

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Appeal Case No. 140 of 2016

JOHN MAHLON TALEO

V

PUBLIC PROSECUTOR

Coram: Judge Aru

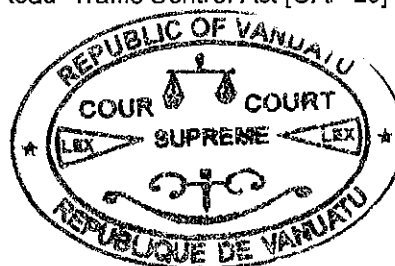
Counsel: Mr. N. Morrison for the Appellant
Mr. T. Karae for the Prosecution (no-appearance)

JUDGMENT

1. The Appellant appeals his conviction and sentence pursuant to section 201(3) of the Criminal Procedure Code. He filed a Notice and a Memorandum of Appeal and an Appeal Book with his written submissions. The Prosecutions also filed submissions in response.
2. The hearing of this appeal has been adjourned several times since the filing of the notice of appeal on 21 January 2016 for various reasons. The last adjournment being the 13 September 2016 when Counsels appeared before me in Chambers. At that conference both Counsels agreed to the matter being heard today. Before the hearing proceeded, Mr. Morrison was the only one in attendance. He informed the Court that he was not aware of the Prosecutor's non-attendance nor was he advised as a matter of courtesy of the reasons for the Prosecutor's non-attendance. The Court was also not informed of Mr. Karae's absence. Several attempts were made by the clerk to contact the Public Prosecutor's office but Mr. Karae could not be located.
3. Mr Morrison insisted I hear the appeal as the matter had been adjourned several times and the Prosecutor had agreed to the today's hearing and no reasons are given for his non-attendance. I then proceeded to hear the appeal on that basis.

Background

4. The Appellant was charged with the following three counts:-
 - Count 1- Careless driving contrary to section 14 of the Road Traffic Control Act [CAP 29]

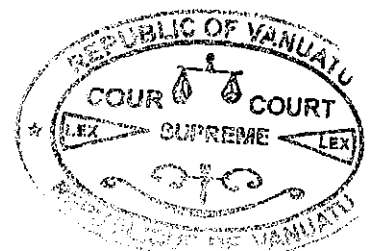


- Count 2 – Reckless driving contrary to section 13 of the Road Traffic Control Act
 - Count 3 – Driving under the Influence of alcoholic liquor contrary to section 16 of the Road Traffic Control Act
5. He was acquitted on count 3 - driving under the influence of alcoholic liquor. In relation to the remaining charges, he was convicted and sentenced in relation to count 1 to pay VT15, 000 fine or 3 months imprisonment and in relation to count 2 he was convicted and sentenced to pay VT 20,000 or 5 months imprisonment.

The Appeal

6. The memorandum of appeal raises nine grounds which in summary allege that the Magistrate erred:-

- 1) In placing reliance upon diagram evidence for the purpose of finding guilt;
- 2) In denoting the date of the accident;
- 3) In not putting sufficient weight on evidence in respect to the state of the other party's vehicle;
- 4) In placing insufficient weight on the defendant's belief that there was an on- coming motor cycle not motor car;
- 5) In finding as an undisputed fact that the defendant was acting Police Commissioner at the date of the accident;
- 6) In failing to qualify the police witness's ability to give expert evidence;
- 7) By placing unreasonable weight on the defendant's agreement to assist to repair the other party's motor vehicle;



- 8) In finding without basis that Mr Owe was an unreliable witness, and that his failure to attend court was tactical to prevent the case progressing and that Mr Owe's evidence that his vehicle had faulty lights was not accepted because his evidence was deemed unreliable;
- 9) In placing reliance on an inaccurate criminal history presented at sentencing.

7. The relief sought is for:-

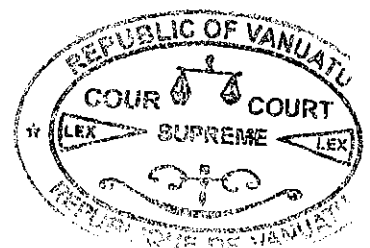
- a) An Order that the decision of the Magistrate Court dated 15 December 2015 be set aside;
- b) An Order that the Appellant's conviction be quashed;

8. The main thrust of the appeal is grounds 1 and 6. The appellant says that the decision of the Magistrate is based on diagram evidence (sketch map of the accident) for the purpose of finding guilt and that the Magistrate failed to qualify the Police witnesses ability to give expert evidence.

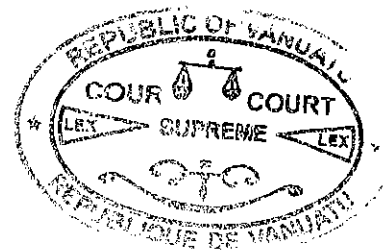
9. The relevant passages of what the Magistrate said in the judgment are as follows:-

"PROSECUTION EVIDENCES

10. *The first Prosecution witness is Traffic Officer PC William Seru who works in the Police Traffic Section and has served in that office for 7 years. His primary role in that office is to investigate road accidents. He said most accidents happen because of numerous reasons such as reckless driving, driving under influence of alcohol and defection of vehicles. He said when attending accident scene, he would normally observe the scene, sketch the accident, collect evidence and identify drivers. He said to find the driver at fault, he had to assess the scene and ask witnesses. He said on 3 July 2013 he received a call about an accident at Pango Road. The caller is unknown however; he responded to the call and attended the scene with PC Rodney Taivakalo and PC Batick Pangsa. They reached the scene at around 10.00 pm about 20 minutes later from when they received the call. At Le Lagon at side corner, he saw a white Isuzu double cabin registration number 4158 and further at front they saw Nissan Navara Registration No, POL07.*



11. *At that point in time, he got off the vehicle and sketches the accident.*
12. *The accident sketch is tendered in court and was accepted as Exhibit P1.*
13. *The Accident sketch indentified (sic) V2 as Nissan Navara double cabin registration no. POL07 driven by defendant and was heading towards Pango Village and white Isuzu pickup registration No.4158 driven by Kennery Solomon was driving towards No.3 Area/ Port Vila.*
14. *After he (PC William Seru) drew the sketch of the accident, he collected witnesses and his witness at that time was the driver of white Isuzu registration No.4158 who is identified as Kennery Solomon. He did not get the chance to see the defendant because he was taken away by Pro-medical vehicle.*
15. *He knew the defendant drives the Nissan Navara double cabin registration P0107 because he saw him drive the vehicle and was in police uniform.*
16. *He said upon assessing the accident, is of view that the defendant did not follow his lane but went across to the next lane.*
17. *The accident sketch deposed that the point of collision, V2 (Nissan Navara POL 07) alleged to be driven by defendant occupied 60 percent of the wideness of the road, The vehicle V2 driven by Kennery Solomon occupied 40 percent of wideness of the road. Both vehicles collided on the front left side resulting on V1 losing its front left wheel and V2 sustaining damage on the front left pumper. V1 stopped 12.90 cm away from the impact point and on the left lane, The missing front left wheel explains why the vehicle had to maneuver leftward before stopping.*
18. *While V2 (POL07) sustained minor damage on its front left pumper (sic), it continued to manoeuver leftward until it stopped 26 meters away and not exactly on side of the road but the picture in exhibit P2 depicted the vehicle stopping because it was obstructed by a heap of debris.*
19. *The court accepted pictures taken by Constable William Seru as Exhibit P2, which shows damages sustained by both vehicles and their locations after the accident.*
- ...
73. *Upon reaching the accident scene, Traffic Officer PC William Seru commenced sketch of the accident and his sketch revealed that at the impact point of the accident; the defendant was occupying the opposite lane by 10 percent. While the defendant agrees that the road at the time of the accident does not have traffic lane, it is not an excuse to justify that error.*
74. *The Defendant like other road users have a duty of care and attention and that duty of care cannot be compromised in any degree because in so doing, will expose danger and harm to other users of the road.*
- ...
86. *The sketch drawn by PC William Seru revealed that the defendant occupied 10 percent of the opposite lane. The defendant knew the road has no traffic lane and he knew accidents occurred on that road in the past and more to say, there is a vehicle coming towards him on the opposite lane and yet he occupied a fraction of his road lane thus*



resulting in the accident."

10. The Prosecution's response in their written submissions filed in relation to grounds 1 and 6 say that Police Officer Seru's qualifications were:-

- His work experience in the traffic section for 7 years;
- His primary role was to investigate road accidents;

- He gave examples of causes of road accidents but not limited to reckless driving, careless driving under the influence of alcohol and defect in vehicles;

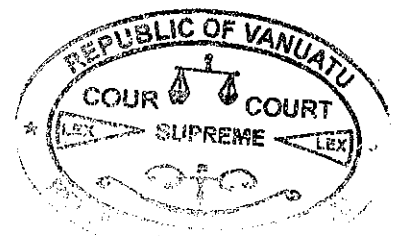
- When attending crime scenes he assesses the crime scene sketches the scene of the accident collects evidence and identifies drivers;

11. It was submitted that the opinion evidence of the Police officer based on his assessment of the crime scene was admissible and sufficient to identify the point of impact where the two vehicles collided.

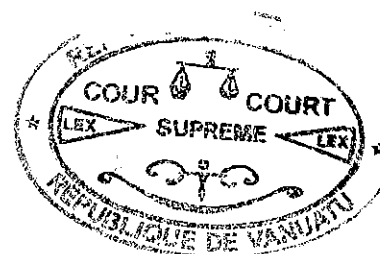
12. The Appellant on the hand submits that first the Magistrate erred insofar as it held at, inter alia, [73] and [86] that the non-expert opinion of an attending police officer (including in a "sketch" of the traffic accident purporting to show the accident at the point of collision, which sketch was drawn by the officer after the accident from his own opinion and the evidence of purported witnesses who were not identified and/or who did not give evidence at trial) was "evidence" sufficient to establish beyond reasonable doubt:-

- a) the precise location where the traffic accident took place; and

- b) the purported "fact" that the Appellant had occupied 10% of the opposite lane at the time of collision.

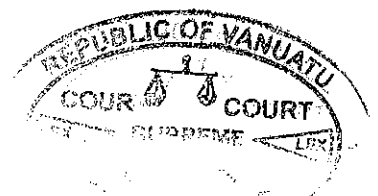


13. Secondly it was submitted that there is also no doubt that, insofar as the officer expressed an opinion that the Appellant's car occupied 10% of the opposite lane at the time of the accident, the police officer's opinion was nothing more than pure speculation.
14. That the relevant opinion was embodied in a sketch. That the officer's opinion was reduced to a document does not give it any special currency. It remained speculation, whether oral or written. That the police officer's opinion (oral and written) ought to have been ruled inadmissible. It was further submitted that There was no evidence about where the Appellant's car was at the time of the accident, much less evidence of any fact which demonstrated beyond reasonable doubt that the Appellant's car was occupying "10%" of the wrong side of the road at the time of the collision.
15. It was submitted that the trial judge's acceptance of the police officer's opinion about these matters was critical to the Court's ultimate finding that the offence charged had been proven beyond reasonable doubt.
16. Furthermore the Appellant says that when, and how, the officer came to form his opinion and/or draw the sketch is unsatisfactorily unclear. What facts or matters did the officer rely on in forming his views? It was suggested that perhaps the officer relied on witness evidence in drawing his sketch. If so, who did he speak to? What did they say? Where was the witness when the accident occurred? What did they see? Did they actually see where the accident occurred and/or where the Appellant's vehicle was at the time of the collision, or were they also speculating?
17. It was submitted that no one whose evidence was relied on by the police officer to create the sketch was identified, much less called as a witness. Whereas the evidence of a witness to the collision may have been admissible, the officer's sketch (if it indeed purported to represent things told to him by a witness) is nothing more than hearsay in its purest form and ought to have been (applying the rules of evidence, which ought to be applied strictly in criminal trials) wholly inadmissible.
18. It was submitted that there are experts who can (or purport to) estimate certain details of an accident from a skid mark, such as the speed at which a car was travelling, but the police officer was never established to be a person possessing such qualifications.



19. It was suggested that perhaps the officer also saw some car debris on the side of the road. If so, what did the officer see and when? Did he take photographs? Did the debris belong to either of the cars involved in the accident? How does the officer know this? From where on the car/s did the debris originate? What was it about the location of the debris which made the police officer conclude that the accident occurred at a specific spot with the Appellant's vehicle occupying 10% of the other side of the road?
20. It was submitted that one can only speculate about such matters because they do not appear in the trial judge's reasons for decision, and certainly did not form part of the officer's evidence. It was submitted that all we have are the officer's unqualified, inexperienced opinion as set out in a sketch. It was further submitted that the opinion of an expert is not admissible merely because the person is an expert, or is proffered as such. Amongst other matters, all of the facts upon which the expert has relied have to be proven; the expert's purported field of expertise has to be accepted by the court as a field in which a person can give expert evidence; and the side calling the so-called "expert" has to establish that that person is indeed an expert in their field.
21. Not only was the police officer here *not* established to be an engineer or other expert in skid mark or debris forensics, but (even if the officer did rely on skid marks or debris) there was absolutely no evidence of the facts upon which the officer relied in forming his opinions.
22. In support of his submissions the Appellant relies on **Williams v. Twynam Agricultural Group Pty Ltd** [2011] NSWSC 1098 where the need to establish all the facts upon which an expert's opinion is based was demonstrated. In that case Hoeben J observed:-

"[53] The submission that the plaintiff was travelling at a speed in excess of 60 km/h depended upon it being possible to measure the length of the skid marks leading up to the edge of the drop box. The calculations as to speed made by the two experts were based on a statement in an investigator's report that the length of the skid marks was 23 m. The basis for that figure of 23 m was not established in evidence. It was not known whether it was measured by the investigator, and if so by what means, or whether it was an estimate. The investigator was not called. The parties agreed that the figure of 23 m in the investigator's report could not be relied upon as a basis for calculations of speed by the experts.



[54] That being so, it was only possible for the experts to calculate a minimum speed at which the vehicle was travelling, but not a maximum speed. This was because none of the photographs showed the skid marks in their entirety."

Discussion

23. The Appellant challenges his conviction and sentence in relation to careless driving and reckless driving on the basis that Police Officer Seru was not qualified by the Magistrate to give expert opinion and therefore his opinion or evidence ie the sketch map which led the magistrate to find guilt was inadmissible. The Magistrate at paragraph 16 of the Judgment in relation to Police Officer Seru's evidence recorded that;

"..

16. He said upon assessing the accident, is of the view that the defendant did not follow his lane but went across to the next lane evidence.

..."

24. Further at paragraph 73 the Magistrate states that :

"..

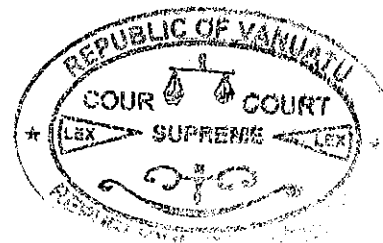
73. Upon reaching the accident scene, Traffic Officer PC William Seru commenced sketch of the accident and his sketch revealed that at the impact point of the accident; the defendant was occupying the opposite lane by 10 percent.

.."

25. Later in his finding at paragraph 86 the Magistrate states that :

"86. The sketch drawn by PC William Seru revealed that the defendant occupied 10 percent of the opposite lane. The defendant knew the road has no traffic lane and he knew accidents occurred on that road in the past and more to say, there is a vehicle coming towards him on the opposite lane and yet he occupied a fraction of his road lane thus resulting in the accident."

26. Police Officer Seru said he investigates road accidents yet no report of his investigation was put into evidence except the sketch map. His evidence as recorded is that he got a call from an unknown caller and when he arrived at the scene of the accident he got of the vehicle and sketches the accident.



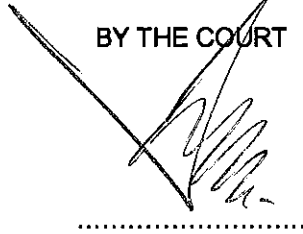
27. I agree with the Appellant that Police Officer Seru was not qualified by the Magistrate to give expert evidence therefore the sketch map remains an opinion of the officer concerned, it is speculative and is therefore inadmissible as it goes to the truth of the matter as found by the Magistrate at paragraph 86 of the judgment.

Conclusion.

28. For the above reasons the appeal is allowed, the conviction is quashed and the judgement and sentence are set aside.

DATED at Port Vila this 21 day of October, 2016

BY THE COURT



.....
D. ARU
Judge

