

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

Criminal
Case No. 20/1222 SC/CRML

PUBLIC PROSECUTOR

v

JOHN MANU

Date of Trial: 1 March 2021
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Mr P. Sarai
Defendant – Mr L.J. Napuati
Date of Decision: 11 March 2021

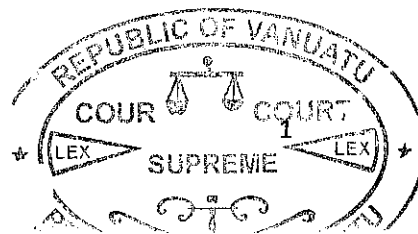
VERDICT

A. Introduction

1. In the early hours of 19 May 2019, a grey Toyota Hilux hit the back right hand side of the white Mitsubishi truck driven by the Defendant John Manu. A passenger from Mr Manu's truck died following the accident.
2. Mr Manu is charged with unintentional harm causing death contrary to section 108(c) of the *Penal Code* [CAP. 135]. It is alleged that he committed this offence through negligence or failure to observe when he did not yield to oncoming traffic with the right of way.

B. Onus/Burden of Proof

3. The Prosecution is required to prove all the elements of the charge beyond reasonable doubt. In contrast, Mr Manu was not required to prove anything, and was entitled to not give or call evidence without any adverse inference arising.
4. The Prosecution and defence witnesses have equal value, and each witness is to be considered on his/her own merits.



5. The Court is able to draw inferences which logically flow from other proven facts. Further, if there is more than one inference available, the inference most favourable to Mr Manu must be drawn.
6. Witnesses' demeanour was a small part of my assessment of the witnesses. I also looked for consistency within that witness' account; consistency with other witnesses' accounts; compared their account with exhibits such as documentary evidence; and considered the inherent likelihood, or not, of the witness' account.

C. Discussion

7. Mr Manu is charged with unintentional harm causing death contrary to section 108(c) of the *Penal Code*:

108. *No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.*

Penalty: ...

(c) *if the damage so caused results in death, imprisonment for 5 years.*

8. The elements of unintentional harm causing death are:
 - i) Damage was caused to the body of another person resulting in death;
 - ii) The damage caused was unintentional;
 - iii) The defendant caused the damage through negligence or failure to observe a law.
9. It is undisputed that Mr Manu was the driver of the white Mitsubishi truck, registration number 970, in the early morning hours of 19 May 2019 at Nambatu area, Port Vila when it was hit by a grey Toyota Hilux, registration number CT 19953, driven by alun Kelep.
10. It is also undisputed that an unintentional harm was caused to the body of Kenny Warek, a passenger of Mr Manu's truck, who was flung from the back of the truck, and that the damage caused the death of Mr Warek.
11. Dr Vincent Atua, Emergency Physician at the Vila Central Hospital, gave evidence of Mr Warek's injuries. He was not cross-examined. I accepted that Dr Atua was a witness of truth and accept his evidence, consistent with his medical report, "**Exhibit P2**", that the likely cause of Mr Warek's death at 8.20am on 19 May 2019 was head injuries sustained as a result of the fall from a moving vehicle complicated by alcohol intoxication.
12. I am satisfied therefore that the Prosecution has proved the first 2 elements of the charge beyond a reasonable doubt.
13. As to the third element of the charge, the Prosecution case is that Mr Manu caused the damage to Mr Warek through negligence or failure to observe a law after he failed to observe and give way to oncoming traffic before he made a turn across the road.

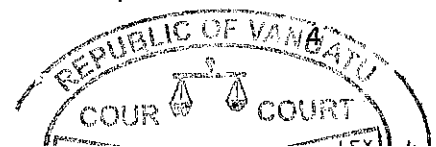


14. It is uncontested that Mr Kelep had the right of way. The requirement that a driver give way at intersections of roads to another driver approaching on his or her right is provided in subs. 4(1) of the *Road Traffic (Control) Act* [CAP. 29]:
4. (1) *Every driver must at all times keep his vehicle to the right hand side of the road (particularly so when another road user arrives from the opposite direction or is ready to overtake). ... At cross roads, intersections of roads and forked roads, the driver of any vehicle shall give way to another coming on his right: ...*
(my emphasis)
15. The test, from subs. 6(4) of the *Penal Code*, to assess whether or not Mr Manu failed to observe and give way to oncoming traffic before he turned across the road is objective:
6. ...
- (4) *A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.*
(my emphasis)
16. “**Exhibit P3**”, an Accident Diagram sketched by Police Constable Mathew Malapa, was tendered by consent. It shows the stretch of road where the accident occurred at Nambatri area, Port Vila as involving a straight road (named as “Elluk Road”) with 2 lanes. In the middle of the 2 lanes are intermittent traffic islands. The traffic in each lane travels in opposing directions. As to the terrain involved, Edward David (below) gave evidence about a dip in the road further away in the direction of Le Lagon/Socometra. There is no other evidence about the terrain so I must assume that it was flat.
17. PC Malapa sketched in “**Exhibit P3**” the direction the 2 trucks had been travelling in and where they came to a stop after the accident. Mr Manu’s truck (“V2”) is shown as having driven from the direction of Nambatu area, and then turned left between two traffic islands, heading straight towards the side road off Elluk Road then immediately ahead of him. Mr Manu’s truck is shown as having come to a stop just over 2 metres down the side road, at a right angle to Elluk Road. The truck driven by Mr Kelep (“V1”) is shown as having driven from the direction of Le Lagon. It is drawn as having stopped 24.2 metres diagonally away from the side of Elluk Road, next to the fence of the property in which it stopped.
18. Peter Nai evidenced that he was the passenger seated next to Mr Kelep. He is the truck owner. Mr Nai agreed in cross-examination that he did not actually see the accident – he only saw his own truck. He agreed that he did not know if they were speeding too much because he was drunk. I accepted Mr Nai as a witness of truth and accept his evidence.
19. Doria Garae and Mr David gave evidence that in the early morning on 19 May 2019, they were outside the shop Namba 3 Shopping Centre at which they worked, waiting for the shop to open. Ms Garae stated that she heard and saw a truck speeding down the road towards them. When she turned, she saw Mr Manu’s white truck approaching from the other direction, it signalled left and then crossed the road and onto the side road.



She said that the front of the white truck had already gone over the footpath for the side road when the speeding truck hit it. She said that when she saw the 2 trucks, she knew at once that there would be an accident. She said that the approaching truck was speeding too much which is why it hit the white truck. Ms Garae stated in cross-examination that there was space behind the white truck for the other truck to get through but that it hit the back of the white truck because it was speeding too much. Ms Garae's account did not change in cross-examination. I accepted her as a witness of truth and accept her evidence.

20. Mr David stated that he was standing, facing towards Inomakas Store. He saw the white truck approaching into Nambatri area then it crossed the road to go down the side road. He heard the sound of the other truck speeding in from the direction of Socometra. There is a dip in the road so he couldn't see that truck when it was in that dip in the road. Then he saw the white truck turn and cross but the speeding truck was already at Sun Store, near Nagire Church. He said Mr Manu's truck turned through the middle of the road where there are plants (between 2 traffic islands) and crossed the road to go down the side road with the nabanga tree, however the other truck speeding through was already close by ('I spid I kolosap finis'). He called out to Ms Garae, "Eh, accident finis ia!" ("Eh, there's going to be an accident!") He said that he said this because the other truck was speeding too much whereas Mr Manu's truck had slowed down in order to get its front wheels over the edge of the footpath of the side road. He said that the speeding truck hit the rear of Mr Manu's truck. Mr Manu's truck spun around completely. Then he ran over because it was just close by.
21. Mr David stated in cross-examination that it looked to him like the space behind Mr Manu's truck was too small for the speeding truck to go through. He said that if the other truck had not sped so much, there wouldn't have been an accident. He stated that although the space behind Mr Manu's truck was small, if the other truck had slowed down, that it could have passed through. In re-examination, Mr David stated that he also thought the space behind Mr Manu's truck was small because the other truck was driving close to the footpath when it hit the rear of Mr Manu's truck. Mr David's account was consistent throughout. I accepted him as a witness of truth and accept his evidence.
22. Ms Garae and Mr David were both witness to the accident, and their accounts were consistent with each other.
23. Mr Kelep gave evidence. He said he had driven to Inomakas Store but it was closed so he turned around to return to town. He said he was shaken to see that the Mitsubishi truck was very close and had already swung out in front of him ('Mi sek lo hem we I kolosap nomo, I swing finis'). He said he wanted to avoid hitting it by veering behind it because it had already swung into his path ('Mi wandem trikim, blo pas bihaen lo end blo hem, from hemi swing finis.'). He said that he was shaken to see it but it was too late ('Mi sek lo hem ia be I late finis.')
24. Mr Kelep stated in cross-examination that it was early morning when there aren't other trucks so he was speeding. He said he did not see any signal from Mr Manu's truck; when he saw Mr Manu's truck, the body of the truck was already in the road in front of him as it was crossing the road to go down the side road. He stated that he braked but he was already too close to Mr Manu's truck. He agreed to the last question in cross-

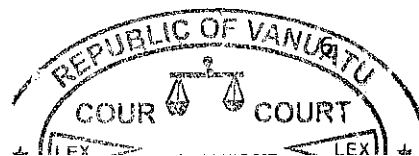


examination that he had sped too much and therefore caused the accident. I accepted Mr Kelep as a witness of truth and accept his evidence.

25. Mr Napuati submitted that because Mr Kelep had confirmed in cross-examination that he applied the brakes but no skid marks were identified in **'Exhibit P3'** nor in Ms Biagk's photos (below), that this should create doubt in the Judge's mind. I do not agree that this was sufficient to create a doubt in my mind as to Mr Kelep's evidence.
26. PC Malapa evidenced that he was the first police officer to attend the scene of the accident, at 6.45am on 19 May 2019. From his observations, he sketched the Accident Diagram **"Exhibit P3"**. In it, he identified the "point of impact" where the 2 trucks collided, placing it 2.75m away from the space between the traffic islands/intersection through which Mr Manu's truck had turned. Mr Napuati challenged him in cross-examination that he had wrongly identified the "point of impact" as Ms Biagk's photo (below) showed the debris from the accident further to the left, nearer to the footpath on the side of Elluk Road. PC Malapa responded that several hours had passed between his and Ms Biagk's attendance at the scene. As Elluk Road had not been cordoned off and it is a busy road, the traffic along the road would have swept the debris to the road side as shown in the photo. I accepted PC Malapa was a witness of truth and accept his evidence.
27. Police Officer Nina Biagk attended the scene of the accident and took photographs there and of the 2 trucks. Her VPF Forensic Section Crime Scene report including photos was tendered and named **"Exhibit P1"**. The time stamp on the photos shows that she began taking the photos at 10.49am on 19 May 2019. She stated in cross-examination that she went to take photos but not to identify who was responsible for the accident. I accepted Ms Biagk as a witness of truth and accept her evidence.
28. Mr Napuati submitted that the 'point of impact' for the accident was not as shown in **'Exhibit P3'** but as was as shown in photograph 13 taken by Ms Biagk which showed debris on the side of Elluk Road, next to the footpath. However, I am satisfied the location of the debris in photograph 13 is explained by PC Malapa's evidence that in the intervening hours between his and Ms Biagk's attendance at the scene of the accident, the traffic along Elluk Road shifted the debris from the 'point of impact' identified in **'Exhibit P3'** to the side of the road as shown in photograph 13. Even if the 'point of impact' was not correctly shown on **'Exhibit P3'**, it is uncontested that some part of Mr Manu's truck was still physically on Elluk Road when it was hit.
29. Mr Manu elected to give evidence and called Willie Kasaus Namel.
30. Mr Manu evidenced that on 18 May 2019 evening, he drank kava and then wine at his house at Bladiniere Estate. From 11.30pm onward, he vomited and from there on he did not drink any more alcohol. He and his friend Alphonse went to the Flaming Bull pub and he was given a whiskey drink but did not drink it. Alphonse introduced him to Mr Warek and a girl and later asked him if they could drop them off at Nambatri area before returning to Bladiniere Estate. Mr Manu stated that he drove up to Nambatri, to the space in the road to cross and then go down the Paama area side road. He slowed down, changed to gear 2, then checked for oncoming traffic. He saw the light of a truck at Sun Store, at the hill where Punjas is and made his decision to cross the road as he

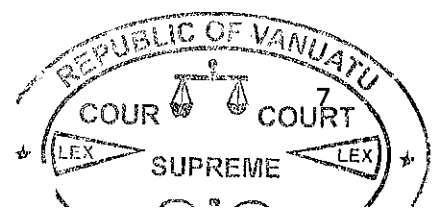
felt that that truck was far away. He stated that he crossed the road normally, then changed to gear 1 to get the truck over the footpath, because he had the passengers on the back of his truck. He stated that the body of his truck had already crossed into the side road when he didn't see the oncoming truck but heard a loud sound like strong wind before it hit his truck. He said his truck spun around 360 degrees and stopped inside the Paama area side road. He said that he hit his head against Alphonse's head (who was beside him). When he came to, he rushed outside, found the girl first and then found Mr Warek. He could not get through to an ambulance so after he gave his truck key to Mr Namel, he stopped a bus and took Mr Warek to hospital.

31. In cross-examination, Mr Manu denied that he had lied about vomiting. He stated that he had vomited and therefore was already sober when he drove. Mr Manu agreed in cross-examination that he had seen both the light of Mr Kelep's truck and the truck. When challenged that he should therefore have given way or yielded to that truck, he stated that he saw the truck and made his decision to cross the road because he had the space to and the right of way to cross the road ('Mi save talem mi luk truck andap so mi mekem desisen blo krosem rod from mi gat distens mo mi gat raet of way blo krosem rod.') To the next question put, he said in part that he felt that the distance was far away to the other truck ('Mi filim se... distens I faraway iet').
32. In re-examination, Mr Manu said that the other truck was about 100 metres away ('Hemi kolosap 100 metre'). I accepted Mr Manu as a witness of truth and accept his evidence.
33. Mr Namel evidenced that he works for Air Vanuatu. He stated that he had woken at 3am, had gotten ready and had walked up his side road to the main road to wait for a work truck to pick him up. He heard loud music from a truck speeding towards him. He said that it was really speeding. That truck hit Mr Manu's truck. He said that Mr Manu's truck was already across the road when it was hit. Mr Namel took Mr Manu's truck key and Mr Manu took Mr Warek to hospital. When the Police arrived, he gave them the truck key. He said that there would not have been an accident if the other truck had not sped so much. He stated that there was space behind Mr Manu's truck for the other truck to pass through.
34. In cross-examination, Mr Namel denied that he had lied that he heard music from Mr Kelep's truck as neither of the witnesses closer to the accident mentioned music. He said that the security guard from Namba 3 Shopping Centre (Mr David) was standing, then there is the Tahos Timber property and after that the side road that goes down to his house. He said that he was standing at his side road and there was music. Mr Namel agreed that he only heard the accident and then ran over and spoke with Mr Manu. He repeated in answer to 2 further questions that he was standing at his side road, heard the bang from the trucks and then ran over to them. I accepted Mr Namel as a witness of truth and accept his evidence.
35. I must consider whether or not Mr Manu failed to exercise such care, skill or foresight as a reasonable person in his situation should have to observe and give way to oncoming traffic before he turned across the road. The road was straight and the terrain flat. There was no evidence that there was anything to obstruct Mr Manu's view down the road and to obstruct his view of Mr Kelep's truck. I conclude that it would have been



possible for a careful driver to see Mr Kelep approaching because of the clear view that Mr Manu had of the road in front of him.

36. Ms Garae, Mr David and Mr Namel evidenced that Mr Kelep was speeding towards Mr Manu. Mr Kelep admitted that he was speeding and that when he saw Mr Manu's truck, it was very close and had already swung out in front of him. I find therefore that Mr Kelep was speeding along his right of way.
37. In cross-examination, Mr Manu accepted that he had seen both the light from Mr Kelep's truck as well as the truck itself. He evidenced that he assessed that Mr Kelep's truck was about 100 metres away and so he felt that he had enough distance to make his turn across Elluk Road. No other witness gave evidence of how much distance was involved.
38. However, I have the evidence of 2 eye witnesses who saw the accident occur – Ms Garae and Mr David. They were consistent in their accounts that when they saw the 2 trucks, Mr Kelep was travelling at such a speed and Mr Manu had crossed Elluk Road so that in Ms Garae's words, she knew at once that there would be an accident and in Mr David's evidence, he immediately called out to Ms Garae, "Eh, accident finis ia!". He said that he said so because Mr Kelep's truck was speeding too much whereas Mr Manu's truck had slowed down to get its front wheels over the edge of the footpath, onto the side road.
39. I also have the evidence of Mr Namel who was standing at the next side road further down Elluk Road towards Le Lagon (3 properties over from where the accident occurred), who said that Mr Kelep's truck was really speeding and that Mr Manu's truck was already across the road when it was hit.
40. Taking into account Ms Garae, Mr David and Mr Namel's evidence, I must conclude that Mr Manu turned left through the space between 2 traffic islands and commenced to cross Elluk Road with Mr Kelep speeding towards him and already so close that Mr Kelep could not avoid hitting Mr Manu's truck. Although Mr Manu evidenced that he assessed that Mr Kelep's truck was 100 metres away and that he felt that the distance was far away enough, I do not consider that this was an inherently likely account when compared to Ms Garae, Mr David and Mr Namel's evidence.
41. Mr Manu in his evidence spoke about having the right of way to cross the road. I understood his use of 'right of way' as a figure of speech. That is, I understood him as meaning that he thought the way was clear for him to cross the road. Ultimately, there was no contest that Mr Kelep had the right of way.
42. I conclude that what occurred is that Mr Kelep was driving at speed along his right of way and suddenly had Mr Manu's truck swing out into the road in front of him.
43. Mr Kelep evidenced that he tried to avoid hitting Mr Manu's truck and veered behind it, resulting in his hitting the rear part of Mr Manu's truck. I consider that if he had not swerved as he did, he would have hit Mr Manu's truck squarely in the side and caused worse damage than that caused to the back right hand side of Mr Manu's truck.

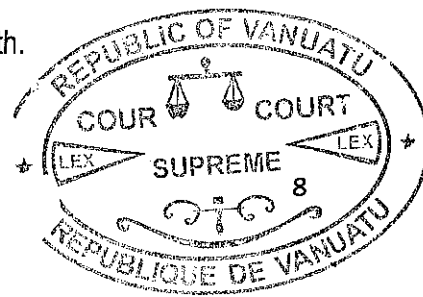


44. Whether or not there was enough space behind Mr Manu's truck for Mr Kelep to drive through is immaterial. There was at least some part of Mr Manu's truck still physically on Elluk Road when it was hit. What I need to decide is whether or not Mr Manu failed to observe and give way to oncoming traffic before he turned across Elluk Road.
45. Mr Napuati submitted that given the municipal area speed limit prescribed by law, Mr Manu was under the assumption that the speed reasonably expected of oncoming traffic would leave plenty of time for him to turn but unbeknownst to him, Mr Kelep was coming at an unexpected speed which resulted in the accident. I do not agree. The law does not allow Mr Manu to make such an assumption. What he had to do was exercise the care that a reasonable person in his situation should to check for oncoming traffic and if necessary, give way to that oncoming traffic.
46. I take into account that Mr Manu had had alcohol to drink however by his own account, he had vomited and sobered up. Further, he had not drunk any more alcohol at the Flaming Bull. I also take into account that Mr Manu had not slept that night. These factors could explain why Mr Manu did not properly observe and assess Mr Kelep's speed and where he was before Mr Manu made his turn across Elluk Road. These factors could also explain why Mr Manu assessed that Mr Kelep's truck was about 100 metres away and why he felt that the distance was far enough when it was actually speeding and so close that Mr Kelep could not avoid hitting Mr Manu's truck.
47. I find therefore that Mr Manu failed to exercise the care that a reasonable person in his situation should have to observe the speed at which Mr Kelep was driving and how close Mr Kelep was to him, and to give way to Mr Kelep before he made his turn across Elluk Road. If Mr Manu had taken enough time and care to observe how fast Mr Kelep's truck was travelling and how close Mr Kelep was, it would have been obvious to him that it was not safe to turn across Elluk Road and he should give way instead.
48. The Prosecution has proved beyond a reasonable doubt that Mr Manu was negligent and failed to comply with the law requiring him to observe and give way to Mr Kelep who was approaching on his right before he turned across Elluk Road and in that way, caused the damage that resulted in Mr Warek's death.

D. Result

49. I find the following facts proved beyond reasonable doubt:

- Mr Manu was the driver of the white Mitsubishi truck, registration number 970, in the early morning hours of 19 May 2019 at Nambatu area, Port Vila when it was hit by a grey Toyota Hilux, registration number CT 19953, driven by Ialun Kelep.
- An unintentional harm was caused to the body of Kenny Warek, a passenger of Mr Manu's truck, who was flung from the back of the truck.
- The damage caused resulted in Mr Warek's death.



- Mr Manu turned left through the space between 2 traffic islands and commenced to cross Elluk Road with Mr Kelep speeding towards him and already so close that Mr Kelep could not avoid hitting Mr Manu's truck.
- Mr Kelep was driving at speed along his right of way and suddenly had Mr Manu's truck swing out into the road in front of him.
- Mr Manu failed to exercise the care that a reasonable person in his situation should have to observe the speed at which Mr Kelep was driving and how close Mr Kelep was to him, and to give way to Mr Kelep before he made his turn across Elluk Road.
- Mr Manu was negligent and failed to comply with the law requiring him to observe and give way to Mr Kelep who was approaching on his right before he turned across Elluk Road and in that way, caused the damage that resulted in Mr Warek's death.

50. Accordingly, I find that all the elements of the charge have been proved beyond reasonable doubt.

51. As a result, I find Mr Manu guilty of the charge of unintentional harm causing death.

**DATED at Port Vila this 11th day of March 2021
BY THE COURT**

VM Trief
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Viran Molisa Trief
Judge

