IN THE SUPREME COURT OF SEYCHELLES

BERNARD ROBERT TOUSSAINT **Appellant**

VS

THE REPUBLIC **Respondent**

Criminal Appeal Side No. 12 of 2010

JUDGMENT

Burhan J

This is an appeal by the accused appellant (hereinafter referred to as the appellant) against the judgment of the senior magistrate (Mrs. Sammia Govinden) who convicted the appellant on the following counts.

Count 1

Causing death by dangerous driving contrary to and punishable under section 25 of the Road Transport Act Cap 206.

The particulars of the offence when summarised are that the accused Bernard Toussaint while being the driver of motor vehicle namely Terios Jeep registration number S 5688 had on the 31st of October 2006 at Providence Highway caused the

death of Dave Eron Mousbe by driving the said motor vehicle in a manner which was dangerous to the public.

Count 2

Dangerous driving Contrary to Section 24 (1) (b) and punishable under section 24 (2) of the Road Transport Act Cap 2006.

The particulars of the offence when summarized are that Bernard Toussaint had on the 31st of October 2006 at Providence Highway while being the driver of motor vehicle namely Terios Jeep Reg No.S5688, driven the said vehicle in a manner which was dangerous to the public.

Having convicted the accused on both the aforementioned counts the learned senior magistrate proceeded to sentence him as follows;

On count 1 to a term of two years imprisonment which was suspended for a period of three years and also to a fine of SR 50,000/- (fifty thousand Seychelles rupees) out of which an amount of SR 30,000/- (thirty thousand Seychelles rupees) was to be paid to the legal heirs of the deceased.

On count 2 to a term of one years imprisonment which was suspended for a period of three years and a fine of SR 10,000 /- (ten thousand).

The learned senior magistrate made further order suspending the driving licence of the appellant for a period of 1 year.

The appellant being aggrieved by the said conviction proceeded to appeal against the said conviction on the following grounds:

a) That the point of impact shown by the witness for the prosecution PW1 cannot be accepted as he had not identified the point of impact himself but was shown by witnesses and as the drivers had not signed the sketch plan the sketch plan was lacking and could not be accepted by court.

b) The evidence of Vivian Lafontaine that when he saw the lights he swerved to avoid the oncoming car and the evidence of the other prosecution witnesses in respect of same could not be accepted as if that be true the vehicle he was driving, the mini-moke would have been damaged from the middle to the rear and not from the front all the way to the back.

c) The learned senior magistrate failed to consider the fact that 4 people were seated in the back of the mini-moke and there was a likelihood that the deceased was on the edge of the mini-moke and not in the mini-moke as stated by the prosecution witnesses.

d) The learned magistrate failed to consider the fact that they were playing loud music from a portable stereo and therefore the occupants at the back could not hear and were having a good time on their way to town.

e) The nature of the injuries and the fact a piece of jeans was hanging on the head light of the jeep driven by the accused support the contention that the deceased was not on the seat inside the mini-moke but on the side at the edge of the mini-moke.

f) The learned magistrate erred in saying that there was no proof that the occupants were drinking when witness Jude admitted that there was a bottle in the mini-moke.

The facts of the case may be summarised as follows. The appellant had on the 31st day of October 2006 been driving his vehicle a Terrios jeep bearing registration number S 5688 in the direction of Anse Royale, when it had collided with a mini-moke bearing registration number S 6218 being driven by witness Vivian De La Fontaine and was travelling in the opposite direction towards Victoria town. The collision had occurred on the Providance Highway near the Airtel Headquarters and had resulted in the death of one Dave Eron Mousbe who had been seated in the back of the mini-moke behind the driver. The learned senior magistrate relied on the evidence of police officer Elson Marcellin, the evidence of the occupants of the mini-moke and the sketch plan marked and produced as exhibit R1 in coming to her conclusion that vehicle number S 5688 was being driven by the appellant in a manner dangerous to the public at the time of the collision as the evidence clearly indicates the said vehicle was been driven on the wrong lane.

The learned senior magistrate further analysed the injuries of the deceased described in the pathologist's post mortem report admitted as R5 in coming to her conclusion that as a result of the said collision the deceased Dave Evron Mousbe sustained injuries which were fatal in nature. Further the facts of the case reveal that in addition to the deceased the occupants of the mini-moke too sustained injuries while both vehicles were severely damaged as shown in photographs 1to7 admitted through witness Sergeant Veronique Pacou. According to her evidence after impact both vehicles had come to a stop on the mountain side verge of grass as depicted in photographs 2 and 5.

When one considers the submissions of learned counsel for the defence in regard to his first contention (a) that the learned senior magistrate's finding in respect of the point of impact is incorrect, on perusal of the sketch plan produced by the

prosecution marked as document R1, it is clear that all the debris as noted down by an independent witness a police officer is on the lane in which the mini-moke was travelling in the direction of Victoria town. The fact that the drivers failed to sign the sketch is not a ground to completely disregard the said plan. In fact the evidence shows the driver of the mini-moke was injured and taken to hospital and the accused too complained of pain and was taken to hospital subsequently. In the light of this evidence one does not expect the drivers to be present at the time the plan is being drawn and to show the point of impact and sign the said plan on the scene. Even though it was onlookers or witnesses who showed the point of impact the fact that debris was on the said side of the road, clearly indicates the accident occurred on the lane in which the mini-moke was travelling which is further supported by the evidence of eyewitnesses. Therefore I am satisfied that the learned senior magistrate has come to a correct finding in this respect and the contention of learned counsel for the appellant bears no merit.

With regard to the second contention (b) of learned counsel for the defence it is apparent that when one considers the damage to the mini-moke it that the driver had swerved to the left as had the impact been head on, the front drivers side headlight would have been damaged and the damage would have been more frontal in nature and would not have been to the extent shown in photograph 2 and 3 extending right along the driver's side of the vehicle which clearly indicates the mini-moke was being swerved. The fact that the mini-moke ended up on the mountain side edge of the road is also supportive of witness Vivian Lafontaine evidence that he had swerved just before the impact. Therefore learned counsel for the appellant's contention that the evidence of Vivian Lafontaine cannot be accepted is baseless.

On consideration of ground (c) which will be considered with ground (e) mentioned above both relate to the appellant's contention that the deceased was not in the rear seat of the mini-moke but seated on the side at the edge of the mini-moke at the time the accident occurred. The eyewitness accounts indicate that the deceased was seated in the corner of the back seat behind the driver when the accident occurred. As the deceased was the person who was just behind the driver and as the impact was on the driver's side continuing right along to the back of the mini-moke, it is clear the deceased would have been vulnerable and directly exposed to impact from the oncoming jeep. It is clear that the jeep had hit the deceased as learned counsel for the defence admits a part of his blue jeans was entangled on the headlight of the jeep in his submissions and the same is stated by witness Veronique Parcou. Even if the deceased was seated on the side of the mini-moke contributory negligence as held in the case of ***Adam v The Republic 1981 SLR 39*** is not a defence in a criminal case but a matter to be considered when awarding damages in a civil action while in the case of ***The Republic v Hansen Perhelmer CS 48 of 2010*** this court held that contributory negligence though not a defence could be considered as a mitigating circumstance in a criminal case.

The fact that the occupants of the mini-moke were playing music and enjoying the music from a portable stereo and having a good time as set out as ground (d), does not it any way indicate the driver of the mini-moke was negligent in his driving or that the accused was not guilty of dangerous driving. The fact that a bottle of Bacardi was in the mini-moke as set out in ground (f) does not in any way indicate that the driver of the mini-moke had consumed liquor. Therefore the learned senior magistrate cannot be faulted in coming to the conclusion that there was no proof that the occupants were drinking or that the driver of the mini-moke was under the influence of alcohol.

On a perusal of the judgment of the learned senior magistrate this court is satisfied that the learned senior magistrate had correctly addressed her mind to the issues relating to proof of dangerous driving and has come to the correct finding in respect of same. She has also properly analysed the facts and come to proper conclusion that it was the dangerous driving of the accused which resulted in fatal injuries to the deceased. I see no reason to interfere with any of these findings.

For the aforementioned reasons all the grounds of appeal of the appellant bear no merit and stand dismissed. There exists no other grounds of appeal based either on a question of law or fact. Therefore this court proceeds to affirm the convictions and sentence imposed in respect of counts 1 and 2. The accused is given a period of 3 months from the date hereof to pay the said fines.

M. BURHAN

JUDGE

Dated this 26th day of April 2011