



## HIGH COURT OF KIRIBATI

*Criminal Case N° 1/2018*

**THE REPUBLIC**

**v**

**LI ZHAN HONG**

*Tewia Tawiita for the Republic*  
*Taoing Taoaba for the accused*

*Dates of hearing: 29-30 August, 2-3 September 2019*

*Date of judgment: 4 September 2019*

### **JUDGMENT**

- [1] Li Zhan Hong is charged on information with careless driving causing the death of Ante Borau, contrary to section 33(1) of the *Traffic Act 2002*.<sup>1</sup> The offence is alleged to have been committed on 29 January 2017, at Bikenibeu on South Tarawa.
- [2] An information was initially filed with the Court on 15 February 2017, charging the prisoner with careless driving causing death. A second information was filed 1 week later, charging dangerous driving causing death. On 24 April 2017 a third information was filed, charging 1 count of dangerous driving causing death and 1 count of dangerous driving causing grievous harm. A fourth information was filed on 20 December 2017, which added a further count of dangerous driving *simpliciter*. The case was first mentioned by the Court on 27 February 2018. On 30 May 2018 the prisoner was arraigned before the Chief Justice on the fourth information. He pleaded not guilty to all counts and the matter was listed for trial on 25 July. The Chief Justice ordered that the services of a Mandarin interpreter were to be secured for the trial.
- [3] The matter came before me for mention on 16 July 2018. Counsel for the prosecution advised that a suitable interpreter had yet to be identified. The

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<sup>1</sup> Despite the repeal of the *Traffic Act 2002* by section 71(1) of the *Traffic Act 2017*, with effect from 5 June 2018, this case has proceeded under the law as it was in force on the date of the alleged offence (as provided for under section 71(2) of the 2017 Act).

trial date was vacated, and the matter re-listed for December. Then-counsel for the prisoner raised the issue that none of the informations filed to that point complied with section 70 of the *Criminal Procedure Code* (Cap.17). The issue was not addressed until 4 December (what was to have been the first day of the trial) when the Attorney-General filed a fresh information. The new information reverted to a single count of careless driving causing death.

- [4] On 4 December 2018, with the assistance of a Mandarin interpreter brought from New Zealand, the accused was arraigned and pleaded guilty. However, when the matter came on for submissions on sentence the following day, it was clear that the explanation being advanced on behalf of the accused was not consistent with his plea of guilty. An application was then made to vacate the plea. Against the objection of counsel for the prosecution, I granted the application, vacated the plea of guilty and recorded a plea of not guilty instead. Unfortunately the change of plea came too late to enable the trial to be concluded before the interpreter returned to New Zealand.
- [5] Several subsequent attempts to fix a date for the accused's trial were thwarted by the lack of funds to pay for the interpreter's return. Funds were finally found and the trial began on 29 August 2019. The Mandarin interpreter was present throughout.
- [6] Five witnesses were called for the prosecution, the first being Miriam Terebu. She is a 37-year-old resident of the area of Bikenibeu known as Tekaihangaki. On the night of 28 January 2017, she was playing bingo at the *mwaneaba* on the ocean side of Tekaihangaki. She left the *mwaneaba* at around 1:00 or 2:00am to go to see her husband at the nearby kava bar. She walked along the feeder road towards the lagoon side, where the feeder road joins the main road. Some distance ahead of her she saw 2 young people, one of whom she recognised as a boy named Marea. When Miriam reached the main road, Marea and his companion were to her right, walking along the ocean-side footpath of the main road in an easterly direction.
- [7] Miriam stopped on the ocean-side of the main road, waiting to cross over to the other side. The kava bar was to the west of her position, and on the lagoon side of the main road. A car came from the west along the main road. It was moving quite quickly. As it passed her, Miriam saw that it was on the wrong side of the road, encroaching onto the footpath. A few seconds later she heard a bang and then a scream. The car had hit the 2 young people. Someone called out, "I am dying." When Miriam later returned to the scene with a police officer, they measured the distance from the point where the car passed her to the point of impact as being 21 or 22 metres.
- [8] Miriam went to the kava bar to get her husband. They then went to the scene of the collision. The car she had seen pass by was stopped in front of a

workshop belonging to an Indian man named Kevin. A fence in front of the workshop made from roofing iron had been knocked down. The car had also hit some other cars at the workshop. Miriam saw Marea's companion being carried to an ambulance by the accused. Blood was coming from her mouth, and she did not make any noise. When the ambulance left, Miriam and her husband returned home.

- [9] In cross-examination, Miriam denied having seen a car coming from the east shortly before she saw the car that collided with Marea and his companion. She said that she had seen no other cars on the road at that time. She agreed that the accused had boarded the ambulance with Marea's companion, but she did not know if he was on the ambulance when it left.
- [10] In answer to questions from the Court, Miriam said that the weather at the time was fine and the road conditions were good. The road had only recently been upgraded and there were wide footpaths on either side of the vehicle lanes. There was no kerb between the vehicle lanes and the footpath – they were demarcated by painted lines on the asphalt. There were no streetlights, but a light situated high on the outside wall of Kevin's workshop was on at the time, illuminating the area.
- [11] Before calling her next witness, counsel for the prosecution tendered by consent a medical report, prepared by Dr Fatima Mwemwenikeaki and dated 29 January 2017 (exhibit 1). Dr Fatima had attended the deceased early that morning. When the deceased was brought to the hospital she was bleeding from the mouth and experiencing some respiratory distress but her vital signs were normal. Her condition deteriorated rapidly and she died, despite the administration of cardio-pulmonary resuscitation and adrenaline. Cause of death was given as aspiration of a large quantity of blood from the oral cavity into the airway.
- [12] The second prosecution witness was Marea Temaraiti, an 18-year-old student at Santa Maria High School. He lives at Tekaihangaki in Bikenibeu, next to Kevin's workshop. On the night of 28 January 2017, a feast was held at the home of Marea's family to celebrate his grandmother's birthday. One of the people who attended was his cousin, Nei Ante. Early the next morning, sometime after 1:00am, Marea and Ante left to go and buy some *kouben*.<sup>2</sup> They went to a place on the road to the *mwaneaba*, not far off the main road.
- [13] After buying the *kouben* they headed home, walking on the footpath on the ocean side of the main road. Marea was closest to the vehicle lane and Ante

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<sup>2</sup> *Kouben* is a locally-produced mixture of tobacco, lime powder, distilled alcohol, powdered cordial and (sometimes) toothpaste, packaged into small foil envelopes and consumed in a manner similar to chewing tobacco. Teenagers are the target market.

was walking beside him, on his right. As they walked, a police car passed them, heading east. Marea watched the car until it reached a curve in the road close to the Otintaai hotel. He then became aware of the headlights of a vehicle approaching them from the west. He turned and could see a car some distance away, perhaps 100 metres or more, in the vicinity of the Bahá'í compound. There was nothing remarkable about it. They continued walking.

- [14] Not far from the house, Marea realised that the car he had seen earlier was now very close behind them. He turned around again and was suddenly struck from behind, feeling the impact in his lower back on the right side. He was initially stunned and then realised that he was on the road, at the back of the car. Roofing iron from the fence of Kevin's workshop had fallen on his legs.
- [15] Marea stood up and moved to the side of the road, near to the house. From where he was he could not see Ante, but he saw the accused get out of the driver's side of the car that had hit him. Marea realised that his right foot was injured. The ambulance came and took Ante away, and Marea was taken to Bonriki to have his foot massaged. It was swollen and very painful. The injury took a month to fully heal, causing him to miss 2 weeks of school.
- [16] The third prosecution witness was Constable Karotu Taom. He is 46 years of age and has been with the Police Service since 2011. He is a mechanic, and is responsible for servicing police vehicles and inspecting vehicles that have been involved in traffic incidents. Prior to becoming a police officer, Karotu had worked for 14 years as a mechanic at Tarawa Motors. He had trained at the Tarawa Technical Institute (now Kiribati Institute of Technology), where he completed a 3-year apprenticeship. While working at Tarawa Motors he attended several training programs run by Toyota in Australia.
- [17] At about 7:00am on 29 January 2017, Karotu went to the scene of the collision in Bikenibeu. He conducted an external inspection of the accused's car, and prepared a report (exhibit 2). In addition to the body damage, and damage to a headlight and front windscreen, Karotu noted that the rear driver's side tyre was punctured. He did not inspect underneath the car until 2 days later.
- [18] When he returned, Karotu saw that the driver's side rack end had come away. The rack end is where the steering rack and the tie rod meet at a ball joint. It is a key component of the steering mechanism. The ball joint had separated. Karotu expressed the view that such a separation could only have been the result of the car hitting something. The ball joint is designed to be robust, and would not separate if the car hit a small bump, although it could happen if the car went over a speed bump at high speed, or if it hit a pothole in the road. The ball joint on the accused's car was worn, and a worn ball joint is more likely to fail. Karotu ruled out the possibility of a spontaneous ball joint failure without some kind of impact occurring.

- [19] Karotu expressed the view that, given the extent of the damage to the accused's car, it had been travelling fast at the time of the incident.
- [20] In cross-examination, Karotu agreed that it would not be possible to control the steering of the vehicle once the ball joint had separated, even if it failed on only 1 side of the car. He rejected the suggestion that a ball joint could separate without there being some kind of impact.
- [21] In answer to questions from the Court, Karotu said that he had not inspected the brakes on the accused's car. Failure of the ball joint would have no effect on the braking mechanism. If the ball joint on the driver's side failed, he would expect the car to pull to the right.
- [22] The fourth prosecution witness was Detective Constable Taakenibeia Bauro. He is 31 years of age and has been a police officer for 9 years. He is presently assigned to the Criminal Investigation Division. He attended the scene of the incident at around 7:00 or 8:00am on 29 January 2017. He took photos, 10 of which were tendered as exhibits (exhibit 3). The following day he interviewed the accused, using an I-Kiribati woman who had studied in Taiwan as an interpreter. The interpreter's mother also attended the interview. The record of the interview was tendered without objection (exhibit 4).
- [23] At the beginning of the interview, it was explained to the accused that he was alleged to have been driving the car that struck and killed the deceased. He was further alleged to have been intoxicated at the time of the collision. The accused was asked to explain what had happened. He said that, immediately prior to the collision, a vehicle had passed by in the opposite direction with its headlights on high beam, temporarily blinding him. Then something happened to the steering of his car, causing it to veer to the right. He could not control the steering. He thought that perhaps a rear tyre had blown. He had no chance to see the person he hit. It was not his intention to hit her with his car. He denied the suggestion that he was intoxicated at the time, and said that he had consumed less than a can of beer prior to the incident. He said that his car was travelling at 35 to 38 kilometres per hour before the collision.
- [24] Senior Constable Biira Tioti was called as the prosecution's fifth witness. He was called at the request of counsel for the accused, for the purpose of cross-examination. He was on duty at the Bikenibeu police station at the time of the collision. He attended the scene, but did not see either the deceased or the accused. He then went to the hospital with another officer. While there, his colleague arrested the accused.
- [25] That brought the prosecution case to a close. Counsel for the accused then made a somewhat half-hearted submission that her client had no case to

answer. I rejected the submission and proceeded to inform the accused of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Counsel for the accused advised that her client would give evidence, and she intended to call 2 other witnesses.

- [26] The accused is now 30 years of age. He has been in Kiribati since October 2012, having been brought here from China to work as a motorcycle mechanic at Wishing Star Trading. He testified that he was driving his car in an easterly direction towards Bikenibeu in the early hours of 29 January 2017. There were 4 other people in the car – his wife, and 3 of their friends. He estimated that the car was travelling at 35 to 38 kilometres per hour. As he neared the place he referred to as the Indian's shop, another car approached, travelling in the opposite direction. The headlights of the other car suddenly switched to high beam as it passed the Indian's shop. At that point the 2 cars were maybe 70 to 80 metres apart. By the time the other car passed by, the accused's car was still more than 10 metres to the west of the Indian's shop. At that point the accused suddenly and without warning lost control of the car's steering. The car pulled to the right and was zigzagging. The accused was scared and panicking. His mind went blank. He tried to steer the car onto the correct path, but it did not respond.
- [27] The accused said that, at the time he lost control of the steering, he had not seen any people. He attributed that to the effect of the passing car's high beam headlights and the fact that there was no moonlight. He did not see the deceased and Marea until they were only a metre from the front of the car. The accused immediately applied the brakes of the car, but it was going too fast to stop. The deceased was struck in the legs by the front of the car, while Marea was hit by the passenger side mirror. When the car came to a stop, the accused got out. He could see the deceased lying face-down on the ground. Marea was sitting on the ground. The accused ran to the deceased and tried to hold her. He helped her to sit up and turned her head to the side. She was bleeding from the mouth and had abrasions on her face and hands. He tried to clean the blood from her mouth with his T-shirt.
- [28] The accused saw his wife outside the car. He asked her to call the hospital. The other passengers remained in the car. The ambulance arrived after about 5 minutes. The deceased was placed onto a stretcher and loaded into the ambulance. The accused helped. He then went on the ambulance with the deceased to the hospital. From there he was arrested and taken to the Bonriki police station. He spent the next 11 days in custody. The last time he saw his car, it was still at the Indian's shop. He never retrieved it and does not know what happened to it.

- [29] Under cross-examination, the accused said that it was his wife's birthday on 29 January. The group had been celebrating, to mark both the birthday and the Lunar New Year. The celebrations began at about 2:00pm the day before in Betio, after which the group went to Bairiki and Taborio before stopping at Ambo. The others were drinking beer, but the accused was not. After leaving Ambo, the group went to several places in Teauraereke, before going to the Bairiki causeway to have something to eat. At about 8:00 or 9:00pm they returned to Teauraereke, to visit the Emperor nightclub. They went to another nightclub in Betio, before returning to the Emperor nightclub shortly after midnight.
- [30] The accused did not accept the suggestion that he was in any way fatigued by the driving, nor did he accept that, with 4 passengers and himself, the car was overloaded. It was put to the accused that he had fallen asleep at the wheel shortly before the collision. He rejected the proposition, maintaining that a mechanical fault had caused the car to veer off the road. He agreed that he did not immediately apply the brakes when the car began to pull to the right. He said that he had never experienced a situation like that before, which is why he panicked, and his mind went blank. The accused insisted that there was no time to respond to the situation.
- [31] After about 3 seconds, the accused's mind cleared. It was then that he saw the deceased and Marea immediately in front of the car. He applied the brakes, but the momentum of the car carried it forward. It could not stop in time. The accused said that he had not seen any people walking on the ocean-side of the road other than Marea and the deceased.
- [32] It was put to the accused that there had been no other vehicles on the road immediately before the collision. He maintained that another car had passed him, with its headlights on high beam. He denied that he was speeding, and rejected the suggestion that the damage to his car was significant. He pointed out that the car into which his car had collided sustained only minor damage.
- [33] In answer to questions from the Court, the accused said that, while he was primarily a motorcycle mechanic, he also had some experience in working on cars. He bought his car in February 2016 – it had only recently been imported from Japan. He is not sure of the car's year of manufacture, but he recalled that the odometer reading at the time of the incident was around 70,000 or 80,000 kilometres. The car had not been serviced in the time that he owned it, but he had regularly maintained it, attending to such matters as replacing the hydraulic fluids and the tyres. The car had not been involved in any collisions prior to the night in question, although the rear window had been broken 6 months earlier. He had experienced no problems while driving the

car in the hours before the collision. The accused said that he had slept early on the night of 27 January, and had woken at about 7:00am the next day. He went to work at Wishing Star from 8:00am until midday.

- [34] The second defence witness was Butonga Maninraoi. He is 43 years old and a lecturer in automotive mechanics at the Kiribati Institute of Technology. He has held his present post for 7 years. Before that he worked as a mechanic at the Public Utilities Board. There his duties involved working on the generators and the PUB fleet of vehicles. He completed a 3-year apprenticeship at the Tarawa Technical Institute in 2000. He understands the steering mechanism of motor vehicles, and was called as an expert witness in this area.
- [35] Butonga explained that the steering wheel is connected by the steering column to the steering rack, which runs parallel to the axle connecting the front wheels. At each end of the rack there is a ball joint, connecting the rack to the tie rod, and providing the means by which the angle of the front wheels can be controlled by the driver. If the ball joint fails, the driver will no longer be able to control the direction of the wheel to which that joint relates. There are many reasons why a ball joint might fail prematurely, including corrosion, manufacturing defects, poor maintenance, and impact with a kerb or pothole. Off-road driving might also be a factor. A ball joint can fail at any time. While the failure might occur without warning, such an occurrence would be rare. Usually the driver will notice some unusual vibrations prior to failure, or there will be a clunking noise from the joint when turning the wheel. If the ball joint on the driver's side failed, Butonga said that he thought the car would pull to the right.
- [36] Under cross-examination, Butonga conceded that he was being paid to testify, although he said that what he was receiving was 'not much'. He agreed that a ball joint could fail as a result of the car hitting an object. He said that the object would need to be solid but, even then, failure of a ball joint on impact was an unlikely outcome. Butonga agreed that there was no relationship between the steering mechanism and the braking mechanism. The brakes would still function after a ball joint failure, unless the wheel had come away from the car altogether.
- [37] In re-examination, Butonga was shown a photograph (exhibit 3J). He said that he would not expect a ball joint to fail as a result of the impact depicted in that photograph.
- [38] Despite having indicated at the start of the defence case that she intended to call another witness, counsel for the accused then closed her case.
- [39] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the



evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.

[40] Section 33(1) of the *Traffic Act* provides as follows:

A person must not cause the death of another person by driving a motor vehicle on a road or elsewhere without due care and attention, or without reasonable consideration for other persons using the road or place.

[41] In the case of *Bwereata Kamoriki*,<sup>3</sup> I referred to the remarks of White J of the South Australian Supreme Court in *Police v Melisi*, in which he said, “The legal principles applicable to alleged contraventions of the obligation to drive with due care are well established.”<sup>4</sup> He continued:

The issue is to be determined objectively. The obligation to drive with due care is the duty to exercise the standard of care which one would expect of a reasonably prudent driver in the like or similar circumstances... The reasonably prudent driver is expected to drive with a defensive outlook, *ie*, a lookout “that not only sees immediate, or immediately developing, danger, but looks well ahead and searches for potential danger”.<sup>5</sup>

[42] There is no dispute that the car driven by the accused collided with Nei Ante and caused her death. The only issue is whether the accused can be said to have been driving without due care and attention at the time.

[43] Counsel for the prosecution submits that it is open to the Court to find that there are several possible explanations as to why the accused’s car veered off the road and collided with the deceased, killing her. Intoxication, fatigue or excessive speed were all available findings, any of which was sufficient to conclude that the accused had failed to drive as a reasonably prudent driver would have in the circumstances. Counsel submits that I should accept the evidence of Karotu that the steering mechanism failure occurred on impact, and not before. Even if the ball joint had failed spontaneously, prior to the collision, there was ample time for a reasonably prudent driver to apply the brakes and stop the vehicle in time. I should reject the evidence of the accused as to the oncoming vehicle with the headlights that temporarily blinded him. Even if I did accept that evidence, there was no link between that car and the collision, as the accused’s car only crossed to the incorrect side of the road after the other car had passed by.

[44] Counsel for the accused submits that the prosecution has failed to establish to the required standard that the driving of the accused fell below that

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<sup>3</sup> *Republic v Bwereata Kamoriki* [2018] KIHc 49.

<sup>4</sup> [2010] SASC 21, at [17].

<sup>5</sup> *ibid.*, citations omitted.

expected of a reasonably prudent driver. The cause of the collision was the spontaneous failure of the steering mechanism, resulting in the accused's car veering uncontrollably to the right. Even though the accused did not adopt any other measures, such as applying the brakes, until after a brief interval, the collision was an unavoidable accident. There was nothing he could have done.

- [45] Assessment of the evidence is not a competition between the prosecution and defence witnesses. Having observed them closely as they testified, I found them all to be generally credible. However, there is one aspect of the accused's evidence that I do not accept. I reject his evidence of the oncoming vehicle. His testimony is directly at odds with the evidence of both Miriam and Marea and, on that point, I prefer their evidence to that of the accused. In any event, as will become clear, it really makes no difference to my ultimate findings in this trial.
- [46] I do not accept that the accused's car was speeding prior to the collision. Miriam testified that the car was moving quite quickly, but that is not enough. It would be impossible for a person in her position, in the dark, to be able to accurately assess the speed of a vehicle moving across her field of vision. Karotu's assessment that the body damage to the car was such that it must have been travelling fast at the time of the collision is little more than speculation. The point was well made that, if the accused's car had been speeding, one would have expected the car into which it crashed to have sustained significantly greater damage than it did.
- [47] The only other substantial point of difference in this case is the divergence of views between the 2 mechanics. Karotu was adamant that only the impact of the collision could have caused the steering mechanism to come apart, which means that something else must have happened to cause the accused's car to veer out of its lane. On the other hand, Butonga explained that there were several possible explanations for the failure of the ball joint, impact being only one possibility. In his view, spontaneous failure is possible, if unlikely. Of the 2, I prefer the evidence of Butonga. The consequence of this is that the prosecution has failed to establish beyond reasonable doubt that it was driver error that caused the car to veer off the road. There is no evidence on which I could be satisfied to the required standard of any of the prosecution contentions that the movement of the car out of its lane was the result of intoxication, fatigue or speeding. I accept that the more likely explanation is mechanical failure, and I will consider the remainder of the evidence on that basis.
- [48] Such a finding does not however absolve the accused. I must still answer the question as to whether the accused's response to his inability to control the

car fell below the standard expected of a reasonably prudent driver. I accept Miriam's evidence that, when the accused's car passed her, it was already beginning to encroach onto the ocean-side footpath. That means that the ball joint had failed some distance to the west of her position, and she was over 20 metres to the west of the point of impact. Even if there was an oncoming vehicle, as claimed by the accused, his car did not begin to pull to the left until after the other vehicle had passed. That still left a considerable distance for the accused's car to travel before the point of impact. Even if it existed, which I do not accept, the other vehicle's presence on the road could not have contributed in any way to the collision.

[49] By the accused's own admission, he did not apply the brakes of his vehicle until he was a metre or so from the point of impact. His car had travelled more than 20 metres from the point at which the steering mechanism had failed before he thought to apply the brakes. This after he had panicked for around 3 seconds from the time the mechanical failure first manifested itself.

[50] In *Melisi*, White J said that a reasonably prudent driver needed to be on the lookout for dangers both extant and potential. The dangers to which he was referring are not just risks posed by the surrounding environment, outside the car. They include dangers that may arise from the car itself, such as spontaneous mechanical failure. A reasonably prudent driver must remain alert to the possibility that something could go catastrophically wrong with the vehicle. In my view the response expected of such a driver to the failure of a ball joint, causing the car to veer uncontrollably to the right, would be to immediately apply the brakes, bringing the car to a stop as quickly and in as short a distance as possible. The accused did not do that in this case. Had he done so, the collision would have been avoided. By failing to apply the brakes immediately, the accused's driving fell below the standard expected of the reasonably prudent driver.

[51] It follows then that I am satisfied, beyond reasonable doubt, that the accused was driving without due care and attention, and that his driving caused the death of Ante Borau. I find the accused guilty of the offence of careless driving causing death, and he is convicted accordingly.

[52] I will hear counsel as to sentence.

  
**Lambourne J**  
Judge of the High Court

