

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

Criminal Case No. 39 of 2014

PUBLIC PROSECUTOR

V

JUDAH NAKAT

Hearing: Thursday 28 August 2014 at 9 am, Isangel, Tanna
Before: Justice Stephen Harrop
Appearances: Damien Boe for the Prosecution
Pauline Kalwatman and Harrison Rantes (PSO) for the Defendant

SENTENCE

1. Mr Nakat you are here for sentence having pleaded guilty to one count of unintentional harm causing death contrary to section 108 (c) of the Penal Code. You appeared before me on 6 May 2014 in Port Vila and pleaded not guilty to that charge but when the matter was called again earlier this week you pleaded guilty.
2. The charge to which you have pleaded guilty is a serious one. It carries a maximum prison sentence of 5 years and so Parliament has said by way of that maximum penalty that even where someone causes the death of a person by negligence or carelessness the potential is therefore for a significant prison sentence. However as I noted back in May when this matter was before me there are three levels of fault within section 108 (c) and you pleaded guilty to a charge containing the particular of negligence which is the lowest level of criminal fault known to the criminal justice system. In effect the fault alleged against you and accepted by you by way of your guilty plea is that of carelessness, of not taking sufficient care to watch out for the young child

Netty Jimmy aged only 8 months whom you ran over and killed. This was a case of a tragic accident and the sentencing must focus primarily on your level of fault and not unduly on the outcome of the level of fault namely the death.

Brief Facts

3. On the 17th December 2013, you were travelling to Leneai Village and on your way back you met Twain Frank who was walking along the road and he had an injured leg. He asked you if you could collect firewood for his aunty Iamei. When you got to the Lenami Area at Kauarua you turned inside and headed straight to his aunty's place. You saw a woman there and you asked where the firewood should be put and she asked you stop at that place and unload the firewood. There was then some delay in relation to payment of the truck load and some children came over to help you unload the firewood. When you finished you told the children to remind the person who had to make the payment about that issue.
4. You then turned on the ignition and reversed but you felt the tyres at the back had struck something. This turned out to be the baby Netty Jimmy, who as I say was only 8 months old. It is not clear how she got into a position to be run over and who was supervising her. At that age she could only have been placed or crawled to the place where she was run over.
5. You realised as a result of the response of a young girl who was looking on, who screamed out Netty Jimmy's name, that you had killed her. You quickly got out of the vehicle and looked down and you found her lying under the front left tyre, the family was crying and you also cried and you moved the truck. Then, with help from I think her mother who works at the hospital, you removed her body and took her to the hospital. You said that before reversing you had thoroughly checked the front and rear of the vehicle but you didn't see anyone because the baby was so small you could not see her. You are recorded as trying your best to save her life but the truck was too heavy. You are really sorry for accidentally taking the life of this child.

Approach to Sentencing in this kind of case

6. Most Judges will tell you that this kind of case is the hardest one to sentence. That is because it involves the least kind of fault but the worst kind of outcome, namely the death of a person. So balancing up those things is inevitably difficult, indeed impossible, because nothing the Court can do or you can do can bring Netty Jimmy back. No sentence that the Court imposes can provide a measure of the loss of the value of her life which was cut short after it had hardly began.

7. I want to read out to you something that the Court of Appeal said in a case called *Newell* [1998] VUCA 2. That was a case where a 14-year old boy had tragically fatally injured one of his close friends when they were fooling around with a rifle which accidentally went off. The Court said at page 3 of the decision: *“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 term 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 a knowledge that is a consequence of his killer’s act a life was taken”*.

8. This is what I meant earlier when I said that I have to focus primarily on your level of fault while of course taking into account the fact that the death resulted rather than to focus unduly on the fact that the death resulted and to treat you as guilty of a very serious offence simply because the death resulted. In reality your level of fault here is relatively minor, you made an error of judgment in that you did not drive carefully enough, you did not make absolutely sure that the way was clear but there can be no suggestion that you were reckless about whether you hurt anybody; there is no suggestion you were driving fast, there

is no suggestion you were affected by alcohol; and this makes it a very different case from a number of other cases I have read relating to sentencing under this provision.

9. You also were immediately remorseful and you continue to be and you also have a genuine insight into the reality of what happened, That is not surprising because you yourself are a parent of young children who will no doubt have some understanding of what it must be like for Netty's family to lose a child.
10. I have read the pre-sentence report and I can see that you are a good person, you have no previous convictions and in my view the Court does not need to oppose a deterrent sentence on you. You not need to be punished by the Court because you already understand the significance of what happened and you will have a lifelong punishment of living with the fact that you killed this baby girl.
11. That said, there still needs to be a sentence of some significance to recognize the fact that a death occurred and to recognize that a measure of general deterrence and warning to drivers of motor vehicles is appropriate on occasions like this. People who drive motor vehicles need to understand that they can cause a lot of harm with the smallest of errors on the driver's part.
12. You have also pleaded guilty although, as I have noted, not immediately. I am not sure why you pleaded not guilty in June and that you now plead guilty because right from the start as I understand it, you have acknowledged your responsibility and it must have been obvious to you from the start that not only did you cause the death but that you were involved, albeit at a modest level in failing to ensure that there was no one in your way when you reversed.
13. It is also important to record, and of course I must and do take into account, that your family and Netty's family engaged in a custom reconciliation ceremony. In a sense it is unfortunate I think that it happened so soon after the death although that is a measure of readiness of your willingness to take

responsibility. I understand that you did not attend the ceremony and nor did some of the members of Netty's family because they were understandably still in the period of mourning.

14. The pre-sentence report which of course I have read carefully says that the custom reconciliation was a significant one : there were 3 pigs, 7 bundles of kava, 1 big pile of local root crops, some local baskets and mats and VT100.000 provided.
15. I know too from the probation report that you do drive public transport for your employment and that you are generally regarded as one of the best drivers employed by Mr Yapson for whom you work. But this highlights the point that as a professional and regular driver you would have been aware of the risks and ought to have taken particular care being experienced in the risks that vehicles present. As a regular driver you must see many other drivers who do not drive properly on the road, though as I have said this is not a situation of your having driven on the open road in a careless way. So although you were driving in the course of your work it was a simply a minor reversing manoeuvre which was involved here
16. I also take into account sentencing that you have already suffered a punishment of a kind in that between January and May this year you were on bail in Port Vila, away from those who depend on you; they include not only your wife and family but your mother and her mother who are both dependent on you. So they have become indirectly victims of what you did, although I hasten to add of course not at anything like the level that Netty's family have become and will always be victims.
17. When I weigh everything up I reject the submission of the prosecution that this the case were a suspended prison sentence is required. I do not see that that is necessary in this case because your level of fault is modest one. I am satisfied having regard to the authorities I have read including *Poilapa* [2012] VUSC 20 that a sentence of community work and supervision as submitted by Ms Kalwatman is the appropriate outcome here having regard to the custom

reconciliation that has already occurred. I am satisfied the appropriate sentence is 250 hours' community work and supervision for period of 12 months , on the standard conditions. I am not aware if a possible special condition here on Tanna involves anything like driver education but if that is possible then I request that be included in your supervision sentence.

18. You have 14 days to appeal against this sentence if you do not agree with it.

BY THE COURT