

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC

VS

HANSEN PERHERLMER

Criminal side no: 48 of 2010

Mr. Chinnasamy for the Republic

Mr. Chetty for the Accused

JUDGMENT

Burhan J.

The accused Mr. Hansen Perhelmer stands charged as follows:-

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

The particulars of the offence are that Hansen Perhelmer of Denmark, on the 26th July 2010 at Au Cap, Mahe caused the death of Azim Kasamun by driving vehicle S19496 on the road, in a manner which was dangerous to the public.

The accused pleaded not guilty to the said charge and trial against the accused commenced on the 5th of August 2010.

It is pertinent at the very outset to note, the following facts are admitted by both parties in their evidence.

- a) The accused Mr Perhelmer was driving a metallic silver grey KIA car bearing registration no S19496 (hereinafter referred to as the accused's vehicle).
- b) Mr Azim Kasamun (who died as a result of the collision) was driving a metallic green Sirion car bearing registration no S19456 (hereinafter referred to as the deceased's vehicle) from the direction of Anse Royale to Victoria town.
- c) A collision between the aforementioned two vehicles occurred at Au Cap, at the turn to Montagne Posee road on the 26th day of July 2010.

Witness for the prosecution, Pauline Freminot testified in court as an eyewitness to the said incident. Witness broke down in tears on several occasions and appeared distraught at being asked to recollect the events again and had to be assisted by court and both counsel. Witness testified to the fact that on the 26th of July 2010 around 2.45 pm, she was driving her vehicle from Victoria town in the direction of Anse Royale and had been following the accused's vehicle which was proceeding in the same direction. She stated the accused's vehicle was travelling very slowly and at the Montagne Posee junction, had put on its signal and crossed over the white line "a little", when the deceased's vehicle coming at high speed from the Anse Royale direction collided with it. The accused's vehicle after impact had gone to the left side of the road while the deceased's vehicle had gone up in the air and had hit the ground near the pavement and on landing two or three wheels had come off. She stated the driver of the Sireon car (deceased's vehicle) was out of the car and on the ground. After the people had removed the car she realized he was dead.

Another eye witness to the incident Marie Therese Pothin corroborated most of these facts. She too stated that the deceased's vehicle was coming fast from the direction of Anse Royale and the vehicle driven by the

accused had crossed on to the other side of the road and both vehicles hit each other and the deceased's vehicle had turned on its side . She further stated the driver of the Sireon car (deceased's vehicle) had horned prior to impact and that the accused had turned his vehicle right in front of it. The other eye witness Jovette Pothin too corroborated these facts and stated that only part of a tyre of the accused's vehicle crossed over the white line side. (Vide pg 8 of the proceedings of 10th August 2010 at 9am). He further mentioned that the point of impact on the car driven by the accused was on the front light on the driver's side and the point of impact of the deceased's vehicle too was the front light closer to the driver's side. He too corroborated the fact that he heard the horn of the deceased's vehicle and the fact that after the accident, the deceased's vehicle was on its side with the passenger side down and the car was on top of the driver (deceased).

Dr. Marija Zlatkovic stated she conducted the postmortem on the deceased Mr. Azim Kasamun 35 years old and described in detail the injuries sustained by him. She stated that the injuries were consistent with a road traffic accident and that death was due to skull fractures and hemorrhage of the brain and cerebellum and subdural heamotoma. The Post Mortem report was marked as P1. Dr Idris Agbogun was also called to give evidence and stated the deceased was in a deep coma at the time he was brought in which was the deepest unconscious state on the "Coma Scale" due to the head injury. He explained that when he stated the patient was in a deep coma on that scale it meant the patient was dead. The next witness Jude Bistoquet, an officer attached to the Scientific Support and Crime Record Bureau at Mont Fleuri, produced the photographs taken at the scene marked P3 (1 to 25). WPC Louisianne Jean Baptiste attached to the Anse Aux Pins police station, confirmed the fact that when she went to the scene the deceased's vehicle was turned on its side facing Anse Aux Pins and the vehicle driven by the accused was facing Anse Royale. She stated that the accused had complained of a chest pain and was taken to the clinic by

ambulance. The other officer Mari Anne Souris identified the cars involved in the accident. She too confirmed the fact that the deceased's vehicle was completely damaged in both the front and back and the vehicle driven by the accused damaged only in front.

The other police officer called by the prosecution Brenda Finesse who conducted investigations at the scene of the accident stated that she had gone to the scene on the 26th of July 2010 at 14.30 hrs. When she arrived at the scene, she too had seen the deceased's vehicle lying on its side with the driver's side up facing Anse Aux Pins and the vehicle driven by the accused facing Anse Royale. She had noticed a man (deceased) lying with half his body inside the car and his head lying on the pavement. The accused's vehicle was 1.43 metres from the white middle line. She stated that photograph 1, showed the position of the car driven by the accused when she arrived on the scene but the deceased's vehicle when she arrived had not been in the position shown in the photograph, as it had been moved to remove the deceased and the photograph had been taken thereafter. Witness stated she was unable to determine the place of impact on the sketch plan. Thereafter witness Neil Dominique an examiner of vehicles gave detail evidence in respect of the damage caused to the two vehicles. The prosecution thereafter closed its case.

The accused in defence gave evidence under oath. He mentioned he was from Copenhagen Denmark and that he was head of the music department in a grammar school and that he at present was on holiday in Seychelles. He further stated on the said date, he was driving his vehicle with his wife and had decided to go to Anse La Mouche where he was residing, through the Montagne Posee road. He had driven from town to Anse Aux Pins and further South and come to the junction of the turn to Montagne Posee. On arriving at the junction, he had put on his indicator light and came to a stop at the junction. He had checked his mirrors to see whether there were cars behind him. He had then shifted his eyes to the side window to look at the

opposite side of the road, when a car struck his vehicle with enormous impact. He stated he was completely taken by surprise as 3 to 4 seconds earlier when he had been looking towards Anse Royale, the road had been empty and was in fact wondering where the other car had come from. He stated he was parallel to the white line, opposite the junction facing Anse Royale, at the time the accident occurred. He stated the first thing he did was to ask his wife who was seated next to him whether she was alright. When he got out of the car there were people running. He had seen the other car lying opposite the road on its passenger side and was surprised that there was no driver in the driver's seat. When he looked down he saw a young man caught under the car halfway out of the window. He stated at the time of impact his vehicle was on his side of the road. He had felt an enormous pain in his chest and had sat down by the road. His vehicle was struck on the driver's side in front. He further stated his lane was 1.9 metres wide while the other lane from Anse Royale was 4.1 metres wide. He showed court that there was a sign positioned about 800 metres from the junction coming from Anse Royale, indicating the speed limit as 40 kilometres. Photograph of a signpost was marked as D1 and the photograph depicting the turn and the 2 signs indicating the junction as D2. Thereafter he had been taken to hospital and his statement recorded. He had received a charge from the police. He mentioned in his evidence that he was never informed he was going to be prosecuted.

Under cross examination he stated he was driving around 25 to 30 kilometres per hour that day, as there were lot of curves on the road and people. He had checked his rear mirrors before he was to turn to see whether a car was overtaking him. He admitted the visible distance ahead of him was 125 metres. He insisted he had stopped in the right position as he could see the white line all the way in front of him. He admits he did not see the vehicle the deceased was travelling in and states it had covered the 125 metres in 4 seconds (Vide page 33 of the proceedings of 7th September

2010 1.45 pm). The other witness called by the defence, Steve Marie stated he was a casual labourer and he noticed the accused's vehicle going towards Montagne Possee and the deceased vehicle heading towards town with speed. He further stated the accused's vehicle was not moving at the time the accident occurred. He stated he was about 15 to 20 metres from the vehicle looking towards Victoria side when the vehicles collided (Vide page 5 of the proceedings of 21st September 2010). Thereafter the defence closed its case and both parties tendered written submissions.

In addition to the earlier mentioned admitted facts, when one considers the evidence of the prosecution in this case, it is clear that at the junction to the turn to Montagne Posee at Au Cap, the vehicles collided with each other, the front of the driver's side of the accused vehicle with the front of the driver's side of the deceased's vehicle, which is further borne out by the photographs taken depicting the damage in the cars, a fact admitted by the accused as well. The fact that the accused was driving slowly prior to the accident and that the deceased's vehicle was being driven fast is borne out by the evidence of the prosecution and accused as well.

The point in issue is that while the prosecution witnesses state that a part of the accused's vehicle crossed the centre white line and was on the wrong lane at the time the collision occurred, this fact is denied by the accused who states he was stopped and on the correct lane at the time of the accident. The police in their sketch plan have not been able to determine and mark the point of impact on the sketch plan. Witness Pauline Freminot for the prosecution, stated that only "a little" of the car was over the white line and that the accused was driving his vehicle very slowly and had put on his indicator light to show he was turning onto the Montagne Ponsee road. While witnesses for the prosecution Marie Therese Pothin and Jovette Pothin too stated and corroborated the fact that the accused's vehicle had

crossed the white line. Witness Jovette Pothin specifically states a “tyre” had crossed.

The accused in evidence took up the position that he had not crossed the white line at the time of the accident. He admits he stopped his vehicle with the intention of turning to Montagne Posee but before he could turn the deceased vehicle crashed onto his vehicle. He called witness Steve Marie to corroborate his evidence. When one considers the evidence of his witness Steve Marie, in one instance he states he was facing Victoria side talking to a friend and then states he was facing the road and therefore could see both vehicles coming from both Victoria and Anse Royale side. He states the vehicle came so fast when the impact took place the front wheel came off and fell on its side (Vide pge 12 of the proceedings of 21st September 2010 9am). However the photographs show the front tyres though damaged and broken are under the vehicle as shown in photographs 8 and 14, specially the tyre on the driver’s side where the impact occurred which remains very much fixed to the deceased’s vehicle. He states the accused stopped a distance from the white line and shows a distance of 2 inches. He admits he had not given a statement to the police and had come to court at the request of a lady. Having thus carefully considered the evidence of this defence witness, this court is of the opinion his evidence cannot be accepted.

According to the evidence of the accused himself he admits he was not looking in front of him at the time the deceased vehicle hit his vehicle. In fact he states he did not know from where it came, showing clearly he was not observing the road ahead when he admittedly had a clear view of 125 metres of roadway ahead of him . On his own admission at the time of impact he was concentrating on looking whether vehicles were overtaking him or whether vehicles were coming from the Montagne Posee side and not on the oncoming vehicles. Therefore at the exact time of impact he could not have seen the white line stretching out in front of him. Further

considering that according to the sketch plan taken of the scene and the evidence of the accused himself, it is not plausible that having the full width of his own lane ahead of him clear, which the accused himself states was 4.1 metres wide, the victim would crash onto the accused's vehicle when he was not obstructing or in the lane the deceased's vehicle was travelling. None of the witnesses including the accused has seen the deceased's vehicle out of control just prior to the impact. When one looks at photographs P 4, 14, 15 and 17, it is apparent that the front wheel on the driver's side of the accused vehicle appears turned, while the front wheel of the driver's side of the deceased's vehicle is comparatively straight.

The accused admits he did not see the other vehicle before impact, therefore he cannot say for certain that the deceased had lost control of his vehicle though he attempts to insinuate same. It is unlikely that three prosecution witnesses who had nothing to gain from the accident would testify falsely against the accused that he had crossed the white line when he had not, especially when they say truthfully the deceased's vehicle was been driven fast and the accused had just gone over the white line and the accused was driving very slowly. The fact that he had not travelled a great distance over the white line in the direction of Montagne Posee, is borne out by the fact that the collision impact was in the front part driver's side of the two vehicles and the accused vehicle had after impact ended up in the place shown in photograph 19. Further when one looks at the scattered debris in the photographs almost all the debris seems to be on the lane in which the deceased's vehicle was travelling.

For the aforementioned reasons, I reject the contention of the defence, that the accused was on his correct lane at the time of the accident and proceed to accept the evidence of the witnesses for the prosecution that the accused had driven his vehicle just over the white dividing line, at the time of the accident, in the lane the deceased's vehicle was entitled to travel. I am

satisfied that the prosecution evidence establishes and proves this fact beyond reasonable doubt.

In the case of **The Republic v Raymond Lebon 1980 SLR 1** Seaton CJ held:-

“Regarding the driving of the accused, in my view, the evidence appears to show not so much recklessness - which in the offence of causing death by reckless driving involves foresight of possible consequences and an indifference to risk- but negligence which may be defined as the doing of something which a person of ordinary care and skill under the circumstances would not do, or omitting to do something which a person under the circumstances would do.” The accused in the said case was acquitted of the charge of reckless driving and convicted on the count of negligent driving.

In the case of **R v Marzetti 1970 SLR 20** the accused was charged with manslaughter under section 195 of the Penal Code and dangerous driving under section 18(1) (b) and (2) of the Road Transport Act. Sauzier J held that the degree of negligence required to establish manslaughter, must go beyond a mere matter of compensation between subjects and show disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment and proceeded to find the accused not guilty of manslaughter. He also held that he was not satisfied that it had been proved that the accused was driving at a high and dangerous speed. He thereafter proceeded to consider whether the accused was guilty of negligent driving and stated:-

“The test, which is an objective test, may be stated as follows; Was the accused exercising that degree of care that a reasonable and prudent driver would exercise in the circumstances? If the circumstances show that the

accused's conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved **Simpson v. Peat (1952) 2Q.B. 24.**"

When one considers the facts of this case too, as even the prosecution witnesses do not state that the accused was driving at high speed or in complete disregard to the safety of the users of the roadway and to human life, this court is satisfied that the accused did not drive recklessly or in a manner which was dangerous or could be attributed to dangerous driving. However the fact that he had taken a part of his vehicle at the time of impact over the white dividing line is established beyond reasonable doubt by the evidence of the prosecution eye witnesses to the incident and the surrounding facts. Therefore I am satisfied beyond reasonable doubt that the prosecution has established and proved that the accused failed to exercise the degree of care, a reasonable prudent driver would exercise in these circumstances. On the evidence before court, one cannot come to a finding that the accused conduct was not inconsistent with that of a reasonable prudent driver.

Learned counsel for the accused has highlighted the fact that the victim at the time of the collision was driving fast, not in observance of the road signs and was not wearing his seatbelt. In the case of **Adam v The Republic 1981 SLR 39** it was held that contributory negligence was not a defence in a road accident case. Case law further shows that contributory negligence is a matter to be considered at the time of awarding damages in a civil action.

In the aforementioned **R v Marzetti** (supra) case Sauzier J, acting under section 159 (2) and 162 of the Criminal Procedure Code, proceeded to find the accused guilty of negligent driving contrary to section 18(1) (b) and (2) of the Road Transport Act and acquit him of the charge of manslaughter.

For the aforementioned reasons, as this court is satisfied that the prosecution has established or proved all the ingredients of negligent

driving beyond reasonable doubt, acting under section 156 (2) and in consideration of the provisions contained in section 160 and 161 of the Criminal Procedure Code (Cap 54), this court finds the accused guilty of negligent driving contrary to section 24(1) (b) and (2) of the Road Transport Act (Cap 206) and proceeds to convict him of same.

M. BURHAN

JUDGE

Dated this 26th day of October 2010