

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** A. Fernando (J.A), M. Twomey (J.A), J. Msoffe (J.A)]

## **Criminal Appeal SCA22/2014**

**(Appeal from Supreme Court Decision CR 10/2008)**

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Mervin Sedgwick

Appellant

Versus

The Republic

Respondent

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Heard: 07 April 2017

Counsel: Mr. A. Derjacques for the Appellant

Mr. Chinnasamy Jayaraj for the Respondent

Delivered: 21 April 2017

### **REASONS FOR JUDGMENT**

A. Fernando (J.A)

1. The Appellant had appealed against his conviction by the Supreme Court for causing death by dangerous driving contrary to section 25 of the Road Transport Act (Cap 206) and the sentence of 18 months imprisonment and the suspension of his driving license for a period of two years imposed on him.
2. The charge against the Appellant read as follows:

#### Statement of Offence

Causing death by dangerous driving contrary to section 25 of the Road Transport Act (Cap 206). (emphasis added by us)

#### Particulars of Offence

Mervin Sedgwick of Majoie, Mahe on the 11<sup>th</sup> October 2003 at Roche Caiman, Mahe caused the death of Herby Fideria by driving motor vehicle S 13941 on the road, in a manner which is dangerous to the public. (emphasis added by us)

What is noted by us, is that the Appellant had been charged for dangerous driving and not

driving “recklessly or at a speed”.

3. Section 25 of the Road Transport Act reads as follows:

“A person who causes the death of another person by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction to imprisonment for a term not exceeding five years.”

4. The Appellant had raised the following grounds of appeal against his conviction:

1. “The Honourable Judge erred in law and principle in failing to determine that the Republic of Seychelles had failed to prove the criminal charge against the Appellant, beyond a reasonable doubt.
2. The Honourable Judge erred in law in failing to appreciate the entire circumstances, including;
  - a) That the deceased was not walking along the road but was walking in the middle of the road, in the Appellant’s lane, towards the Appellant’s vehicle.
  - b) That the speed was well below the speed limit which is 80km per hour, and the Appellant was driving lawfully, well below the speed limit.
  - c) That the Appellant had already overtaken the second vehicle and was in his own lane when suddenly the deceased appeared right before his vehicle, in the dark, in the middle of the night.
  - d) That it was dark, at night, with no street lights in the vicinity.
  - e) That the second driver could himself not stop his own vehicle and collided with the back of the Appellants vehicle when the Appellant suddenly stopped.
  - f) That the mental state of the deceased is important as it shows his erratic behaviour and obviously this was a “one off” and bizarre accident that could have occurred to anyone, any prudent and reasonable driver.

- g) That the Appellant did say that he had hit someone, when questioned by the second driver and that he tried but could not avoid him, which is part of the *res gestae*.
  - h) That there was no zebra crossing at that point of the road it was the highway.
5. The Appellant has raised the following grounds of appeal against the sentence imposed on him:
- 1. “The sentence imposed of 2 years (*error – it was 18 months imprisonment*) of imprisonment was harsh and excessive in all the circumstances, including;
    - a) The age of the Appellant at 31 years at the time of the incident.
    - b) That the Appellant was sober and not intoxicated as is frequently the case in other similar criminal actions.
    - c) The contributory negligence of the deceased in walking in the middle of the Appellant’s lane, on the highway, in the middle of the night, in the dark. There must be an apportionment of blame to the deceased.
    - d) The Appellant was recently married, and his wife, present in Court, visibly pregnant. He was a first offender. He was starting out in life.
  - 2. The Learned Judge erred in law in failing to apply a non-custodial sentence in all the circumstances of the case.” (verbatim)
6. By way of relief he had sought from this Court an order quashing the conviction and discharging the Appellant and for setting aside of the sentence imposed on him.
7. At the very outset we wish to state that this had been an accident that had taken place nearly 14 years ago and we are surprised why it had taken such a long time to conclude and dispose of this case before the courts. We note from certain comments recorded on the appeal brief that the file had reached the Attorney General’s Department from the Police Department two years after the accident and had been sitting with one State Counsel for three years before the charges came to be filed by another State Counsel. Thereafter it had taken another 6 years to conclude this case before the Supreme Court. Undoubtedly, the way this case has proceeded has resulted in a violation of the

Appellant's right to a fair hearing within a reasonable time enshrined and entrenched in the Seychellois Charter of Fundamental Human Rights and Freedoms and a travesty of justice. In view of this we decided to deliver judgment soon after the conclusion of the hearing of this appeal on the 7<sup>th</sup> of April 2017, quashing the conviction of the Appellant and acquitting him forthwith. To delay delivering judgment in this case until the conclusion of all the appeals taken up for hearing during this April Court of Appeal session, by another 14 days, as we would have normally done, we felt was unfair. We set out below the reasons for our judgment.

8. There had been only one witness who was on the road when the accident occurred according to the prosecution case and he too had not witnessed how the accident really occurred since he was driving his car behind the jeep, the Appellant had been driving. He is PW 5 K.V. Cupidon, a taxi driver by profession. The accident had occurred around 11.45 p m on the night of the 11<sup>th</sup> of October 2003 at Roche Caiman in the vicinity between the Palais de sport and the Roche Caiman playing field and opposite the Unity Stadium, in a not well lit stretch of the road. According to PW 1 Sub Inspector James Tirant, there were no electricity bulbs or lights for about 100 meters along that stretch of the road. PW 5 had been driving from Victoria to his home at Pointe Larue at the time of the accident. His evidence had been to the effect that when he was driving at the roundabout, he had seen the Appellant's jeep overtaking him. There was no evidence of any traffic coming from the opposite direction or of movement of people at this time. Thereafter Cupidon had continued in his way and the Appellant had got on to the correct lane, namely to the left side of the road having overtaken him. Prior to the Appellant overtaking him he had seen another car going ahead of him. On seeing the break lights in the Appellant's jeep in front of him, Cupidon had tried to overtake the Appellant's jeep but had collided with the jeep in front, when the jeep tried to move. The very fact that Cupidon himself tried to overtake the Appellant's jeep at this stage shows that the road ahead was clear for overtaking. He had then brought his car to a halt and had gone over to speak to the Appellant. The Appellant had then told him that he had seen someone crossing the road and there was nothing he could do to avoid hitting him, even had he tried and that the accident occurred. Cupidon had then seen a man lying on the road unconscious about 3 meters away from the jeep. The police officer PW 6, W. Victor who arrived soon after at the scene of accident had confirmed the distance the deceased was lying away from the jeep as 2.90 meters. The jeep had been on the left side of the road and the front part of it was damaged. This too had been confirmed by PW 6. As regards the speed he was driving at this time, Cupidon had said he was driving at a speed of about 30-40 kmph and when questioned about the speed at which the Appellant had been driving he had said "He was a bit speedy", but had not mentioned any speed. It must be borne in mind that when one's vehicle is overtaken the driver of the overtaken vehicle would always know that the other driver is driving 'a bit' faster than him. Certainly the evidence on record does not satisfy the element of 'speed' envisaged in section 25 of the

Road Transport Act as referred to at paragraph 3 above. There was no zebra crossing at this place. PW 1 Sub Inspector James Tirant who photographed the scene of the accident had confirmed this. According to police officer PW 6, W.Victor, the body of the deceased was lying “just after the line in the middle of the road”.

9. The Appellant testifying before the Court had said that he had been driving to Katiolo Discotheque with Roddy Marie, a friend of his when the accident took place. According to him he had been driving at a speed of about 37 kilometres and had accelerated to 40 in order to overtake the vehicle going ahead of him. Having overtaken the car he had returned to the correct lane, namely the left side of the road and got back to his normal speed of driving, namely 37-40 km. After he had overtaken the car, he had suddenly seen a man coming towards his jeep on the middle of the left side of the road where he had been driving. The distance between his jeep and the man had been very short. This was 3 or 4 minutes after having overtaken the car. He had then applied the brakes suddenly and tried to swerve the jeep away from the man, on to the right of the road, to avoid hitting the man but his jeep had collided with the man. He had immediately stopped his jeep and disembarked to see what had happened and had seen a fairly aged man on the road. It was the left side in front of the jeep that collided with the man. The bonnet, the bumper and the windscreen of the jeep had got damaged as a result of the impact. PW 5 Cupidon who was driving behind him also could not stop his car and had collided with his jeep from behind. The collision was from the left side of Cupidon’s car. The Appellant’s evidence that he applied the brakes and swerved the jeep to the right to avoid hitting the man stands corroborated by the evidence of PW 5 Cupidon who had said that he saw the brake lights in the jeep in front of him when he had tried to overtake but had collided with the jeep in front, when the jeep tried to move. The damage to PW 5, Cupidon’s car had been on the left side of the front of his car. The Appellant had said that he was not drunk and was very alert while driving. Unfortunately at the time of the trial, which had taken almost 10 years to commence since the accident, Roddy Marie who was in the front passenger seat of the jeep the Appellant was driving, was out of the country and had been unable to attend court.
10. DW 1, Marie Joubert a nurse who had been attached to the psychiatric ward at the Victoria Hospital had said that the deceased was a patient in the acute psychiatric ward who used to be attended to from time to time by her and suffered from hallucinations. DW 2 M. Leonel who is a niece of the deceased and with whom the deceased was staying had said that sometimes they had to lock him up in a room at night as he was in the habit of escaping from the house to go and buy cigarettes and guinness. She had said that the deceased suffered from hallucinations and feared that people were chasing after him.
11. From the testimony of the prosecution and defence witnesses the following uncontroverted facts emerge. The Appellant had been driving his jeep around 11.45 pm

in an area which was not well lit. He had been driving at the normal speed of about 37-40 kmph. He had accelerated and overtaken a car going ahead of him. There had been no oncoming traffic on the road at this time. Having overtaken the said car he had gone on to the correct lane, namely the left side of the road and had been driving for about 3-4 minutes when the deceased had suddenly emerged in the middle of the lane that he was driving. At that time the distance between him and the man had been very short. There was no zebra crossing in the vicinity. He had applied the brakes and tried to swerve the car to his right to avoid knocking him but was unable to avoid hitting the deceased. The deceased had collided with the front of his jeep causing damage to the windscreen, the bonnet and bumper and fallen about 3 meters away and in front of his jeep in the middle of the left lane of the road when proceeding from Victoria to Pointe Larue. Even PW 5 was unable to stop his vehicle and thus collided with the Appellant's jeep as everything happened so suddenly. It is also in evidence that the deceased was a mental patient suffering from hallucinations who feared that people were chasing him. The deceased had been one who had to be locked up in his room for his own safety and to prevent him from escaping unnoticed from the house. The learned Trial Judge had said: "It would have been different if the evidence had shown that the deceased suddenly ran onto the road giving the accused no time to stop....." In the absence of any evidence how the deceased happened to be on the middle of the left lane of the road, we cannot exclude the possibility taking into consideration his mental condition and usual behavior, as testified by DW 1 and DW 2, that the deceased had suddenly come on to the road, whether running or otherwise, without realizing that he was exposing himself and the other road users to danger. Absence of evidence as to how the deceased came to be on the road cannot be taken against the Appellant.

12. It is clear from a reading of the judgment that the learned Trial Judge had, contrary to both the prosecution and defence evidence, a total misconception of the manner the accident had taken place and had got his facts wrong. According to paragraph 6 of the judgment in stating the evidence of PW 5 the learned Trial judge had said that the Appellant while overtaking the car of PW 5, had hit PW 5's car and then knocked down the deceased for he says "The jeep hit against his car and stopped suddenly thereafter in front of his vehicle". He had come to this conclusion partly as a result of being misled by Counsel for the Prosecution, for he states at paragraph 16 of the judgment, while referring to the submissions of Counsel for the Prosecution: "He submitted that the evidence showed that the accused drove his motor vehicle fast and overtook in a manner that was dangerous which caused the accused's vehicle to hit against the vehicle of Kevin Cupidon and hit Herby Fidera causing his death." We find this submission at page 2 of the Written Submissions filed before the Supreme Court by the Republic. Counsel should take great care when submitting on evidence led before the Court. The learned Trial Judge in his reasoning had said: "the evidence in this case shows that the accused was involved in the accident immediately after overtaking the vehicle of Keven Cupidon who

was alarmed by the manner of the accused's driving at the time" and "...it was the accused who was undertaking an overtaking manoeuvre which did not allow him to properly observe the road ahead and which was deemed dangerous by another fellow driver." This is totally contrary to PW 5 Cupidon's evidence which we quote below:

“Q. When he had already and finished overtaking you then he took back the correct lane which is the left side?

A. Yes

Q. You were now both travelling south, which is what we say east which going towards Pointe Larue?

A. Yes

Q. At a given point further down the road you saw a red light?

A. Yes

Q. That car stopped

A. Yes

Q. You tried to stop also?

A. I never say I tried to stop, I put my sign to overtake, immediately the same car who had stopped tried to move, and that's how the accident happen.”(verbatim) (Here as per the recorded proceedings PW 5 is speaking about how his car collided with that of the Appellant's jeep.)

We also find that nowhere in PW 5's evidence do we find PW 5 saying he was alarmed by the manner the Appellant had been driving. Had the learned Trial Judge not had this misconception about the Appellant's jeep colliding with Cupidon's car prior to colliding with the deceased, we are certain that his decision would have been different.

13. Counsel for the Respondent in his Skeleton Heads of arguments had said responding to ground 2(a) of appeal against the conviction: “It is not an issue whether the deceased was walking on the sideline or in the middle of the road. It is an issue whether the Appellant had exercised objective standards of a reasonable driver while on wheels. The evidence shows that the deceased was merely walking in that road upright and not in a unruly manner so as to confuse the Appellant.” (verbatim) We are simply dismayed by this submission. A highway is not a place for people to walk on the middle of the road ‘upright’ or otherwise, and one does not expect any person to walk on the middle of the road especially in an unlit area of the road in the dead of the night. Counsel for the Respondent has misquoted a portion from page 115 of the Brief in order to bolster his submission that “the Appellant had known that there was a man in the middle of the road”.

We quote here the entirety of the recorded proceedings of page 115 which is part of the cross examination by Counsel for the Respondent:

“Q. After 5 minutes you completed the overtaking?

A. Yes

Q. And you got to the left again?

A. Yes

Q. You continued left?

A. Yes

Q. After this overtaking after 5 minutes of continuous overtaking when did you see this person?

A. 3 or 4 minutes driving

Q. After you overtaking you continued to go?

A. Yes I returned in my lane ....."

The proceedings therefore bear out that the Appellant did not hit the deceased soon after he overtook the car driven by Cupidon. We warn Counsel to be careful when quoting from the proceedings.

14. Counsel for the Respondent in his Skeleton Heads of arguments had said responding to ground 2(d) of appeal against the conviction: "The Respondent respectfully submits that the Appellant cannot take the factors of darkness, night and no street lights for his defence since they are factors that should have been kept in mind by the appellant during driving on that night. It amounts to admission that he did not have proper light put on him for safe driving. The evidence shows that he was driving in low beam..." The complaint been made by the Republic is not that he was driving without his lights, but without his head lights on. The submission by Counsel for the Respondent in response to ground 2(d) of appeal against the conviction has been made without considering the wording in section 25 of the Road Transport Act which states that driving of a motor vehicle dangerous to the public has to be assessed "having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road".
15. Counsel for the Respondent in his Skeleton Heads of arguments had said responding to ground 2(g) of appeal against the conviction: "In fact there is such strong evidence that the appellant was the one who hit the deceased....There is no issue of res gestae here". We are of the view that since this was the first statement made by the Appellant soon after the accident and as an immediate and spontaneous reaction to the accident, that is certainly evidence of res gestae admissible and favourable to the Appellant. The Appellant's statement to Cupidon soon after the accident that he had seen someone crossing the road and there was nothing he could do to avoid hitting him, even had he tried and that the accident occurred, is evidence of res gestae.
16. Since there isn't much jurisprudence in this jurisdiction on what is meant by 'dangerous driving' we have decided to elaborate on it. In our view section 25 of the Road Transport Act postulates an objective test as had been stated in **DPP V Milton 92006) R.T.C. 21, DC**. Thus proof of guilt depends on an objective standard of driving, namely what would have been obvious to an ordinary competent and careful driver. The standard of driving must fall 'far below' that expected of an ordinary competent and careful driver and it must be obvious to an ordinary 'competent and careful' driver that the manner of driving



is dangerous. The special skill of a driver is an irrelevant circumstance when considering whether the driving is dangerous, for taking that into consideration would be to substitute the standard of the driver with special skills for that of the ordinary, competent and careful driver.

17. 'Danger' therein, refers to the danger of injury to a person or serious damage to property and taking into consideration the duty cast under section 206 of the Penal Code on all users of vehicles to take reasonable care and reasonable precautions to avoid any danger while in control of the vehicle. The following examples of driving may support an allegation of dangerous driving: racing or competitive driving against another vehicle – 'showing off'; speed, which is highly inappropriate for the prevailing road or traffic conditions like driving head-on when there is on-coming traffic; aggressive driving, such as sudden lane changes, cutting into or overtaking a line of vehicles; driving much too close to the vehicle in front, unless in a traffic jam; deliberate disregard of traffic lights and other road signs; disregard of warnings from fellow passengers; driving with a load that presents a danger to other road users; where the driver is suffering from impaired ability such as having an arm or leg in plaster, or impaired eyesight; or is known to be an epileptic who is not on medication; driving when too tired to stay awake; driving while in an intoxicated state, including legal medication known to cause drowsiness; driving while using a mobile phone, without an ear piece, whether as a phone or to compose or read text messages. In **A-G's Ref (No 17 of 2009) (Curtis) (2009) EWCA Crim 1003**, the Court of Appeal confirmed that there is never any excuse for texting or using a hand-held mobile phone while driving.
18. Driving with actual knowledge of a dangerous defect on a vehicle is another example. If the state of the vehicle is not such as to be obviously dangerous to a competent and careful driver and the driver has no particular knowledge, then no actus reus can be said to be committed. In **R V Marchant (2004) 1 WLR 442 CA** it had been held "*Particular care should be taken in deciding whether it is appropriate to institute a prosecution for dangerous driving based on the "current state" of the vehicle where the alleged danger stems purely from the vehicle's inherent design, rather than from lack of maintenance or positive alteration; the term "current state" implies a state different from what might be termed the "original" or "manufactured state"*". However if the manufacturer had recalled the cars due to a manufacturing defect as what happened quite recently with Volkswagen when they recalled Volkswagen and Audi cars which they manufacture due to serious vehicle defects that pose risks to consumer safety and the accused had been aware of it, he could be charged for dangerous driving. What has been itemised above as instances of dangerous driving are indicative only and not conclusive as to the type of behaviour which might constitute dangerous driving.

19. At paragraph 2 above we have noted that the Appellant had been charged for dangerous driving and not driving “recklessly or at a speed”. In this case the Appellant had been charged for ‘dangerous driving’, although both offences attract the same penalty when death is caused. **Smith and Hogan’s Criminal Law 13<sup>th</sup> edition** it is stated at 33.2.2.1: *“Careless driving may well create a risk of injury to the person or of serious damage to property but careless driving which does not fall ‘far below’ what would be expected of a competent driver does not suffice. Conversely, driving might fall far below the standard of the competent driver and yet not create a risk of injury to the person nor of serious damage to property. Moreover the danger of the relevant harm must be ‘obvious’ to the competent and careful driver and this requires more than that the danger would have been foreseeable to the competent and careful driver; the situation must be one where the competent and careful driver would say that the danger was plain for all to see”*. In **Conteh (2004) RTR 1 and Few 92005) EWCA Crim 728** it had been held: *“It is nevertheless, intended to be a high threshold, and not one applying to every slip”*. In **Taylor (2004) EWCA Crim 213** it was held: *“It is not every breach of the Highway Code will be sufficient to establish the offence of dangerous driving, although it will be a guide as to the standard to be expected of the careful and competent driver”*. In this case we are of the view that the evidence does not disclose that the Appellant was even driving “carelessly”.
20. The simple issue that had to be determined on this appeal was can it be said that on the evidence summarized at paragraph 11 above and the law discussed at paragraphs 16 and 17 above, that the Appellant had been “driving a motor vehicle on a road in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which was actually at the time, or which might reasonably be expected to be, on the road”? We have no hesitation in saying ‘No’. We do not have to place reliance on authorities to answer this issue. Any reasonable driver endowed with ordinary road sense will agree that this, as submitted by Counsel for the Appellant, was an unfortunate but an inevitable accident. We have referred to some of the instances of ‘dangerous driving’ at paragraph 16 above and none of those apply to this case. The accident had taken place late at night in a not well lit part of the road, when there was hardly any traffic and not much traffic could have been reasonably expected to be on the road and also at a time one does not expect pedestrians to be walking on the middle of the road. We are not oblivious to the fact that opinions of judges may, and no doubt will, differ on how far below that expected of an ordinary competent and careful driver is ‘far below’; and that an appellate court should not normally interfere with what are said to be decisions ‘of fact and degree’. But in this case we are convinced that the decision of the learned Trial Judge is patently unreasonable taking into consideration the facts of this case and more so because he had

been acting under a misapprehension as to the manner the accident had taken place, as stated at paragraph 12 above.

21. We hold with the Appellant on all his grounds of appeal against conviction. It was for this reason that we had no hesitation to quash the conviction and sentence of the Appellant and acquit him soon after the hearing of the appeal.

A.Fernando (J.A)

**I concur:.** .....

M. Twomey (J.A)

**I concur:.** .....

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017