

DIRECTOR OF PUBLIC PROSECUTIONS

v

DAMIAN RAKATAU

JUDGE: HER HONOUR JUDGE DAWES
WHERE HELD: Melbourne
DATE OF HEARING: 12 August 2019
DATE OF SENTENCE: 22 August 2019
CASE MAY BE CITED AS: DPP v Rakatau
MEDIUM NEUTRAL CITATION: [2019] VCC 1318

REASONS FOR SENTENCE

Subject: Culpable driving causing death, negligently causing serious injury
Catchwords:
Legislation Cited: s5A and s11A of the *Sentencing Act* 1991 (Vic)
Cases Cited: *R v Verdins* [2007] 16 VR 269; *R v Willis* [2019] VSC 398
Sentence:

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr J. Singh	John Cain, solicitor for Public Prosecutions
For the Accused	Mr S. Moglia (For Plea) Ms M. Greener (For Sentence)	Emma Turnbull Lawyers

HER HONOUR:

Mr Rakatau,

1 A collision occurred on Hopkins Road, Truganina, on Saturday, 7 July 2018 at approximately 11.58pm. You were driving a Ford Territory station wagon, in a southerly direction on Hopkins Road when you collided head on with a Ford Fiesta sedan that was travelling in a northerly direction.

2 You have pleaded guilty to:

- Charges 1 and 2, culpable driving causing death
- Charge 3, negligently causing serious injury to the driver of the ford fiesta

You have also pleaded guilty to the related summary offence of unlicensed driving.

3 On 7 July 2018 in the evening, you attended a function at the Melton Rugby Club. Your partner, Karalee Pakoti, had driven you. Whilst there, you and a friend consumed between you 25 cans of “Double Jack”, a mixture of Jack Daniels whiskey and Cola (6.9 per cent alcohol). You left at around 11.15pm. Your partner drove you to your address in Rockbank, arriving at around 11.30pm. She then went to bed. At approximately 11.53pm, you left the Rockbank address alone, driving the Ford Territory. You travelled east along the Western Highway. You turned into Hopkins Road, travelling in a southerly direction.

4 Your driving caught the attention of other motorists, as it was erratic and appeared to be dangerous. One driver recalls being overtaken by your car, travelling at “a high rate of speed”. She saw you cross double lines to overtake another car. Another driver saw you swerving from side to side, trying to overtake a car. At one point in time, you were driving on the wrong side of the road and another car had to brake and swerve to avoid a collision. A different

witness estimates that you were travelling at approximately 110 kilometres per hour as you drove up behind her.

5 The driver of a grey Honda CRV was also driving in a southerly direction on Hopkins Road. His cruise control was set at 80 kilometres per hour. He observed you travelling behind him in the same direction. At the same time, he observed another car, a red ford fiesta sedan, driving in a northerly direction along Hopkins Road. You were moving at a fast rate of speed. The ford fiesta was travelling at a speed of approximately 63kph. When the ford fiesta was almost alongside the CRV, you tried to overtake the CRV. In your attempt to overtake the car, you immediately collided head on with the red Ford Fiesta. The force of the impact knocked the CRV to the side of the road. The Ford Fiesta was forced backwards, coming to rest in a ditch on the western shoulder of the road.

6 A family of 4 were in the Ford Fiesta. Manju Varughese was the driver of the vehicle. Her husband, George Panicker, was in the front passenger seat. Their two children were in the backseat of the vehicle.

7 Mrs Varughese was crushed in the driver's seat of the vehicle. She was conveyed to the Royal Melbourne Hospital in a life-threatening condition.

8 Ruana Panicker, a 10 year old girl, was sitting in the backseat on the driver's side of the vehicle. Tragically, she was pronounced dead at the scene. Immanual Panicker, a 4 year old boy, was seated in a booster seat in the back on the passenger side of the vehicle He was conveyed to the Royal Children's Hospital but died on 9 July 2018. George Panicker, seated in the front passenger seat of the vehicle, did not suffer from serious injuries in the collision.

9 The force of the impact rotated your Ford Territory clockwise across the road, and it came to rest on the western shoulder of the road. You were trapped in the driver's seat and conveyed to the Alfred Hospital with various injuries, including fractures to your right hip and your left hand, lacerations and bruises.

- 10 The collision occurred in Hopkins Road, Truganina, which is a semi-rural location. It is a posted 80 kilometre per hour speed zone. At the time of the collision, it was dark and there was no provision for street lighting. Conditions were clear and the road was dry.
- 11 A sample of blood was taken from you at the Alfred Hospital on 8 July 2018. It was analysed and found to contain not less than 0.13 grams of alcohol per 100 millilitres of blood. Dr Sanjeev Gaya from the Victorian Institute of Forensic Medicine, has estimated that your blood alcohol concentration at the time of the collision would have been between 0.152 per cent and 0.173 per cent. This blood alcohol content significantly affected the skills required for driving, thus rendering you incapable of having proper control of a motor vehicle.
- 12 At the time of the collision it is estimated that you were travelling at a minimum speed of 115 kilometres per hour, this is approximately 35km per hour over the speed limit.
- 13 You were not licensed to drive a motor vehicle. You have never held a full Victorian Driver's Licence.
- 14 Ms Varughese received life- threatening injuries and was in an induced coma for several weeks. She has ongoing spinal and pelvic injuries.
- 15 The children's father was present in Court during your plea hearing. He has provided a victim impact statement. In it, he has with great dignity, briefly outlined the impact of the sudden loss of two beloved children. Your conduct has caused him and his wife unspeakable grief, sadness and pain.
- 16 He describes being haunted by the memories and the space that is left from losing their children. The reality of life, as it now is, is extraordinarily difficult. He also describes the distress and worry associated with his wife's recovery, as she bravely overcomes her serious injury.

- 17 A detailed analysis of the injuries sustained by Ms Varughese has been outlined in a report from the Royal Melbourne Hospital, written by Dr Madhu Bhamidipaty on 27 June 2019. Ms Varughese was referred from the Royal Melbourne Hospital to the Epworth Rehabilitation Unit on 17 August 2018 and was discharged on 31 October 2018. She resides at home and continues to be reviewed as an outpatient.
- 18 In a medical report from Epworth Rehabilitation, dated 9 May 2019, Dr Michael Ponsford confirms that in the accident, Ms Varughese sustained the following injuries:
- a moderate traumatic brain injury;
 - spinal injuries at C1-2;
 - multiple severe orthopaedic injuries, including fractures to her pelvis, right femur, right patella, right forefoot and right forearm;
 - abdominal injuries with splenic and small bowel trauma.

He confirms that in light of the extent of her severe orthopaedic injuries, she has been unable to return to work as a nurse.

- 19 In court, details of Ms Varughese's current treatment were provided by her husband. She attends physiotherapy twice a week, attends the outpatient clinic at the Epworth Hospital twice per week, sees a psychologist monthly and also has occasional follow up appointments at the Royal Melbourne Hospital. She still requires one crutch to assist her in walking. He confirms that she is incapable of working as a nurse.
- 20 Fortunately, Mr Panicker did not suffer serious physical injury in the accident. He is currently seeing a psychiatrist once every two months for treatment. In his VIS he describes that he is finding it very difficult to work, in light of the

emotional distress that he has suffered and the concern he feels when leaving his wife at home when he is not there.

21 It is difficult to contemplate the depth of loss and the impact your driving has had on Ms Varughese's and Mr Panicker's lives. The sentence that I will ultimately impose is in no way a reflection of the value of the children's lives. The horrific consequences of this collision, including the content of the victim impact statement, are not in dispute. I take the medical evidence and the victim impact statement into account.

22 You were taken to the Alfred Hospital from the scene of the accident. You declined to answer any questions when interviewed in hospital by police on 10 July 2018. You were transferred to St Vincent's Hospital and after approximately 2 weeks you taken into custody.

23 A contested committal was conducted on 3 December 2018, where evidence regarding the reconstruction of the accident was called. At the conclusion of the committal, you pleaded guilty to these offences. It is accepted by the prosecution that your plea was entered at an early stage. Your pleas of guilty have a significant utilitarian benefit. You have saved the court and the community the time and expense of running a trial. You have spared the victims and other civilian witnesses from giving evidence in Court. In those circumstances, you have facilitated the efficient administration of justice and are entitled to a benefit for that. I accept that you have wanted this matter to progress as quickly as possible through the court system.

24 It has been submitted that your plea of guilty is consistent with remorse. The prosecution agree that you have never disputed that you were responsible for what occurred. In the words of your counsel, "you accept that the blame for this accident lies at your own feet". In court, through your counsel, you apologised for your conduct.

- 25 You brother, Richard Rakatau and your sister, Emma Rakatau, have written brief personal references to the Court. They both state their surprise that you have acted in the manner that you admit and that you are truly sorry for the pain and suffering you have caused.
- 26 As a result of a request by your solicitor, clinical psychologist Carla Lechner prepared a report for court, dated 22 March 2019. She states that you expressed immense regret to her for your actions. When talking about the accident, you began to weep. You now attend church services “to pray for the family of the deceased and to ask God for forgiveness”. In the circumstances I accept that your plea of guilty is consistent with remorse. I take that into account in your favour.
- 27 You were remanded in custody on 7 July 2018. It is the first time you have been incarcerated. Ms Lechner describes that you present with symptoms of Adjustment Disorder with mixed depression and anxiety, secondary to your offending and your anticipation of a lengthy gaol sentence. You have a recent history of binge drinking. You also have some features of post-traumatic stress disorder. Intellectually, you are low functioning. You have cognitive limitations but your impairment is not such that you do not understand the wrongness of your actions. Ms Lechner is of the opinion that you would benefit from appropriate treatment when in custody and also upon your release into the community.
- 28 Sadly, your long-term partner suffered a heart attack and died in a motor car accident whilst you have been in custody. You were not able to attend her funeral. Prior to her death, she visited you twice a week and you spoke to her twice a day on the phone. You describe not having any contact with anyone else outside the prison, nor do you have emotional support from anyone else. This has resulted in your feeling increasingly isolated whilst in custody. Ms Lechner, in a second report to the court dated 25 July 2019, expresses the view that your depression has been aggravated by the recent loss of your partner,

and that you are suffering from symptoms of acute grief. In those circumstances, your experience in custody has become more difficult. She states that you need more regular counselling and support.

29 I accept that your sense of isolation means that any sentence of imprisonment will be more onerous than it would have been before. You no longer have a sense of what the future holds, when you are eventually released from custody. That issue is compounded by the fact that you are not an Australian citizen. I am told that you will be deported at the conclusion of your sentence of imprisonment. Your offending has resulted in the loss of opportunity to build a life in Australia. The impact of your likely deportation is a genuine concern for you. I take all of these factors into account.

30 Dr Linda Borg, clinical neuropsychologist, gave evidence at your plea hearing. She has also prepared a report for the court dated 2 April 2019. I have read the report and will briefly summarise parts of her evidence.

31 In her opinion, you do not have an intellectual disability, but aspects of your cognitive function demonstrated deficits. You have a significant difficulty with conceptual reasoning, deficits in attention and executive functioning and a likely alcohol-related mild brain injury. Your reading and spelling abilities are in an impaired range, being at a grade prep to grade one equivalent.

32 Your cognitive processing was moderately impaired. It fell to an impaired level with additional task complexity. When your attention is divided in complex or unfamiliar circumstances, you have difficulty in shifting your attention between competing elements. This is relevant to your ability to drive.

33 Dr Borg said that your cognitive impairment results in impulsive actions. You have the skills to mitigate your impulsivity when sober. However, when under the influence of alcohol, this impulsivity is exacerbated, as alcohol serves as a further disinhibitor as well as diminishing your consequential thinking. In her

opinion, acute intoxication is likely to exacerbate these underlying vulnerabilities, leading to more significant deficits.

34 The speed of your mental processing was found to be between a borderline to impaired range. It would be a barrier to ever holding a driver's licence. In Dr Borg's opinion, it is unlikely that you will ever be able to obtain a driver's licence

35 She stated that you have insight into your current predicament and an awareness of the seriousness of your circumstances. You had the foresight to understand the risks of engaging in driving when intoxicated.

36 Dr Borg stated that she believes that you are moderately anxious, with severe levels of depression and stress.

37 It was submitted that in light of the effect of these cognitive weaknesses and your levels of stress and depression, the fifth limb of *Verdins*¹ is enlivened and the level of hardship you will suffer in custody is increased in these circumstances. I accept that incarceration will be more onerous for you than for others without these difficulties and I take that into account in your favour.

38 Your counsel submitted that your impaired cognitive functioning also lowered your culpability when compared to a driver who was not afflicted by such a condition. Your capacity for impulse control and consequential thinking are reduced in light of your reduced cognitive ability. This is not to ignore your intoxication at the time of the accident. When affected by alcohol, it was reduced even more.

39 The prosecution submitted that the principle of general deterrence could be moderated on this account, but not substantially. You made the decision to drive and you understood the effect that heavy drinking would have on your ability to drive.

¹ *R v Verdins* [2007] 16 VR 269

40 It is difficult to evaluate the extent that your cognitive function has affected your decision making and so reduce your culpability. I accept that your cognitive ability is reduced. However, given the significant quantity of alcohol you had consumed, the effect that your self-induced intoxication had on you and your ability to control any impulsive behaviour is hard to determine. Clearly, your level of intoxication was an integral factor in your offending. Your BAC significantly affected your ability to properly control your car. You were unable to drive safely at that level of intoxication.

41 Ultimately, you must satisfy the court on balance, of mitigating factors. I am unable to be satisfied to that standard that your cognitive deficit played a meaningful part in this offending.

42 You are 42 years of age. You are of Maori descent. You were born in New Zealand and moved to Australia at the age of 15. Sadly, your mother died soon after, and you have had little contact with your father, who is now living in New Zealand. Your schooling was disrupted as you were illiterate and had significant learning difficulties. You started to drink alcohol at around the age of 15 years. You have consumed large amounts of alcohol over the years. At the time of the collision, you had made attempts to reduce your intake of alcohol, although you had a habit of binge drinking. In the past, you have used cannabis and methyl amphetamine although this has not been for many years.

43 At the time of the accident you had been in a relationship with your partner for six years. You have been in three other significant relationships and have four children. Your son, aged 24, resides in Queensland. You have two children, aged 13 and 12 years, who reside in Geelong, and a six year old daughter who resides in Melton. Prior to your incarceration, you had little or no contact with your older children. You saw your six year old occasionally. You have not had contact with any of your children whilst you have been in custody.

- 44 When you first moved to Australia you lived in Brisbane. Your brother and sister still reside in Queensland. You were supported in court at the plea hearing by your brother and by a friend.
- 45 You describe being employed for about 50 per cent of the time since leaving school. You have done various types of unskilled work, including labouring and spray painting. You obtained your forklift licence about five years ago, undertaking casual employment as a fork lift driver since then. You have worked whilst in custody and are currently employed in the laundry. You have also undertaken a number of drug and alcohol courses and counselling programs to address your personal issues.
- 46 Your criminal history is confined to driving offences. It dates back to 2002 and is relevant. You have never held a valid driver's licence. You have been found guilty of unlicensed driving on five previous occasions between 2002 and 2014. In 2009, you were found guilty of exceeding the prescribed concentration of alcohol when in charge of a motor vehicle. In 2014, you were found guilty of driving at a speed dangerous.
- 47 In my view, your prospects of rehabilitation present a complex picture. In April 2014 on the dangerous driving charge and 2 of the unlicensed driving charges that I have just mentioned, you were sentenced to a 24 month Community Correction order with a condition for treatment and rehabilitation for alcohol abuse. You completed that order. In light of what has subsequently occurred, it is clear that the treatment did not sufficiently address your issues with alcohol abuse.
- 48 You claim to have reduced your intake of alcohol over the past 6 or 7 years. You have tended to binge drink on the occasions that you consumed alcohol. Your blood alcohol content on the night of the collision was very high. You admit that you had no good reason for driving without a licence or whilst intoxicated.

49 When you met with Ms Lechner, you told her that you do not currently see drinking as a problem for you. You stated “I’ll never drink again”, such is your regret and remorse for your offending. Ms Lechner states that remaining abstinent should be a lifelong goal for you. Dr Borg believes that treatment for your alcohol addiction and the factors that contribute to that, is the best way to reduce the risk of recidivism.

50 Given your cognitive limitations and your limited capacity to control impulses, it is clear that abstinence from alcohol is a critical factor in your prospects for the future.

51 The charges of culpable driving attract the standard sentencing provisions in s5A and s11A of the *Sentencing Act* 1991. The relevant standard sentence is eight years imprisonment.

52 The standard sentence for an offence is one where the Act specifies the appropriate sentence for an offence in the middle of the range of seriousness, taking into account only the objective factors affecting the relative seriousness of that offence (s5A(b) *Sentencing Act*).

53 Objective factors are to be determined by reference to the nature of your offending “to the extent that it illuminates your actions” *R v Willis* [2019] VSC398 [Lasry J]. The nature of your offending is defined without reference to your personal factors (s5A(3)(a) and (3)(b) *Sentencing Act*).

54 There are a number of factors that are relevant when assessing the objective gravity of the offending. These include:

- (i) The excessive speed at which you were travelling;
- (ii) Your blood alcohol content at the time of the collision (being between .152 and .173 per cent);
- (iii) That you drove whilst being unlicensed;

- (iv) That the collision killed two people (both of them children);
- (v) That the collision caused serious injuries to Ms Varughese;
- (vi) That the collision was not contributed to in any way by the driving or the conduct of anyone in the other car, or anyone else.

55 I take the standard sentence of eight years into account as one of the factors that is relevant to the instinctive synthesis of imposing sentence. I accept that it is a guidepost, to be considered when determining the appropriate sentence in this case. I also take the maximum penalties into account.

56 There are no current sentencing practices available for culpable driving under the standard sentence provisions. In addition, I am required to fix a non-parole period which is at least 60 % of the total effective sentence, unless it is in the interests of justice not to do so (*S11A Sentencing Act*).

57 This is a very serious example of a significant criminal offence. Your driving was grossly negligent, compounded by your drunkenness. You pulled out to overtake a car at a high speed, without any regard to oncoming traffic. You did not give Ms Varughese any chance to avoid you, resulting in this horrific collision. It is conceded by your counsel that a lengthy term of imprisonment is required and that there will be some cumulation of sentences. I take into account the principle of totality. I have taken care not to doubly punish you for your offending.

58 General deterrence is a significant consideration in the sentencing process, as are the factors of denunciation and punishment. Whilst the sentence I impose will be long, I consider that I must give specific deterrence some weight in this process in light of your driving history. Your rehabilitation needs to be supervised by a lengthy period on parole, to reduce the risk of reoffending and enhance your future prospects.

59 Mr Rakatau, would you please stand?

60 Balancing these factors as best I can, I sentence you as follows:

- 1) Charge 1, you are convicted and sentence to 9 years' imprisonment.
- 2) Charge 2, you are convicted and sentence to 9 years' imprisonment.
- 3) Charge 3, you are convicted and sentence 4 years' imprisonment.
- 4) For the summary offence of unlicensed driving, you are convicted and sentenced to 4 months' imprisonment.

I direct that charge 1 be the base sentence. 3 years of charge 2 and 1 year of charge 3 to be cumulative upon the base sentence and upon each other. The sentence for the summary offence will be concurrent.

TES 13 years imprisonment

NPP 9 years

61 The total effective sentence is 13 years' imprisonment. I fix a non-parole period of 9 years.

62 I enter in the records of the court that you have served 408 days by way of pre-sentence detention.

63 The application for a forensic sample was not objected to and is granted. I make the order in light of the seriousness of the offending, in the context of your criminal history. I am satisfied that it is appropriate to have your DNA sample for the detection of further crime. I need to advise you, sir, that you if you fail to comply with that order, the police may use reasonable force in order to take your saliva sample.

64 Any Driver's licence you hold is cancelled. You are disqualified from driving in
Victoria for a period of 5 years. That period commences today.

65 I make a finding that these offences were committed under the influence of
alcohol and the alcohol contributed to your offending. (s89C(1) and (2)
Sentencing Act).

66 The declaration under s.6AAA is but for the plea of guilty, a total effective
sentence of 15 years and 6 months, with a non-parole period of 12 years would
have been imposed.

67 Are there any further orders?

68 MR SINGH: No. Thank you, Your Honour. Your Honour, can I just double-
check, if I may?

69 HER HONOUR: You can have a seat, Mr Rakatau.

70 MR SINGH: Your Honour, Charge 1 was 9 years sentence. That is the base?

71 HER HONOUR: Yes.

72 MR SINGH: Charge 2 was of another 9 years sentence.

73 HER HONOUR: Yes.

74 MR SINGH: And two years of that was to be cumulative?

75 HER HONOUR: Three years.

76 MR SINGH: Three years. Thank you.

77 MR SINGH: Yes.

78 HER HONOUR: Charge 1, nine years, Charge 2, nine years plus three - - -

79 HER HONOUR: - - - and Charge 3, four years plus one.

80 MR SINGH: As Your Honour pleases. Thank you.

81 HER HONOUR: A total effective sentence of 13 years with a minimum of nine.

82 MR SINGH: Yes.

83 HER HONOUR: Thank you. You can remove the prisoner.