaro has submitted that an appropriate starting point is one of one year and two months imprisonment with a reduction for a guilty plea and personal factors resulting in an end sentence of 8 months and 10 days. He proposes a suspension of that sentence.

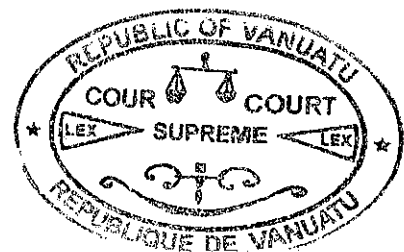


17. In proposing a starting of one year and two months Mr Tagaro relies upon a case called PP v. Maliu³ which he submits is very similar to this case. I do not accept that submission. Malju involved excessive speed only. Your case involves not only excessive speed but the other matters which I have already referred to.
18. In considering an appropriate starting point I take into account the following factors:-
- a) You were driving at an excessive speed.
 - b) You deliberately swerved your vehicle onto the opposite side of the road.
 - c) You continued to drive on the wrong side of the road instead of immediately returning to your correct side of the road.
19. Those are all aggravating features of your offending. Additional factors are also these:-
- a) You were driving at the time as a professional driver carrying passengers for reward. You owed them a high duty of care in ensuring their safety.
 - b) Your driving resulted in two deaths and many injuries. The consequences of your offending were very, very significant.
20. Considering those factors and the authorities have been referred to, I consider an appropriate starting point to be one of three years and six months. I acknowledge that this is higher than the figure suggested by the Public Prosecutor but the recklessness involved in this offending, in my assessment, justifies such a starting point. I deduct three months for your good character and remorse. I then deduct a further 11 months to take account of your guilty plea. That leaves an end sentence of 1 year and 10 months imprisonment.

³ [2016] VUSC 4



21. The issue for consideration is then one of possible suspension of your sentence. As Mr Blessing has correctly submitted, that decision must be made judicially after a proper assessment of the circumstances of your case, the nature of the crime and the character of the accused. In this regard the Public Prosecutor emphasizes the circumstances of the offending and the need for deterrence.
22. There are a number of purposes of sentencing which are applicable. Some of those are the need to provide whatever rehabilitative measures may be necessary and the need to impose the least restrictive sentence appropriate to the circumstances of the case. But there is also the need to hold you accountable and responsible for this offending. And this is a case where the need for deterrence assumes some importance. Vanuatu is a country that relies heavily on tourism. It is a country without a public transport system. The public need to have confidence in the level of professionalism and competence of those who earn a living from transporting passengers. They need to know that when they are transported by professional drivers they will be transported by someone who undertakes a high degree of duty of care to ensure their safety and security.
23. As against that of course, you are still relatively young and you are a first time offender. You are clearly a person of good character and you will have to carry the consequences of your offending for the rest of life and I acknowledge that that in itself is a heavy burden.
24. Taking into account all relevant matters, I consider that it is appropriate to suspend your sentence in part only and this is to underline to you and others in the Public Transport industry and also to drivers generally that recklessness will not be treated lightly by the Courts.
25. As to compensation for the victims it will be clear from my earlier comments that I do not regard you as being able to pay compensation. I know that your family as I have said is hoping to undertake a reconciliation ceremony with the

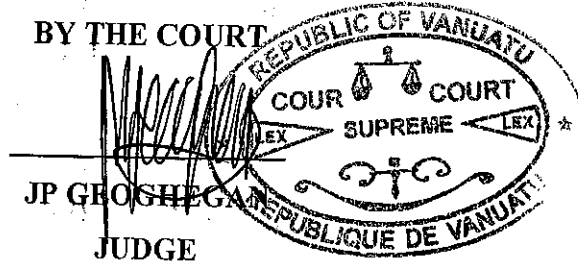


families of the deceased and I hope that that will provide some way forward. I wish to record my gratitude to your family for the attitude that they have shown in respect of this matter.

26. Accordingly you are sentenced in respect of both charges to one year and ten months imprisonment. Those sentences will run concurrently. You will be required to serve 11 months of that term and the balance is to be suspended.

Dated at Port Vila this 10th day of March 2017

BY THE COURT



JP GHOSEGAN

JUDGE

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

**Criminal
Case No. 16/3480 SC/CRML**

BETWEEN: **Public Prosecutor**

AND: **Guillaume Kasten**
Accused

Date of Minute: *15th day of March, 2017*

By: *JP Geoghegan*

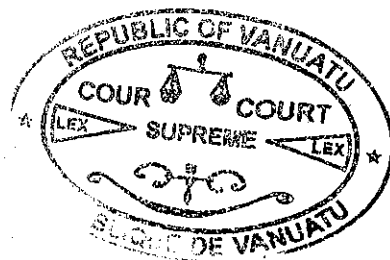
Distribution: *Mr Blessing for the Public Prosecutor*

Mr Tagaro for the Accused

Correctional Services, Port Vila.

MINUTE

1. Further to my sentencing of Mr Kasten on March 10th and upon signing the sentencing notes, I noted two matters which had not been recorded in those notes.
2. The first and most important matter is the advice to Mr Kasten pursuant to section 94 of the Criminal Procedure Code [Cap. 136] that he has a right of appeal in respect of his sentence and that that right of appeal must be exercised within 14 days of the sentence being imposed. I record that I did not give that advice to Mr Kasten and that is a regrettable omission on my part.

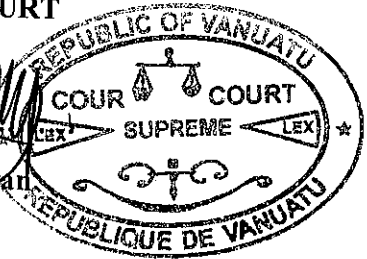


3. The second matter relates to the partial suspension of Mr Kasten's sentence and to section 57 (2) of the Penal Code (Amendment) Act No. 25 of 2006 which requires the Court when ordering the suspension of the execution of a sentence to explain clearly to the person sentenced the nature of the order and must ascertain that he or she has understood its meaning. In this regard I wish to record that prior to the sentencing I discussed with Mr Tagaro who was counsel for Mr Kasten whether or not he had spoken with Mr Kasten regarding a suspended sentence and the effect of a suspended sentence. Mr Tagaro confirmed that he had discussed that matter with Mr Kasten and that Mr Kasten understood the nature and effect of such a sentence.
4. Given the failure on my part to advise Mr Kasten of his right to appeal I direct that apart from distribution of this Minute to counsel for the parties that the Registrar take steps to ensure that Mr Kasten is personally served with a copy of this Minute as a matter of urgency to ensure that he is aware of that right and can take appropriate steps if he wishes to exercise that right.

DATED at Port Vila this 15th day of March, 2017

BY THE COURT

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JP Geoghegan
Judge

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a sword. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are positioned on either side of the scale, with "SUPREME" below them. The word "LEX" appears on both sides of the central emblem, and a small star is located on the right side of the seal.