

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

Criminal
Case No. 18/253 SC/CRML

PUBLIC PROSECUTOR
v.
HARRIET YATIPU

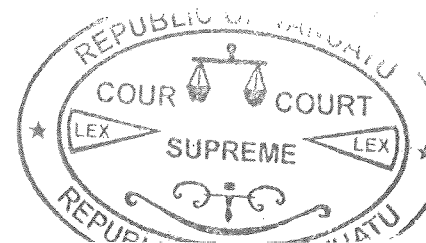
Coram: Justice D. V. Fatiaki

Counsel: Ms M. Taiki for the State
Mr A. Godden for the Defendant

Date of Ruling: 8th February 2019

VERDICT

1. This is a retrial ordered by the Court of Appeal on 27 April 2018. In such a case one might expect a case which was prosecuted competently and fairly. Unfortunately it was not as will become clearer in this verdict.
2. The defendant on her first trial faced two charges – Causing Death by Reckless Driving under the Road Traffic (Control) Act and Causing Unintentional Harm Causing Death under the Penal Code. The defendant pleaded guilty to the latter and not guilty to the former. The prosecution treated the charges as alternatives and did not seek to prove the reckless driving charge. The first trial therefore reduced itself to a sentencing exercise on an Unintentional Harm Causing Death charge based on agreed facts.
3. In the retrial before this Court, the defendant was charged with identical offences, namely, Causing Death by Reckless Driving contrary to Section 12 of the Road Traffic (Control) Act (Count 1) and an alternative charge of Unintentional Harm contrary to Section 108(c) of the Penal Code (Count 2).
4. The defendant pleaded not guilty ("*ino true*") to both charges and the prosecution were obliged to proceed to trial on the Reckless Driving charge.
5. As with all criminal trials I remind myself of the terms of Section 8 of the Penal Code which states:



“No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous”.

6. From the foregoing provision the following essential features of a criminal trial may be extracted:
 - (1) The burden of proving a defendant’s guilt rests solely on the prosecution throughout the trial;
 - (2) The corollary to (1) is that the defendant bears no burden and is not required to prove his innocence by giving evidence or calling any witnesses in defence;
 - (3) The standard of proof required to be attained by the prosecution’s evidence is proof “*beyond reasonable doubt*” which excludes any fanciful or frivolous claims by the defendant.
 - (4) If at the end of the trial, after hearing all of the evidence both for the prosecution and the defence, any reasonable doubt exists as to the defendant’s guilt then it is the Court’s duty to find the defendant not guilty and acquit him or her of the charge.

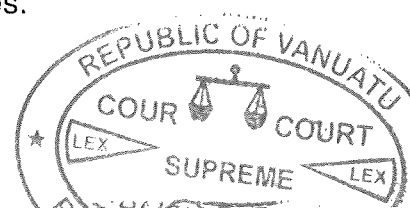
7. In order to establish an offence of Causing Death by Reckless Driving the prosecution must call and produce evidence which establishes two essential ingredients:
 - (1) The defendant caused the death of the deceased;
 - (2) By driving a motor vehicle on the road recklessly;

8. Although there is no definition of the term “*reckless driving*” in the Road Traffic (Control) Act, it has been said to be something more serious than careless driving and involves doing something a driver knows is a risk such as driving too fast in the circumstances. Similarly is the statement in the leading English case of R v Lawrence [1981] 1ALL ER 974 where the Court said:

*“... what is meant by reckless driving is that [the Court] must be satisfied of two things: **first**, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road ...; and **second**, that in driving in that manner the defendant did so without having giving any thought to the possibility of there being any such risk ...”*

(my highlighting)

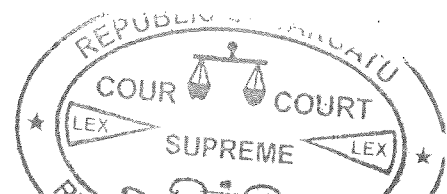
9. In the present case, given the prima facie nature of the eye-witnesses’ testimony and the accident scene evidence, this Court dismissed a “*no case*” submission. The case is now for verdict on the same evidence in view of the election of the defendant to remain silent and not to call any defence witnesses.



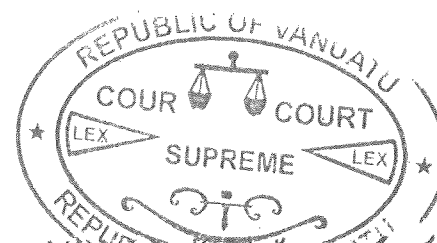
10. In considering its verdict on the charge of Reckless Driving this Court has also considered Section 16D of the Road Traffic (Control) Act which provides:

"A driver in a roundabout must keep any traffic island or other structure that is located at or near the centre of the roundabout on the driver's left hand side".

11. In the present case the prosecution's case of "*reckless driving*" is based on the eye-witness testimony of Ms Marie Massing and the evidence of Cpl James Bila the investigating officer who took measurements, drew a rough sketch plan of the scene and also took photographs at the scene on the night in question.
12. The prosecution's case is that immediately before the accident, the defendant was illegally driving her bus on the Tagabe roundabout on its incorrect side *ie.* with a traffic island on the defendant driver's right hand side instead of it being on her left hand side. The defendant was also driving at an unsafe speed as evidenced by the burst tyre and dented rim, and was not keeping a proper lookout for other road users who might be lawfully using the roundabout at the time when the defendant's bus entered it from the Mele/Blacksands approach.
13. Marie Massing the prosecution's preferred eye-witnes described in chief that she was standing at the side of Tagabe roundabout (marked with pink "X" on a sketch plan) when she saw a bus coming from Mele/Blacksands and go straight across the roundabout heading towards the airport and it struck a man and he fell on the side of the road. The bus then swung around, climbed onto the kerb and broke its tyre. The bus was facing towards the road leading back to town. It was a white coloured bus and she saw the defendant inside the bus. She said nothing about seeing a broken wind screen.
14. In cross examination she was shown a coloured A4 size photograph [Exhibit D(4)] on which she marked the spot "X" from which she says she observed the collision. This latter "X" is almost directly opposite to and, some considerable distance away from the earlier spot she had marked on the sketch plan in chief. That error is explained however by the witness' obvious unfamiliarity with the layout of the rough sketch plan of the scene and her location and orientation within it.
15. In cross-examination Marie Massing maintained her evidence that she saw the bus come from Blacksands direction and headed straight for the airport she saw a boy crossing the road and the collision with the boy and the climbing of the bus onto the kerb occurred on the same small triangular island heading from Mele/Blacksands and not at the big central round island in the middle of the roundabout. She agreed there was no light at the Tagabe roundabout on the night. She was not shown nor asked to identify the boy in any of the photos.

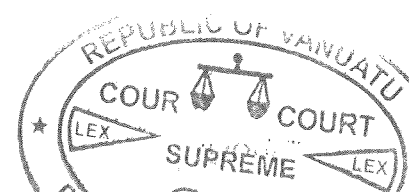


16. She was not asked the distance from the point "X" where she was standing and the place where the collision allegedly occurred nor was she asked as to what became of the boy who was struck by the bus. Although in re-examination she said she noted the bus registration number at the time and gave it to the police who attended at the scene, she was not asked what the number was or the identity of the police officer to whom she had given the number. She saw the boy in the buses' headlight beam.
17. She was not asked what the boy was wearing at the time of the collision or whether she had seen items of clothing at the scene of the collision. She did not assist the officer who drew the rough sketch plan of the scene. She did not mention or describe seeing any damage to the bus.
18. Cpl James Bila was the investigating officer but he was not the first officer at the scene. Nevertheless he secured the scene, took measurements and noted items on the road. He drew a rough sketch plan of the scene on which he marked the location of various items of clothing and vehicle debris noted on the road and the "*point of impact*" where a slipper was found on the road.
19. As to who the hat or slipper belonged to? Cpl Bila was not asked nor was he able to answer how the deceased's body came to be on the roadside grass verge where he first saw him. He agreed in cross examination that the deceased's body had been turned by an unknown officer at the scene. Although he did not take any photos of parts missing from the bus, he was adamant that the vehicle debris he noted on the road came from the defendant's bus when it collided with the deceased (I disbelieve this unfounded assertion). I note the deceased suffered no open wounds from having come into contact with the front panel and windscreen of the bus. Cpl Bila disagreed with defence counsel's suggestion that the deceased's injuries may not have all been caused by the defendant's bus.
20. In this latter regard the deceased's Death Certificates discloses the causes of death as: "... *Poly Trauma, severe head injury and open fracture of right leg*". In particular, the head injury was: "... *concussion and diffuse axonal injury-progressive*". No upper body or external facial or head injuries were noted on the deceased's body. In light of the injuries and Doctor Samuel Kemuel's professional opinion, I too, reject the defence suggestion of a possible alternative cause of the deceased's injuries and death as "*fanciful*". In my view the absence of open external head or facial injuries is due to the fact that the collision was a glancing side-on collision while the deceased was moving.
21. Likewise no effort was made by the prosecutor or the investigating officer to produce some evidence identifying the deceased's slippers and hat allegedly found on the road at the scene of the accident. Merely hamming them as



belonging to the deceased in a rough sketch plan is not evidence of actual ownership of the items.

22. Having considered the rough sketch plan [Exhibit P(2)(A)] and the prosecution's nine (9) black and white photo sheets [Exhibit P(2)(C)], I can say that I found them of little assistance in understanding the prosecution's case.
23. The sketch plan does not easily show that it is part of a roundabout and although it has a fixed reference electric power pole, it fails to clearly show the location of the deceased's body on the plan at the letter "E". The distance between "E" and the "*point of impact*" at letter "B" is not measured nor is there any explanation as to how the deceased's body had moved from the "*point of impact*". Neither the hat nor the slipper found on the road at the accident scene has been positively identified as belonging to the deceased. This is a fatal flaw in the prosecution's chain of evidence collected from the accident scene.
24. In similar vein the prosecution's black and white photos did not clearly show the Tagabe roundabout and all close-ups of items of vehicle debris and clothing found on the road were quite unhelpful and were visually, unrelated in any way to the "*point of impact*" nor did the photos show the triangular island where it is alleged the collision/impact occurred on the defendant's incorrect side. Likewise the close-ups of the deceased's body beside an iron pipe bears no reference to where on the road or roundabout it is located or to the rough sketch plan of the scene or the estimated "*point of impact*".
25. For completeness, prosecuting counsel when asked, frankly admitted that she had "*overlooked*" to produce the defendant's police caution statement which contained numerous admissions that could have helped the prosecution's case. In the result none of that is available for this Court to consider especially as counsel had accepted both in the no-case submission and in her closing address that impairment of the defendant's driving ability as a result of alcohol consumption, was not part of its case.
26. Finally, I come to the evidence of the other eye-witness called by the prosecution, Ms Caroline Malapa and I note at the outset that there never was an application to declare her hostile, yet, in her closing address the prosecutor quite unfairly asked the Court to disbelieve her evidence because she was not telling the truth. About what is unclear, but I disagree in any event.
27. In this latter regard Ms Malapa described how after dropping her small brother and his fiancé at Blacksands without incident, the defendant then drove her bus to go to her home at Anamburu and on the way they arrived at the Tagabe roundabout where the bus followed its correct route on the right hand side with the triangular island on the buses' left hand side. She said she saw a man suddenly appear in the buse's headlights on the right hand side and she called



out "*Harriet wan man*" and the defendant immediately swerved to avoid the man, and the bus climbed the kerb in the process and burst its right front tyre and its front wind screen also broke.

28. Ms Malapa was seated on the front passenger seat beside the defendant driver and would have had possibly the best view of the accident than any other eye-witness. Having said that she did not clearly say in her evidence that the bus collided with the man as was the prosecution's case.
29. Prosecuting counsel accepts that she could have sought a declaration of hostility on the basis of Ms Malapa's police statement which records her saying: "*After Harriet itanem blong avoidem man be man ia ibang smol long bus*" (trans: "*After (the defendant) swerved to avoid the man he still collided slightly with the bus*"). Counsel did not seek to cross-examine Ms Malapa and even accepting that she is a friend of the defendant, I decline counsel's invitation to disbelieve her evidence.
30. Indeed after careful consideration of all of the evidence I am finally left with the real and reasonable doubt about the prosecution's case in particular, about where the accident occurred on the Tagabe roundabout and what it is about the defendant's driving at the time that the prosecution says was "*reckless*".
31. Needless to say the occurrence of a death in a road accident is a tragic event but, on its own, it is not enough to establish that the death was caused by the "*reckless driving*" of the driver concerned. Much more is required to be established about the nature and manner of the defendant's driving before the court can be satisfied beyond a reasonable doubt of the defendant's guilt.
32. Accordingly the defendant must be given the benefit of the doubt in this case and it is the court's duty to find you Harriet Yatipu not guilty of the offences which you have been charged with namely, Causing Death by Reckless Driving and Causing Unintentional Harm Causing Death as charged in the information.
33. Harriet Yatipu, you are free to go.

DATED at Port Vila, this 8th day of February, 2019.

BY THE COURT



D. V. FATIAKI
Judge.

