IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

THE QUEEN -v- NICHOLAS EVGENIOU.

REASONS FOR JUDGMENT

MANN C.J.
PT.MORESBY
27/9/63.

The accused is charged with the manslaughter of JUSTUS BESIARO on Hubert Murray Highway near Port Moresby on the 29th June, 1963.

The accused was driving his Peugeot 404 motor car along the Highway near its intersection with Hohola Road when the car came into collision with JUSTUS BESIARO, who was one of a group of pedestrians.

The evidence shows that JUSTUS, with his wife and brother and several children, had walked from the bus-stop in Hohola Road and had taken up a position on the gravel outside the bitumen edge of the roadway, waiting for the traffic to clear so that he and his family could cross. They stopped in quite a safe position a few feet off the edge of the roadway, and the car driven by the accused, at all material times, was driven on his correct side of the road. Approaching the place where the pedestrian group was waiting, the accused, travelling outwards towards Boroko, had the group on his left-hand side.

The evidence shows that there were several other cars on the road and that the deceased JUSTUS stepped off from the gravel at a walking pace and commenced to cross the road immediately behind the car which was driven by the witness Martyn, apparently regarding that as the last car with which he was particularly concerned, and being unaware that the car driven by the accused was coming towards him from the opposite direction. Thus the deceased stepped right into the path of the car driven by the accused, and was struck with very great violence, killing him

instantly and carrying his body some distance down the road before the vehicle stopped.

The deceased was carrying a small infant at the time and was shading the child with a red umbrella, so that it is possible that his view of the on-coming car was obscured. The other members of the party, and especially the wife who had the best view of the on-coming car, stayed still when the deceased stepped forward; nevertheless this appeared due to the actions of the children, one of whom may have seen the car coming, and it appears most likely that the adult members of the pedestrian group were all unaware of the danger when JUSTUS stepped forward.

Mr. Martyn, whose evidence was clear and precise on all points, described a gesture or suggestion of movement on the part of JUSTUS as Mr. Martyn's car was passing, indicating that he was either communicating with somebody on the other side of the road or was just about to move forward. This caused Mr. Martyn to keep JUSTUS under very close observation in case he should suddenly become a hazard.

As Mr. Martyn drove on slowly past this point, he suddenly became aware of a rush of air as the car driven by the accused passed him in the opposite direction.

I am satisfied beyond doubt from Mr. Martyn's evidence and also from the circumstantial evidence, including the marks on the roadway, that the accused was travelling at a relatively high speed. I am unable to fix the speed, but the indications are that it was very considerably in excess of the official 30-mile per hour speed limit in that area.

I do not attach much weight to the evidence as to the rather erratic driving by the accused as he was ascending the 3-Mile Hill, because the driving conditions are different and the hazards caused by native pedestrians are not the same. The greater risk would be in relation to other motor traffic. Besides this, the character of the locality is

different, and a distance of perhaps half a mile from the scene of the collision, during which distance one would normally expect a car to travel at a variety of different speeds, depending on the actual part of the roadway being traversed.

I gained more support for the finding of undue speed from the evidence given by the accused himself. Even allowing for his difficulty in expressing himself in what is to him really a foreign language, he gave a very strong impression of having no idea of what was going on at the time of the collision, and of a man whose handling of the car was confused either by inadequate observation of his surroundings as he passed or by his apparent clumsiness in handling the car.

The defence to the charge of manslaughter arises under Section 23 of the Criminal Code and constitutes the defence of accident. In cases of this kind, careful scrutiny of the circumstances is called for, for it is clear that the deceased stepped forward right into the path of danger. At the time when the accused in fact became aware of the danger, he apparently had no hope of avoiding the deceased and struck him at a speed high enough to cause quite extensive damage to the car, including the bumper bar in front which came into contact with the legs of the deceased. It may well be that the deceased himself contributed by his own negligence to the accident, or on the other hand, he may have been misled by the unusually high speed at which the car was travelling.

The evidence shows that the deceased would have had about 200 yards of roadway leading up to the point of collision upon which the car might have been observed by him after it passed the crest of the 3-Mile Hill and came into view around a curve. If the accused were travelling at 60 miles per hour (and on the evidence I can make no such finding) the car should have been within the view of the deceased for something like eight seconds; but the evidence also shows that the deceased and his family group had been waiting at the road side for an appreciable

interval of time whilst a number of cars passed. Having a picture of the normal rate of flow of traffic and having looked to his right on a number of occasions and found the road clear, the deceased might well have been misled by the rapid approach of the car driven by the accused and believed that Mr. Martyn's car was the only car close enough to constitute any danger.

Considerations of this kind may be of importance in a civil case, but they could not be resolved precisely on the available evidence, even if they now fall for determination. In my opinion they do not, for regardless of whether the deceased was negligent in the circumstances, the real question is one of causation. In other words, was the accused travelling at such a speed or otherwise so unprepared to meet the situation which confronted him that his negligence was a cause of the collision. This depends again on the question of foreseeability, for criminal responsibility attaches notwithstanding Section 23 if the accused ran into a situation which was foreseeable as creating a substantial risk of death for the deceased. As soon as such a risk was apparent to a person in the position of the accused, it was his duty to reduce his speed, observe the situation more closely, and if necessary stop his car so as to avoid the risk of killing the deceased.

In the circumstances of this case, was it foreseeable to the accused that a native pedestrian, standing on the side of the road and apparently waiting for the traffic to clear, would suddenly step off into the path of an on-coming car. If such a risk were not apparent to a person in the position of the accused, the result would be an accident, and he would not be criminally responsible, but if it were apparent and foreseeable, then he was bound totake the appropriate action, and failed to do so.

I have no substnatial evidence upon which to determine this question of foreseeability in the circumstances existing at the time of the collision. I think that it is proper for me to determine that question by taking judicial notice of the circumstances which normally prevail in that area. There is only

one major Highway running through Port Moresby and it runs through the centre of the town and out past Boroko, which is a large suburb and the only really substantial residential area outside Port Moresby. Between Port Moresby and Boroko there are several places such as the Koki market, Badili, and the stretch along which this accident occurred, where at most times, and especially during the week-end, one encounters large numbers of native pedestrians. There are no footpaths for them to walk on, and they normally walk along the gravel edge of the roadway off the bitumen. In a few places there are foot tracks.

A very large number of native people are not trained to traffic conditions and they have a very well-known propensity for walking in the path of an on-coming vehicle without looking and without giving the traffic conditions prevailing any apparent thought. In consequence they frequently walk in amongst moving traffic, and anybody driving a vehicle in the Port Moresby area should be well aware of this.

The fact that a group of pedestrians was apparently waiting at the side of the road would be a presumptive indication that they were aware of the dangers of traffic and would justify a driver in travelling past them at a reasonable rate, provided that he kept them under close observation in the case of a sudden movement of precisely the kind that happened here. To drive past any such group of pedestrians at high speed is, in my opinion, to create a very serious risk.

A person, even travelling within the official speed limit, would be wise to act as Mr. Martyn did in driving past at reduced speed and keeping a very careful watch. To drive past at a considerably higher speed is to bring about the very kind of risk which occurred here

For this reason I think that the actions of the accused and the manner in which he drove the car were the cause of a risk which should have been obvious to him, and that therefore the event which occurred was not an accident within the meaning of

Section 23 of the Criminal Code, and that he is guilty of manslaughter in consequence of his actions.

Although, on my view of the facts, the question of negligence does not arise, I will deal with it upon the footing that contrary to my view of the matter, the circumstances of this case rendered the event of death an accident within the meaning of Section 23. Upon this footing the accused would not be criminally responsible for the event which happened unless he failed to discharge the duty imposed upon him by Section 289 of the Criminal Code to take due care in the driving of his motor car, it being in the circumstances an object under his control coming within the terms of Section 289.

Upon an inquiry into negligence, it would no doubt appear that both parties were at fault in some degree, and the accused might derive some assistance from the evidence of EZEKIEL, the brother of the deceased, who said that the deceased saw the car coming, but if I understand his meaning correctly, he was apparently misled by the speed at which it was travelling. According to EZEKIEL it was after seeing the car that his brother stepped on to the road. In another passage it becomes clear that EZEKIEL was referring to an earlier moment of time when the car driven by the accused was a yet a considerable distance away, and that when the deceased started to cross the road, he was actually looking straight ahead of him and not looking to the right.

I do not place much reliance on EZEKIEL's evidence because it seems to me to be more an explanation of the case than an account of facts strictly as observed. This is a common tendency with native witnesses who often cannot distinguish between the two things. The time and distance relationship of events is frequently not reliable, but even if EZEKIEL's evidence were to be given the greatest weight that it could bear, it would not, in my view, exclude the negligence of the accused as a contributing cause of the accident, for EZEKIEL's impression was clearly one of very high speed.

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I think also that on the question of negligence the tyre-marks show clearly that the accused was at fault. His car at the time of the accident was capable of pulling up from 30 miles per hour so as to leave heavy black tyre-marks on the road's surface, 36 feet in length. The tyre-marks actually left by the accused were very much lighter, indicating that the wheels were not locked to anything like the same extent and they extended to 115 feet 6 inches. Even allowing for the probable loss of concentration as a result of shock after the impact, the evidence of the tyre-marks strongly supports the evidence of speed by suggesting that the car was travelling too fast for the wheels to be locked, and that the speed was very much in excess of 30 miles per hour.

In my view, these comparisons of the negligence of the two parties could only assist the accused if they led to a conclusion, or at least did not exclude the conclusion, that the deceased unforeseeably stepped on to the road in circumstances creating a situation in which the negligence of the accused was not a contributing cause. On such a view the accused would have hit the deceased at whatever speed he might have been travelling.

Such a view in the present case is inconsistent with my finding that it ought to have been apparent to a person in the position of the accused that a situation of this kind might arise, and that he should have reduced speed as soon as the danger became apparent to a person in his position. Nevertheless, dealing with the case on the assumption that this was an accident within the scope of Section 23, I must treat the facts as revealing that it was not foreseeable to a person in the position of the accused as he was approaching the pedestrians that one of them might step forward into the path of his car. Upon such a view, the accused was taken completely by surprise and it becomes a question of fact at what point of time he had actual warning of the movements of the deceased so that he was not required to predict them but merely to observe them and act according to what he saw or ought to have seen.

Section 289, which creates the duty expressly made applicable to accidents arising within the scope of Section 23, required that reasonable care and precautions must be taken to avoid such danger (and I say again to avoid dangers which in fact arise but which were not foreseeable). In this case, the standard imposed by the Section is much lower than the obligation to avoid causing death which arises where the event is foreseeable and therefore not an accident. It is a duty to take reasonable care and precautions, but the standard of care as interpreted by R. v. Scarth 1945 St.R.Q. p.33 and other cases to which I was referred in argument and which have previously been followed by this Court is one the breach of which involves an element of reckless disregard for the life and safety of other persons.

On the evidence it appears to me to be clear that at the point at which the car driven by the accused passed the car driven by Mr. Martyn in the opposite direction, there was ample time for the accused to stop. As soon as Mr. Martyn's car passed, the deceased was walking across the roadway in the full view of the accused, and even if, for some reason, the accused could not or did not see this movement until the point at which he was passing Mr. Martyn's car, he still had ample time to pull up at a speed of anything like 30 miles per hour. Even, therefore, on this most favourable view of the duty owed by the accused under Section 289, he failed, by a combination of reckless speed and failure to observe an actual danger when it clearly arose, to discharge his duty, and on that ground also the accused is guilty of manslaughter.