

Criminal Case No. 94 of 2013

THE REPUBLIC

V

NAMIKO EIMARUMEN SCOTTY

Defendant

JUDGE: Eames, C.J.
DATE OF HEARING: 20 November 2013
DATE OF SENTENCE: 22 November 2013
CASE MAY BE CITED AS: Republic v Namiko Scotty
MEDIUM NEUTRAL CITATION: [2013] NRSC 17

CATCHWORDS:

Criminal law - Sentence - Manslaughter - *Criminal Code of Queensland 1899* (1st Schedule) Adopted s. 303, s. 310 - Passenger killed after leaping from car driven dangerously by intoxicated driver - Plea of guilty - No prior convictions - Defendant aged 20 years - Medical condition - Need for general deterrence - Attitude of Director of Public Prosecutions - *Criminal Code* s. 656 not applicable - Sentence 9 months' imprisonment with further 9 months' probation upon release.

APPEARANCES:

For the Republic

Mr W Kurisaqila DPP

For the Defendant

Mr V Clodumar (Pleader)

CHIEF JUSTICE:

1 Namiko Eimarumen Scotty, you have pleaded guilty to Manslaughter, an offence
under section 303 of the Criminal Code. By your plea you have admitted that you
unlawfully killed Marlianna Melekiola by your gross negligence.

2 Section 310 provides that the maximum penalty for manslaughter is life
imprisonment, but it is well recognised that it is an offence that covers a very wide
range of criminal behaviour and, in consequence, attracts very diverse penalties,
according to the seriousness of the circumstances in each case. However, the fact
that the offence carries such a high maximum term of imprisonment indicates that, in
all cases, it is regarded by the Republic as being a very serious offence, because it
involves the loss of life.

3 The circumstances of the offence, as admitted by you, are as follows. On the 16th of
May 2013 between 10-11pm, you collected your friends Rosie Raidi and Marlianna
Melekiola in a government vehicle, a Toyota Harrier. You were not permitted to be
driving that vehicle that night. The three of you went for a ride around the island,
with Rosie sitting in the front passenger seat and Marlianna in the back seat, leaning
through the gap between the front seats with her arms around the tops of the front
seats.

4 Marlianna suggested that you all should have a drink, as she was not working the
next morning as it was Constitution Day holiday. Between you you bought a bottle
of Vodka then found a plastic bottle in which you could mix water with the Vodka.
You all started drinking from the plastic bottle. You continued driving around the
island until you got to Western Bay in Boe District where you stopped again and
kept drinking.

5 Rosie was trying to limit how much alcohol you were drinking as she didn't want
you to get too drunk. After spending about 20 minutes to half an hour at Western
Bay, you then suggested that the three of you go somewhere that was not so

exposed, because you were travelling in a Government vehicle.

6 You drove them to Anabar district past the piggery farm and turned left off the road towards the beach, and turned so that the vehicle was facing the piggery farm but was hidden from the road. Whilst you were there a number of other people, including Marlianna's sister, came from the beach and had a conversation. Marlianna said that you were just drinking and invited the others to join in.

7 The others declined that offer, saying that they wanted to watch some of the events for Constitution Day the next day and they said that they were leaving. As they were saying goodbye to Marlianna, you told Rosie not to talk to those people and not to even say goodbye, as they had not joined in with you, Rosie and Marlianna. Rosie and Marlianna however continued to say goodbye to the others. When you three were alone again you asked the other two if they weren't they tired of talking to those three who just left. You complained that those three always gossiped and swore at you.

8 Rosie said it was normal for people to talk about them, but you were not happy and you sulked and stopped talking to Rosie and Marlianna. Your mood apparently changed and you told them that you hated them because they had such a strong friendship. Marlianna replied that you had only just said that you loved them both. From this stupid discussion, an argument developed between you and Marlianna, who began to cry. You then left the vehicle and relieved yourself nearby. Whilst you were away Rosie told Marlianna to stop crying and not to talk to you, as you were just trying to create a drama. Marlianna told Rosie to tell you to drop them at home.

9 When you got back to the vehicle, Rosie asked you to take them back home but you said that you didn't have the keys. After a search it emerged that you did have the keys but you had hidden them in the vehicle, Rosie then took the keys, but you snatched the keys back and started the vehicle. Rosie told you to let her drive, as they might have an accident. You told them both to get out of the vehicle and walk

because the vehicle was yours and you hated them both. They remained in the vehicle, and you then reversed the car until you were facing a clockwise direction. You accelerated, doing a U turn until you got back on the main road, travelling at high speed in an anti-clock wise direction in the wrong lane. Both Rosie and Marlianna kept telling you to stop but you did not. Rosie was terrified, as you were travelling at high speed in the wrong lane. When you got into the right lane Rosie grabbed the gearstick, pushed it forward and the vehicle stopped suddenly. The engine kept racing as you had your foot on the accelerator. Rosie held on to the gear stick and opened the door and got out of the vehicle.

10 Marlianna was still in the back seat, holding the two front seats. She tried to reach the door as the vehicle sped off again. Rosie stood watching the car speed off and she saw the left hand rear door fling open, and Marlianna jump out of the car. The car door swung back and hit Marlianna's right leg. Rosie heard a thump as Marlianna hit the ground. The car drove away at high speed. Rosie went across to Marlianna who was breathing with difficulty, and was bleeding from the nose and mouth. Rosie flagged down a vehicle and soon the police and an ambulance arrived at the scene and Marlianna was taken to the hospital, where she arrived in emergency at 3:30am.

11 A medical report from the general surgeon, Dr Ako Millan, states that Marlianna was unconscious on arrival at the emergency department where she was admitted to the high dependency unit and was given treatment. Her consciousness level gradually improved throughout the day, and she was later able to move all of her limbs and to respond verbally. Sadly, those positive signs did not continue. On the next day the 18th of May 2013, at 5:05am, her condition suddenly deteriorated, her heart was arrested and her breathing stopped. Cardio pulmonary resuscitation was performed and her heartbeat resumed. The medical report states that, although Marlianna's heartbeat resumed, her respiration had not returned spontaneously. She was then put on a mechanical ventilator, and stayed on the ventilator until the 21st of May 2013 at 6:20am when she was pronounced dead.

12 The Director of Public Prosecutions submitted that aggravating factors in this case were that a death had occurred, that a government vehicle had been used, and that with the increase in traffic in recent years, there was a prevalence of accidents involving alcohol, frequently resulting in injury. Nonetheless, the Director submitted that your driving in this case put the case at the lower end of the scale of manslaughter offences. He submitted that this was not a case where it was appropriate that you be sentenced to imprisonment. He submitted that a non-custodial order would be appropriate.

13 Mr Kurisqila was unable to refer me to any previous case of manslaughter by dangerous driving in Nauru, save for one case in 1977 for which there was no information about the sentence imposed. That might suggest that the particular offence is not prevalent and that, in turn, might reduce the weight to be given to the factor of general deterrence. Nonetheless, I found it surprising that the Director would positively assert that this case was not appropriate for a custodial sentence.

14 Whilst the need for general deterrence might not be as great as in some other Pacific jurisdictions, where road deaths are more frequent, it remains a very important consideration in Nauru. Nauru may have been blessed by the rarity of motor vehicle manslaughter deaths, but the need for deterrence must still be regarded as high. The few roads are narrow, with houses, pedestrians and children in close proximity to vehicles. The roads have become very congested in recent years, and motor vehicles are often overcrowded and unsafe.

15 However, important as is the factor of general deterrence, it is not the sole factor to be taken into account.

16 Mr Clodumar made a strong submission on your behalf, urging that there are many mitigating features that justify a non-custodial sentence being imposed.

17 You pleaded guilty to manslaughter, at the first opportunity. That demonstrates

remorse and in itself justifies a significant reduction in sentence.

18 You are only 20 years of age. You have no prior convictions. You completed secondary school in 2010 and have been employed part time in 2011 in private businesses as a cashier. You are now employed in the Education Department as a clerical assistant. With your earnings of \$215 per fortnight you support yourself and your grandmother. You are the only breadwinner in the house. I will assume that, were you to be imprisoned, not only would you lose your job, but it would damage your future earning prospects.

19 After your parents' marriage broke up you lived with your grandparents, with whom you were very close. You were saddened by the break-up of your parents. You were brought up in a Christian environment, your grandfather being a preacher. You are described as a very quiet person. You have helped your grandmother with chores since you were a small child. You were deeply affected by the death of your grandfather in February 2012.

20 When this event occurred, your grandmother had been off island for four weeks. It seems that your drinking increased in that time, while you were not under her gentle supervision.

21 You have a significant health problem. A medical report discloses that you have rheumatic heart disease, first diagnosed in 2004. You have injections of penicillin and are monitored by the hospital. I was not told that your ill health would make imprisonment any more difficult for you than any other person, but I will assume that to be the case.

22 The Acting Chief Probation Officer said that you seriously regret what you have done, and show remorse. You said to her that you could not remember the events of the evening, as you were too drunk. The Chief Probation Officer assessed you as a low risk to the community, and with good prospects for rehabilitation.

23 Although I suspect that you would not want to expose your feelings to others, I

accept that you are genuinely remorseful and saddened. By your gross negligence you have killed one of your closest friends. That is something that will remain with you for life. You have been described by Mr Clodumar as depressed and in a fragile state.

24 I am satisfied that you were significantly affected by alcohol, and that not only fuelled your anger against your friends but also affected your judgment about the dangerous situation you had created.

25 You must have known, however, that your two passengers were terrified by your driving. They were in fear of being killed or injured in an accident. Shortly before this tragedy you had been driving wildly, on the wrong side of the road. They had begged you to stop and when finally you did, one of your friends asked you to hand over the keys, which you did not do, but instead accelerated angrily as they sat in the vehicle, your progress only being stopped by the quick thinking of Rosie, who grabbed the gear stick, and stopped the car. The two passengers reasonably believed that your dangerous driving was going to continue, and that forced them to make what for Marlianna was the fatal decision to jump out. By leaving the vehicle they faced a long walk home, which shows the extent of their anxiety.

26 I accept that the death was not a result of daredevil behaviour. When the injury occurred, Marlianna was trying to get out of the car. I accept that you may not have known that Marlianna was trying to flee the vehicle, but you were so consumed by a ridiculous and trivial anger against your friends that you gave no thought to their welfare. You did know that your dangerous driving had led to Rosie getting out of the vehicle, because she had been sitting in the front seat. You were putting on a performance to display your contrived anger, and frightening them was part of that performance. Had Marlianna remained in the vehicle, it is highly likely that you would have resumed driving as dangerously as before.

27 Events such as these cannot be dismissed as mere accidents. They are the result of gross negligence and disregard for the safety of other road users.

28 I accept that this case is not at the worst level of manslaughter cases; the offence here is very much an instance of youthful foolishness and immaturity, rather than of conscious criminality. However, it is by no means trivial, or the result of mere momentary misjudgement.

29 I have not heard directly from the family of Marlianna. Her mother is the first cousin of your grandfather, and so the families are very close. Your grandmother has visited Marlianna's mother on two occasions since her daughter's death and as Mr Clodumar reported "there is still a raw atmosphere of sadness and hurting", in the house of Marlianna's mother.

30 That eloquently hints at the terrible reality of cases like this. It must be brought home that such tragedies bring disaster not just for the families of the victims but also for the families of the convicted driver. It is the common experience of courts dealing with cases involving serious motor vehicle accidents that very often it is otherwise good and upstanding people who face imprisonment for unintended deaths caused by their gross negligence. It is a sad reality that wherever road deaths occur, very often the convicted person has led an otherwise unblemished life. It is also sadly common that the person killed was a family member or friend. This was such a case. You had known the deceased Marlianna since childhood; you were like sisters and you treated her as such. She was your closest confidante.

31 So often both the offending drivers and their victims are young people, full of hope for the future.

32 Nauru is fortunate not to have had more such tragedies. The Court must do what is necessary to discourage other young people from behaving foolishly on the roads.

33 I am mindful of what was said by Justice Von Doussa in a Court of Appeal decision in Vanuatu of *Jenkinson v The Public Prosecutor* [2000] VUCA 5. His Honour said :

"In the case of a first offender with a long history of good driving, good character, good employment record and involvement in community affairs, it is a very serious step to send that person to gaol. Suspension of the sentence, which allows the best opportunity for rehabilitation, will be the appropriate

course”

34 That case was not an offence of manslaughter but negligent driving causing injury, which carried a maximum of 5 years imprisonment.

35 There is no provision in Nauruan law for imposing a suspended sentence in circumstances such as this. S.656 of the *Criminal Code* 1899 allows a suspended sentence to be granted for a first offender, but only in cases where the maximum sentence for the offence in question does not exceed three years imprisonment¹. The maximum sentence for manslaughter is life imprisonment, so the section does not apply.

36 Mr Kurisqila and Mr Clodumar both suggested that among non-custodial sentencing options that were available a recognisance or bond could be imposed under s. 19(7) of the *Criminal Code*. That provides that a bond to be of good behaviour may be imposed in any case, in addition to or instead of a term of imprisonment. Also, s.19(9) provides that in any case not punishable with death, the court may “instead of passing sentence” discharge the offender upon him entering a bond to appear for sentence at some future sittings of the Court.

37 I have some doubt whether s.19(9) applies to a case where the maximum penalty is life imprisonment, as in this case. It is not necessary, however, that I discuss that further. In my view, neither provision could appropriately be employed in this case, given the seriousness of the offence.

38 Other non-custodial options include probation under s.7 of the *Criminal Justice Act* 1999 and/or a Community Service order under s.22.

39 I have given careful thought to the submissions made by Mr Clodumar, in urging that I not imprison you. I have also had regard to the fact that the Director has submitted that this is not an appropriate case for imprisonment. That is a very

¹ See *Republic v Terry and Tekema Diehm* [2011] NRSC 27 at [11]-[14]. Note 3 in the 3 December 2011 version of the *Criminal Code* in Ronlaw suggests that s.656 was repealed by virtue of s.220 of the *Criminal Procedure Act* 1972, notwithstanding that that version includes s.656. The precise status of the provision must be regarded as uncertain.

significant matter, but it is my responsibility, not the Director's, to determine what in all the circumstances of the case is the appropriate sentence that reflects the needs for community protection and balances the various competing sentencing considerations.

40 If I agreed to the submissions of Mr Clodumar and the Director, and then, in 12 months' time, had to face two other families mourning the occurrence of a similar tragedy, it might appropriately be asked, "What did the Court do to discourage such dangerous behaviour?".

41 This is a very sad case. There are very strong factors that point towards a non-custodial order, and I do think that you would benefit from the supervision that a probation order would provide. But after long and careful thought, I think this is a case where a sentence of imprisonment must be imposed, if the message of road safety is not to be undermined. I will, however, very substantially reduce the sentence I would otherwise have imposed, in light of the mitigating factors I have identified.

42 Namiko Scotty, I convict you of manslaughter and I sentence you to 9 months' imprisonment, to date from today. I further order that upon completion of your sentence of imprisonment you be released on probation for a period of 9 months, pursuant to s.7 of the *Criminal Justice Act 1999*. In addition to the standard terms of probation under s.11, I direct that, pursuant to s.12, the probation order contain the following condition: that you abstain from the use of intoxicating liquor and drugs.

43 I further order, pursuant to s.27 of the *Motor Traffic Act 1937*, that any licence to drive a motor vehicle that you now hold be cancelled, and you be disqualified from obtaining a licence for a period of two years from this date.

Geoffrey M Eames AM QC

Chief Justice

22 November 2013.