

IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 981 of 2015

PUBLIC PROSECUTOR

-v-

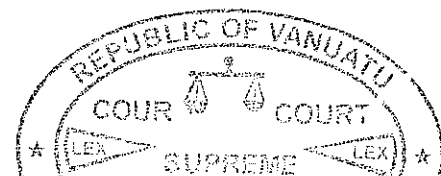
ISIRELI DAKUNAMATI

Before: Chetwynd J
Hearing: 1st March 2016

Mr Massing for the Public Prosecutor
Mr Sugden for the Defendant

Judgment

1. I handed down brief written reasons for my decision whilst in Luganville. I said I would provide full reasons when I returned to Port Vila. These full reasons incorporate the brief reasons already read. Where there is a difference I will indicate by paragraph numbers.
2. The Defendant is charged with unintentionally causing damage to a person through negligence. If a Defendant is so convicted and if the damage has resulted in death, the penalty is imprisonment for 5 years. The negligence alleged against this Defendant is that he drove a motor vehicle at very high speed causing him to lose control. The Defendant is charged under the Penal Code (section 108) not the Road Traffic (Control) Act. The later act does have an offence of causing death by reckless driving. It should also be noted that under section 108 a Defendant can be charged with causing harm through recklessness or failure to observe any law or, as is the case here through negligence. There are definitions in the Penal Code (section 6) of recklessness and negligence. It is clear that recklessness is something more than negligence. A person is said to be negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.
3. Most pertinent facts are agreed. On the morning of 20th November last year at about 10 am the Defendant was driving a Toyota Twin Cab Hilux on a road between Bambu Village and Fanafo on Santo. He had four passengers with him. Everyone in the vehicle was a member of the Church of Jesus Christ and Later Day Saints. At some point along the road the vehicle swerved to the left, went across the road to the left hand verge, drove partly off the road and then swerved to the right back onto the road. The vehicle left the road travelling sideways. It rolled over and came to a rest on its wheels. Several of the passengers were injured and one of them, Elder Benri, sadly died from head injuries.
4. Evidence was adduced by the Prosecution consisting of evidence from two Police Officers who attended the scene. Photographs and sketch maps taken and made by the officers were entered into evidence. There was evidence from a villager who said he lived at the side of the road. He heard a vehicle travelling at speed then he heard a loud bang (like an explosion) and went up to the road with others where he



saw dust and the smoke and the vehicle and several injured people. The clear allegation from the Prosecution in the Information and from the evidence was that the Defendant was driving too fast and lost control.

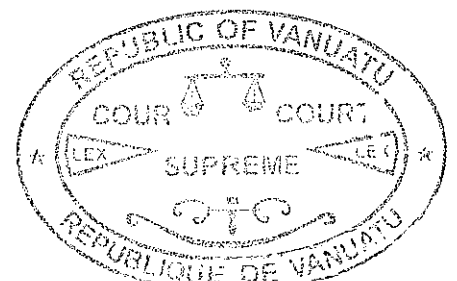
4(a) The photographs provided at the trial by the Police were rather grey and indistinct. I asked for computer files of the photographs to be provided to me, the prosecutor and defence counsel so that the photographs could be seen in colour. We were provided with a Word document file which had colour photographs imbedded in it. These were much more helpful than those tendered at trial. I appreciate that the police officers did not have access to a decent colour printer and that is why the "black and white" prints were initially provided.

5. The Defendant gave evidence as did several passengers. (One as a rebuttal witness for the Prosecution). The bare facts of the defence are that the Defendant was driving normally. At some time the front seat passenger, the deceased Elder Benri, exclaimed loudly and made a movement towards the driver. The Defendant saw Elder Benri's hands moving towards him as well. Another passenger saw Elder Benri raise his hands. There is no suggestion that Elder Benri touched the steering wheel. The Defendant turned the steering wheel to the left; he then turned the wheel to the right meaning to regain control and to proceed straight ahead. The Defendant says that an intervening factor caused him to lose control and not the speed at which he was driving. The suggestion is that Elder Benri saw some potholes on the right side of the road and thought the Defendant would hit them. The Defendant produced a photograph of some potholes taken some 6 days later by a witness who had the location of the accident pointed out to her.

6. Mr Sugden for the Defendant says that the Prosecution must prove beyond reasonable doubt that the Defendant was driving at very high speed. I have to admit I had difficulty in following his submission because he said that proving negligence was not enough. He said that the negligence alleged in the particulars was very high speed and so that is what the prosecution must prove. If they fail to prove that the Defendant is entitled to be acquitted. Mr Sugden did not accept that negligence involved consideration of other factors, the circumstances in which the driving occurred. I am of the view that he is wrong.

7. Several cases in this jurisdiction show that negligence is not so one dimensional as Mr Sugden suggests. Two recent cases from Harrop J and a 2013 decision from His Lordship the Chief Justice make that clear.

"Driving on public road is a privilege, it comes with significant responsibility.... You must ensure that you and your passengers remain safe as well as other road users and pedestrians. Most importantly, you must drive according to the prevailing conditions. So one day it might be safe to drive at 60 kilometres an hour on a road but the next day the conditions might mean that only 30 kilometres an hour is a safe speed on the same road. Regard has to be had to the weather, the



*state of the road, the number of cars and trucks on the road and whether you are driving through an area where there are pedestrians, or likely to be.*¹

*“Within the category of negligence though there are clearly degrees of fault and degrees of contribution to the resulting deaths so a careful analysis of the fault involved is required to make an assessment of your level of culpability.”*²

*“Further, Defendant Adams Tari was negligent in his driving on 16 July 2007, on Teouma Road whilst travelling towards Port Vila to the extent that he had failed to exercise such care, skill or foresight as a reasonable man in his situation should exercise.”*³

7(a). The prosecution were obliged to prove, beyond reasonable doubt, that the Defendant was driving in a negligent manner. Speed was one factor involved. It is, as Harrop J pointed out, a question driving in different conditions at appropriate speeds for those conditions.

8. The police photographs show a post-accident scene with skid marks extending some 40 meters and starting close to the left hand side of the road, then travelling across the road to the right side again. There is a distance of 12.5 meters from the left hand road side verge to where the vehicle came to a rest. The skid marks show that when travelling back to the right side of the road the vehicle was turning so that the front was facing the way it had come. It was travelling sideways for some 10 or 20 meters when the left hand side of the vehicle hit a heap of soil and that flipped the vehicle so that it landed on its roof and rolled back onto its wheels.

9. Whilst there is no way of telling from the length of the skid marks, their orientation and that of the vehicle in its final resting place, *exactly* how fast the vehicle was travelling, the path clearly demonstrates excessive speed. The loss of control was not caused by the “sudden” shout and movement by Elder Benri or even a sudden swerve to avoid a pothole. I am satisfied that the photographic evidence and the sketch maps demonstrate beyond reasonable doubt that had the Defendant driven with “*such care, skill or foresight as a reasonable man in his situation*”⁴ he would have been able to regain control of the vehicle before it spun nearly 180 degrees and left the road. The Defendant failed to regain control and a major contributing factor must have been speed he was driving at; and that is speed excessive given all the circumstances prevailing.

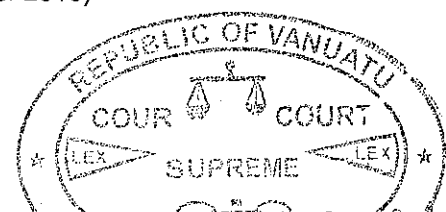
9(a). The defence argument was that none of the prosecution evidence enabled the Court to say the Defendant was driving at a particular speed therefore it could not be said the Defendant was driving at a very high speed. As I have pointed out it is not necessary to prove the exact speed, it is enough to prove the speed was excessive for the conditions. This was a rural road on Santo. A reasonable driver would expect to encounter any number of different kinds of hazards on such a road, be they potholes, pedestrians, livestock, other bad drivers; in fact any sudden or unexpected encounters or events. A reasonable driver would drive at a

¹ *Public Prosecutor v Maliu* [2016] VUSC 4; Criminal Case 90 of 2016 (5 February 2016)

² *Public Prosecutor v Riri* [2015] VUSC 28; Criminal Case 93 of 2014 (11 March 2015)

³ *Public Prosecutor v Vuti* [2013] VUSC 152; Criminal Case 84 of 2007 (5 September 2013)

⁴ See Vuti above



speed which would enable him to negotiate such hazards safely. A reasonable driver would take into account the road surface. As I say, this was a rural road and it did not have a bitumen surface. The road consisted of graded coral and the surface was covered with loose gravel. The reasonable driver would also take into account the type of vehicle he was driving. In this case the vehicle being driven was a twin cab Toyota Hilux. This type of vehicle does not behave like a saloon car because it has a comparatively high centre of gravity and when only carrying passengers, little weight over the back axle. These factors would be in the purview of the reasonable man.

9(b) The prosecution evidence shows, beyond reasonable doubt, that the Defendant lost control of the vehicle. The evidence shows it travelled no short distance, quite possibly under heavy braking, spun nearly 180 degrees and left the road with still enough momentum to be flipped onto its roof and then onto its wheels. In other words it rotated 360 degrees through its horizontal axis. Whilst the Defendant does not have to prove anything, that onus or burden was and is on the prosecution at all times, there is nothing in the evidence which can lead to any other conclusion that, given all the circumstances that prevailed at the time, loss of control was due to excessive speed .

10. The Defendant was not driving with, "*such care, skill or foresight as a reasonable man in his situation should*" and he was therefore negligent. As a result of his negligence other persons were injured or suffered physical harm, one of those persons sadly dying as a result of injuries suffered. The Defendant is guilty of causing unintentional harm to another person through negligence.

11. (*The reasons I have set out are brief and they are so because of time constraints. I shall provide more detailed reasons in due course. Unfortunately that will not be until I have returned to Port Vila at the end of this tour some 10 days hence.*)

Dated 29th March 2016 at Port Vila.

