

**PUBLIC PROSECUTOR VS- DOLSEN LELE**

**Coram:** *Mr. Justice Stephen Harrop*

**Counsel:** *Ken Massing for Public Prosecutor  
Len Tevi for the Defendant*

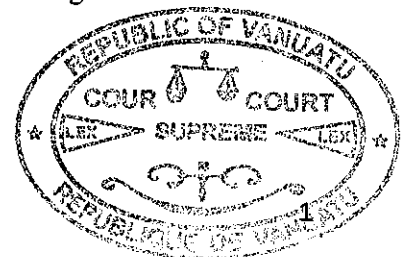
**Date:** *18<sup>th</sup> December 2014*

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**RULING**

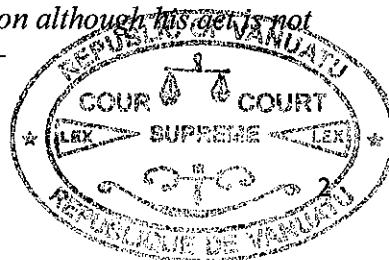
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1. Mr. Dolsen Lele pleaded guilty earlier this week to a charge of unintentional harm causing death against section 108 (c) of the Penal Code. The charge to which he pleaded guilty reads under the heading the particulars blong wrong: "Dolsen Lele, sometimes long number 24 September 2014, long road igo long Matata Bridge, long East Santo, yu bin stap drivem wan truck mo yu no bin aware se woman ia Melissa Tova hemi jump long truck mo hemi ded."
2. That guilty plea followed my granting Mr. Massing leave to file an amended information to one that it replaced that was dated 10<sup>th</sup> October; that had alleged in its particulars blong wrong that Mr. Lele had "unintentionally causem death blong girl ia Melissa Tova trough long negligence we yu causem olsem yu bin fail blong stop long place we deceased Melissa Tova istap long hem mo ignorem hem time hemi stap singsingaotem yu blong yu stop mo yu stap speed nomo mekem se hemi fraet mo jump aot long truck mo causem death blong hem."
3. After Mr. Lele pleaded guilty and was convicted I remanded him on bail until this morning and called for a pre-sentence report and submissions as to sentence. These have been received.
4. After yesterday's hearing I had cause to reflect at some length on the case and I have advised counsel this morning that on reflection I consider I was in error in granting Mr. Massing leave to file that amended information and further in error in accepting a guilty plea and entering a conviction based on it. I am therefore going to vacate the guilty plea, vacate the conviction and reverse my decision to grant leave to Mr. Massing to file that amended information.



5. I now set out the reasons why I have come to these decisions. In general terms the facts are that on 24<sup>th</sup> September 2014 between 6 and 7pm at night Melissa Tova who was 17, and her 22 year old sister Krendy Mol, were in town waiting for the Big Sista ship. They then needed to get a ride back to their home village. They met Mr. Lele in his public transport vehicle and they asked him if they could be dropped off at their place on his way home.
6. There is some evidence, not disputed I think by Mr. Lele that during the journey he and his friend who was in the passenger cab consumed some Tusker beer. The two young men were inside the vehicle and the two sisters were on the tray at the back. There was also suggestion that the car was travelling at some speed and it appears through some misunderstanding that the vehicle did not stop at the place where the sisters lived. Apparently the older sister called out to Mr. Lele to stop the vehicle but he did not stop. However the prosecution accepts that because it was noisy with music playing in the cab Mr. Lele did not hear this request.
7. After reaching Matevulu College Mr. Lele stopped the car and turned back again travelling at some speed. Following this Melissa Tova apparently jumped off the back of the vehicle and tragically died from injuries sustained. This was not noticed by even her sister, never mind Mr. Lele. Ultimately, after the elder sister banged on the cab roof and the vehicle stopped the tragedy became apparent.
8. It is not clear why Ms Tova jumped off the vehicle or even if she did (it may that she fell). Her sister did not see her departure from the back of the vehicle and it appears there was no discussion between them about any plan to jump off.
9. The charge filed on 17<sup>th</sup> December alleges in the particulars blong wrong simply that Mr. Lele was driving the truck and was not aware that Melissa Tova had jumped off the back and died.
10. One's immediate reaction is that this could not possibly amount to a criminal offence. If a driver has not been charged with any offence alleging driving fault but merely with failing to be aware of someone of the back of the vehicle jumping or falling off and dying, surely that does not involve any fault whatsoever, never mind criminal fault, on his part?
11. However in advancing the charge the Public Prosecutor was relying on section 109 of the Penal Code, the full text of which follows:

*A person shall be deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases –*



*(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;*

*(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;*

*(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;*

*(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;*

*(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.*

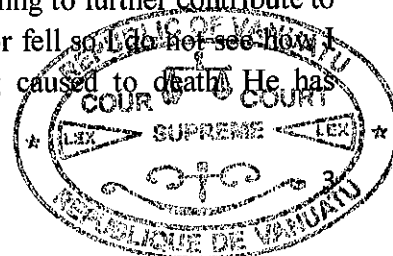
12. In particular Mr Massing is relying on subparagraph (e) which allows for the possibility that if an act or omission by a defendant would not have caused death unless was accompanied by an act or omission of the person killed or another person then causation is established.

13. On the face of that *any* act or omission by the defendant, regardless of any criminality, if associated with or accompanied by an act or omission of the person killed or another person, and with a death, would be sufficient to amount to causation of that death and thereby to render the person liable to imprisonment for five years under section 108 (c). That surely cannot be right.

14. I do not consider on reflection that this is how section 109 (e) should be read.

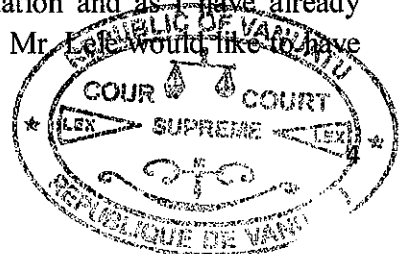
15. The first point arises from introductory words to s109; causation may be found in the various circumstances then set out "although his act is not the immediate or sole cause of death". There is an obvious implication in this that the act must still be a cause of death, albeit not the immediate or the sole cause of death. There has to be a link in a causative sense between the conduct of the defendant and the death.

16. In this case it seems to me that is not present as all that Mr. Lele did was to provide the context, circumstance or opportunity, or literally the vehicle, for Miss Tova to die. Beyond that, there is no allegation of his having done anything to further contribute to her death. It is not able to be proved whether she jumped or fell so I do not see how I can be satisfied that he can properly be seen as having caused to death. He has



arguably not committed any *causally relevant* act or omitted a relevant one. Driving a truck with a passenger on the back is not a criminal act. There is no charge of driving while under the influence of alcohol or of driving without due care and attention or any other allegation of fault in his driving..

17. A punitive criminal provision is always to be strictly construed against the prosecution and in favour of the defence. Here the prosecution it seems to me on the information available is not able to prove that leaving the truck deck was other than a voluntary action on the part of Miss Tova who after all is aged 17 and capable of making an informed decision about whether to jump, if indeed that is what she did. It is at least a reasonable possibility that Miss Tova's death was an accident.
18. I consider that the reference to "act or omission" in section 109 must be read as meaning a **criminal** act or omission. If that is not so then completely innocent people who happen to in some way be associated within an incident of death could be liable to five years' imprisonment. If every driver in Vanuatu is going to be liable for unintentional death if one or more of the numerous passengers one sees on the back of vehicles jumps off and dies then the criminal law would fall into disrepute as failing to accord with common sense.
19. There is perhaps an obligation on the driver of any vehicle to ensure so far as possible the safety all of his passengers but there is also responsibility on those passengers to look after themselves and to avoid harm to themselves. Because it is unclear exactly what happened here I am not at all comfortable with any conclusion that Mr. Lele has committed a criminal offence at all.
20. For these reasons I am vacating the guilty plea, the conviction and my decision yesterday to grant Mr. Massing's application to amend the information.
21. This puts Mr. Lele and Mr. Massing as well back in a position where the original information applies. It seems obvious from the amendment application that the prosecution accepts that it cannot succeed in proving that charge. It may be that on reflection and taking account what I have said today Mr. Massing elects to apply for a nolle prosequi. However I leave that to him because it is entirely a matter for the prosecutor. I will allow him time to reflect on the matter before expecting him to do anything. It is also for the same reason not appropriate to require Mr. Lele to plead to that information. I think if he did it would inevitably be a plea of not guilty.
22. Mr. Massing asks for some time to reflect on the situation and as I have already indicated I am happy to provide this to him. I appreciate Mr. Lele would like to have

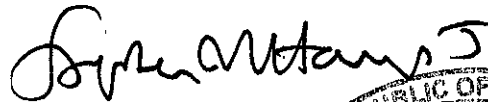


the matter dealt with and so I am sure would the family of Miss Tova but it is important that this matter is determined correctly and completely.

23. I remand Mr. Lele on continued bail to appear again on **Tuesday 3 March 2015 at 9.00am** when I will back in Luganville.
24. Mr. Lele, whether criminally responsible or not, obviously accepts moral responsibility for what happened and according to the Probation Report he comes from a well- respected family. He has indicated a willingness for him and his family to be involved in customary reconciliation and to pay compensation to the family of Melissa Tova in the sum of VT400.000. It seems to me there is nothing to stop the parties undertaking such a customary reconciliation and nothing to stop any voluntary payment which Mr. Lele wishes to make is part of or separate from such ceremony. If there happens between now and 3 March it may influence Mr. Massing in terms of whether a nolle prosequi is applied for.
25. Also not to be overlooked is the reality that Mr. Lele spent 16 days in custody so he has already served the equivalent of a one-month prison sentence. It may well be as I have already said that he has committed no criminal offence and yet suffered the most serious penalty which the law provides namely imprisonment. This too is a factor which may weigh with both people involved in the customary reconciliation ceremony and with Mr. Massing in terms of the way forward.
26. Mr. Massing agrees by **15 February 2015** file a memorandum at the Court and to serve this on Mr. Tevi setting out the way in which the Prosecution intends to proceed.

**DATED at Luganville this 18<sup>th</sup> December 2014.**

**BY THE COURT**



**STEPHEN HARROP**

**Judge**

