

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 23/2013

[2014] SCSC 103

THE REPUBLIC

versus

IAN JOSHUA PORIS

Accused

Heard: 12 May 2014

Counsel: Mr. Kumar, Attorney General for the Republic
Mr. Anthony Juliette for the accused

Delivered: 13 August 2014

JUDGMENT

McKee J

[1] The accused is charged with the following offence:

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

[3] The Particulars of the offence are as follows:

[4] Ian Joshua Poris of Beau Vallon, Mahe on the 23rd September 2012 at Anse aux Pins, Mahe caused the death of another person namely Ms Daniella Fuhrer by driving a motor vehicle on the road at a speed or in a manner which is dangerous to the public.

[5] The accused pleaded not guilty to the charge and the matter proceeded to trial. The Accused was represented by Mr Anthony Juliette.

[6] **EVIDENCE.**

[7] The incident occurred in the early hours of 23rd September 2012 at Anse aux Pins in the area opposite the now closed Reef Hotel. The accused was the driver of a motor vehicle, a car, travelling in a northerly direction towards Victoria. The deceased, Ms Daniella Furher, the girl friend of the accused, was seated in the front passenger seat of the car. On a straight part of the road the car took a right turn, crossed the opposite carriageway, and mounted the verge on the seaside of the road. It struck a wire fence careered on its way on the verge and overturned, finally coming to rest on its roof. The accused remained in the car after it came to rest but the body of Ms Fuhrer was found outside the vehicle. The prosecution called five witnesses and produced documentary evidence, referred to hereafter, including a statement given by the accused, all of which were entered unchallenged into evidence.

[8] The first prosecution witness [PW1] was Detective Sub-inspector, Robin Sublime, a scene of crimes officer and photographer. He arrived at the scene around 3.40am and took photographs. He revisited the scene later that day and took further photographs. During the morning of 25th September he went to the mortuary at Seychelles Hospital and took photographs of the injuries on the deceased. All the photographs were mounted in an album with an accompanying legend. The car was later removed from the scene and PW1 took further photographs of the damage sustained by the car. In evidence special reference was made to two photographs depicting a dead cat in the middle of the road at the scene of the incident. These had not been entered into the album when it was initially compiled. In cross-examination [XXD] PW1 stated that he did not see any skid or brake marks or other marks on the road at the scene.

- [9] PW2 was Woman Police Officer Lance Corporal Marie Anne Souris then attached to Anse aux Pins Police Station. She was one of the first officers to arrive at the scene. She found the body of Ms Fuhrer lying on the ground face upwards outside of the car. She had blood on her face. PW2 detected no movement from Ms Fuhrer. She was subsequently transported to hospital. The accused was also seen by PW2 and he was driven away from the scene. It was the evidence of PW2 that she found the car on the verge on the seaside of the road. It had overturned, was resting on its roof on top of the gutter with the front of the car facing in a northerly direction, ie, toward Victoria. PW2 drew a sketch plan of the locus with measurements and it was admitted into evidence. In XXD PW2 confirmed that there had been no breathalyser test in respect of the accused. She had not seen any tyre marks on the main carriageway but found such marks on the grass verge in the area where the car entered and came to rest. She described the verge as having a gutter running in between the edge of the road and a metal screen boundary fence. Part of the fence with supporting posts had been dislodged and was found lying on the ground. She also confirmed seeing the dead cat lying in the middle of the road at the scene.
- [10] PW3 was Doctor Marije Zlatkovic of the Pathology Department of Seychelles Hospital. She performed the post mortem on the deceased, Ms Daniella Fuhrer. Her formal written report with findings was admitted into evidence. She found the cause of death to be a dissection of the cervical spine. PW3 found that the injuries were consistent with the deceased having been thrown out of a vehicle. There was no XXD of this witness.
- [11] PW4 was Police Sergeant Brian Dogley of the Seychelles Police Force. He was the chief investigating officer in this case. He served a notice of intended prosecution on the accused which was produced. He also produced a vehicle inspection report and a plan of the area prepared by the Government Land Surveyor. All documents were produced by consent. Following his investigations PW4 concluded that there was insufficient evidence to institute a prosecution and advised the office of the Attorney General of his findings. The Attorney General, being dissatisfied with this finding, ordered that further investigation and enquiries be commenced. To this end the services of Dr.BB Arora were obtained. He is PW5. PW4, Sergeant Dogley, advised the court that his investigations

confirmed that the incident took place on a straight stretch of road which is unlit at night. He confirmed the position of the roadside gutter and metal boundary fencing separating the grass verge from the grounds of the Reef hotel. He saw the dead cat lying in the middle of the road. He took a cautioned statement from the accused and in it he recorded that the accused told him that he lost control of his car after the deceased shouted at him to watch out for the cat. She hit his hand and her movement caused him to swerve suddenly to the right and he lost control of the car and the car accelerated on to the grass verge. The cautioned statement was produced to the court. Sergeant Dogley found no tyre marks on the carriageway but there were marks on the roadside verge where the car entered and continued on its track eventually coming to rest in an overturned position. His investigations led him to conclude that the accused and deceased had been in a close personal relationship. He confirmed that there was no breathalyzer test on the accused. It was this officer's opinion that the sudden appearance of the cat on the road caused the accident. The accused took evasive action resulting in the car leaving the road. PW4 was cross-examined at some length. He was the investigating officer. He went to the scene on the night in question. He described the area. The road was bound by the grass verge which ran to a wire fence. A gutter or drain, about two feet in depth, ran down the middle of the verge as shown on the government survey plan. The verge was about five metres wide. He saw the dead cat on the roadway about ten metres from the scene of the accident and ordered that it be photographed. This was done on the night in question. The cat was removed on the morning after the incident. He was told by investigators that the car hit the cat. He considered all the evidence including the cautioned statement of the accused and formed the opinion that there was insufficient evidence to proceed with a prosecution and so advised the Department of the Attorney General. He stated that further representations were made to the Attorney General and the case was reopened. He agreed with a suggestion from Defence Counsel that the Accused acted on the spur of the moment and took avoiding action when he was touched by the deceased. He was asked his opinion on the absence of tyre marks on the road. It was PW4's opinion that any such marks would depend on whether the driver applied brakes and how the car swerved. There were no skid marks. He felt that there was no illumination at this area or roadway. There was no evidence of intoxication. At the end of the day he considered that the accident occurred because of the sudden appearance of the cat on the road. This police

officer was of the opinion that in taking avoiding action the car did “a quarter turn”. I take this to mean a ninety degree turn. He considered that when the car hit the gutter this caused it to overturn.

[12] PW5, the final prosecution witness, was Doctor BB Arora , a forensic expert temporarily attached again to the Scientific Support & Crime Record Bureau of the Seychelles Police Force. He had been employed in this capacity for some time prior but returned to India in May 2011. He was invited back to give his expert opinion as to the cause of this road accident. He held a PhD degree in science and outlined his experience to the court. He was accepted as an expert witness. He had examined the evidence in a large numbers of road and industrial accidents with a view to determining causation and his evidence had been accepted by courts.

[13] Towards the end of 2012 he returned to examine the available evidence in the present case. He worked principally from documents collated by the police and photographs taken. He prepared a report setting out his findings. PW5 produced a detailed Forensic Report setting out the brief facts as he knew them. He told the court that he examined the photographs and other documentary evidence. In the Report he recorded his observations and produced his conclusions as to the cause and reasons for the accident and death of Ms Fuhrer. He gave *viva voce* evidence to the court based on his written report which was formally produced to the court. His opinion was that the car driven by the accused suddenly swerved to the right crossed the opposite carriageway, mounted the grass verge, crossed the gutter and collided with steel fencing. The car then continued on without any diminution in speed in a northerly direction on the verge. It was his opinion that the car glanced against other fencing and trees until the rear left wheel lodged in the concrete gutter causing the car to overturn and come to a halt.

[14] He referred to the photographs of the car. He observed that the front windscreen of laminated glass showed a spider’s web crack pattern and the rear window had been completely dislodged from the body of the car. He drew attention to the fact, as seen in

photographs 15 and 16, where the glass in the window on the left front passenger side of the car was missing. He drew attention to the fact that there was a sizable empty gap left after the front left passenger side window had been dislodged.

- [15] He examined the photographs of the interior of the car. He found evidence of hair, similar to that of the deceased, on the left front door pillar, dashboard, ceiling and floor of the car. He also drew attention to the serious nature of the injuries sustained by the deceased as shown in the relevant photographs.
- [16] He concluded that the car driven by the accused had been travelling at speed on the roadway which speed scarcely diminished as it entered the grass verge area. The car continued its movement until it finally overturned when the body of Ms Fuhrer was ejected out of the left side window space of the car.
- [17] It was the opinion of Doctor Arora that the first collision with the fence did not cause the car to decelerate. He found that the car continued its rapid movement in a northerly direction. The left rear wheel then became entangled in the rain water gutter. This caused the car to overturn and come to a halt. He found that the lack of tyre marks on the roadway indicated that the car crossed the southern carriageway and left the road while travelling at speed. The accused did not have sufficient time to apply the brakes before mounting the verge due to the speed. Dr Arora told the court that he was of the opinion that when the car overturned this caused the left front window to disintegrate thus providing the space for the body of Ms Fuhrer to be ejected from the car. The violent nature of the movements of the car throughout the episode caused the injuries sustained by the deceased. The spinal and head injuries, in his view, pointed to the strong possibility that Ms Fuhrer was not wearing a seat belt at the time of the accident. Dr Arora, having considered all the above factors, estimated that the speed of the car immediately prior to it leaving the road was in the region of 90 to 95 kilometres per hour. He had been advised that the speed limit on this area of road was 65 kilometres per hour.

[18] This expert witness, PW5, was extensively cross-examined by Defence Counsel. PW5 confirmed that his report and evidence was based on the photographs and written reports which are now exhibits in the case, although the two photographs depicting the dead cat on the road were not given to him. The date on the report was 23rd March 2013. He confirmed that the thrust of his report was to provide his opinion as to how the accident occurred and the speed of the car at the time. He explained that his estimate of speed of 90 to 95 kilometres per hour was based on his reconstruction of how the accident occurred and based on the evidence made available to him. Defence Counsel suggested to PW5, who agreed, that the evidence was deficient in certain aspects, for instance, a detailed analysis of the soil on the grass verge and the materials used in the construction of the fencing. PW5 was also cross-examined about his estimation of the speed of the vehicle. He replied that the estimated or mean speed was based on the available evidence. Defence Counsel also sought the views of PW5 on the absence of marks on the road. PW5 considered that if the driver had been travelling at a slower speed he may have had the opportunity to apply the brakes or take avoiding action which would have resulted in less serious consequences. PW5 was extensively questioned as to the progress of the vehicle after it mounted the verge and rebounded after the initial contact with the metal fence. Despite extensive cross-examination and alternative suggestions PW5 maintained that his version was correct. PW5 was of the opinion that, based on the injuries sustained, the deceased had not been wearing her seatbelt. It was the opinion of PW5 that the deceased had been ejected from the car after the left window had disintegrated. Defence Counsel referred to the two photographs depicting the body of the cat on the road and this being the primary cause of the sudden turning movement of the car to its right. PW5 conceded that the presence of the cat could very well have been a factor involved in this accident. PW5 accepted that there was no evidence that alcohol and drugs were a contributing factor in this accident. Finally Defence Counsel submitted that the report was unreliable due to shortage of data available to PW5. PW5 conceded that his report, evidence and conclusions were based only on the evidence which was given to him and further detailed information would have been helpful.

[19] Finally, produced into evidence as P9 was the police statement of PW1, officer Omblime. In it he described his actions on the night in question and how he compiled the

photographic album. In the final paragraph he confirmed that he had photographed the dead cat on the road, which lay some fifty metres from the scene of the accident.

[20] This concluded the evidence for the prosecution. There were no submissions at the end of the prosecution case. I found a case to answer. I explained the election to the accused. The accused elected not to give evidence and he did not call any witnesses.

[21] Both counsel made closing submissions.

[22] **DIRECTIONS.**

[23] I reminded myself that the prosecution brings the case and is required to prove the guilt of the accused beyond reasonable doubt, the accused has nothing to prove. I reminded myself that the accused had the right to remain silent and no inference can be drawn in relation to his election not to give evidence nor call witnesses.

[24] I find that the car registration number S16868 was a motor vehicle in terms of the Road Transport Act [Cap 206].

[25] **EVALUATION OF THE EVIDENCE.**

[26] It is not disputed that in the early hours of 23rd September 2012 the accused was the driver of the car which was involved in this accident.

[27] Admitted into evidence without objection are the sketch or plan drawn by PW2 on the night in question at the scene of the accident, the album of photographs, the notice of intended prosecution, a statement made by PW1, the post mortem report, the vehicle inspection report, an area plan prepared by the Government Land Surveyor, the report from PW5, the written statement of PW1 and the cautioned statement of the accused. I refer to all for their content.

- [28] I look first to the sketch drawn by PW2 after she took measurements. The roadway is 7 metres 55 centimetres wide. I can infer that the breadth of the carriageway leading south is approximately 3.75 metres or slightly over 10 feet in breadth. This is the distance that the car would travel from the north lane and across the south lane of the roadway before it entered on to the grass verge. Point [D] on the police sketch is shown as the first point of impact; this is a metal mesh fence, hence the car crossed over the gutter without any loss of forward velocity before striking the fence which was dislodged from its foundation, the care travelled on before overturning. PW2 measured a distance of 16 metres or some 45 feet from the point of impact with the fence to the rear of the car. Point [E] is where a car mudguard was found. It is between the point of impact and where the car came to rest. I can infer that the mudguard became dislodged from the car after it collided with the fence. Point [A] shows where the deceased was found. There is no measurement to show the distance between the body and the car but from the sketch I find that the body was lying a short distance from the car. I infer from all the evidence that Ms Fuhrer was thrown from the car shortly before it finally came to rest. The deceased's shoe and purse were also located outside of and close to the car.
- [29] The Survey Report prepared by the Government Land Surveyor shows the drain or gutter running along the middle of the grass verge.
- [30] I also refer to the inspection report prepared by the Vehicle Examiner. He refers specifically to six particular areas of damage. The vehicle had damage all around the body. Both front and back windscreens were broken. Both headlights were broken and there was damage to the left rear wheel and rear axle. The photographs also show that the large passenger side window was missing at the time when the police arrived on the scene.
- [31] I refer to the album of photographs.
- [32] Photographs 1-4 show the car in the position where it came to rest and the 'open gutter'.. The car is in an overturned position over the drain or gutter referred to in the survey report. The left rear wheel is shown as 'off the straight'. Photograph 5 shows the

mudguard referred to in the police sketch. Photograph 6 shows the type of fencing and a length of dislodged fencing lying on the ground. The dislodged fencing is also shown in photographs 7-9 taken in daylight. These photographs show the edge of the road, the gutter or drain, the fencing and trees growing on the verge. Photographs 10-12 show that the road was relatively straight up to the point where the car left the carriageway. Photographs 13-21 show the damage to the exterior of the car. There is extensive damage to the front of the vehicle. The car roof over the rear area has been pushed down to the level of the rear headrests. As shown in photographs 15 and 16 the left front passenger side window is missing. The driver's side window on the right is intact. Photographs 22-25 concentrate on the front passenger seat area. Blond hairs are seen on the dashboard and left door pillar. The left front passenger side of the front windscreen shows circular spider web type fractures which would tend to suggest that at some point the head of the deceased may have struck the windscreen. I can also infer from all the findings that the deceased was not wearing a seatbelt. It is worthy of note that the windscreen in front of the driver's position does not show any direct point of impact. The remaining photographs show the extensive injuries sustained by the deceased.

- [33] The post mortem report particularizes these injuries. Following her detailed examination PW3 found the cause of death to be dissection of the cervical spine. I find this to be the cause of death.
- [34] The cautioned statement of the accused was given five days after the incident. There is no challenge to its voluntariness. The Accused stated that he was driving north with his girlfriend sitting beside him. At a particular point on the road he says that his girlfriend spotted a cat running across the road from left to right and hit his left hand in an attempt to alert him to the cat and to try to make him avoid it. This made him swerve to the right and he lost control of the car. He says that he felt the car accelerate and the car collided with some object. He regained his senses after the car came to a halt. Two photographs were taken by PW1 of a cat lying in the centre of the road. In the written statement of PW1 he stated that the cat was about fifty metres from where the car came to rest. PW4 also saw the cat on the road on the night of the accident. He estimated that the cat was some 10 metres from the accident. The two photographs of the cat were taken at night.

[35] FINDINGS.

- [36]** I find that the car registration number S16868 driven by the Accused was travelling on the northern carriageway opposite the old Reef Hotel in the early hours of 23rd September 2012. His girl friend, Ms Daniella Fuhrer, was a passenger in the front passenger seat. She was not wearing her seat belt at the material time. At a particular spot a cat was in the act of crossing the road and was seen by Ms Fuhrer. She touched the left hand of the accused pointing out the cat. As a result the Accused took sudden avoiding action and steered to the right. He did not apply the brakes as the car crossed the southern carriageway and mounted the grass verge on the seaside of the road. I find that the car continued on its way, crossed the gutter and struck the metal fencing with force resulting in the fencing being dislodged from its foundations. I find that the front of the car was badly damaged by this initial impact. I find that the car rebounded from the fencing, displacing its front bumper and continued its movement in a northerly direction on the grass verge brushing against trees and other parts of the fence. During its progress I find that the rear left wheel of the car became entangled in the gutter and combined with its speed at the time caused the car to overturn and come to a complete stop on its roof some 15 metres from its initial point of impact with the fence.
- [37]** I find that the car was extensively damaged as a result of the above. I find that the overall damage occurred during the initial impact with the fencing, when the car continued its progress brushing against trees and fencing culminating in its overturning and its landing with considerable force on its roof before coming to a halt. I find that the movement of the car from its entering on to the grass verge until it came to a halt was at speed. The ongoing violent movement of the car was such that it caused substantial injuries to be sustained by the deceased while she was inside the car.
- [38]** I find it difficult to say for sure at what precise point the left front passenger side window shattered. It may have been as a result of the numerous impacts or, as suggested by PW5, during its final overturning movement when the car landed with force on its roof. While PW3 was of the opinion that the fatal injury sustained by Ms Fuhrer is consistent with her being thrown from a car I find it difficult to make this definitive finding. I find it difficult

to say with certainty which impact or series of impacts caused the dissection of the spine. It may have been when she was being tossed about in the car. It may be that her body struck part of the car when her body was propelled through the window space. It may be that her impact with the ground caused the dissection of her cervical spine. However I find that her body was ejected from the car during the final overturning motion since her body was found lying on the ground close to the final resting point of the car.

[39] I look at the evidence in the round. The car entered on to the grass verge, crossed it and the gutter, struck the wire mesh fence, rebounded from it, careered on for some fifteen metres with such momentum that it finally overturned resting on its roof. The passenger in the car, Ms Fuhrer, albeit without seatbelt, during this progress of the car received severe injuries including the fatal injury and was finally thrown from it. She sustained a dissection of the spine from which she died. I am led to the irresistible conclusion that the car driven by the Accused was travelling at speed when it crossed the southern carriageway and entered the grass verge area. I find that the car careered on at speed after it mounted the verge until it finally overturned. I do not accept, as seems to be suggested by the Accused in his cautioned statement, that up until the cat was seen, he was travelling at an economical speed and that the car only accelerated when he took avoiding action. The southern carriageway was only three to four metres in width. The car would not have accelerated over this short distance to such a speed as to cause such damage to the car and such injuries to Ms Fuhrer. There were no brake marks on the road. The accused had insufficient time to apply his brakes. Consequently I reject the accused's version of events as stated in his cautioned statement. I find that the Accused was driving at speed BEFORE the cat was seen.

[40] There is a discrepancy in the evidence given by PW4 and PW1 as to the location of the cat on the road. Each sighting was during the hours of darkness. I accept that PW4's assessment is the more accurate. If as PW1 suggested the cat was some 50 metres further down the road the accident would not have occurred as it did. Either the Accused, if driving at a lower speed would have had the opportunity to take avoiding action and apply his brakes thus avoiding or minimizing his collision with objects on the grass verge, or if travelling at speed, would have entered the verge area further south from the place the accident occurred.

- [41] I find that but for the actions of Ms Fuhrer when she saw the cat it is unlikely that the Accused would have taken the avoiding action he did. If the cat had not made its way on to the road at the material time the accident would not have occurred. The Accused would simply have continued his journey to Victoria without mishap. Consequently I find that the actions of Ms Fuhrer partially caused the accident to occur. Likewise it is unlikely that she would have sustained the extent of injuries that she did if she had been wearing her seatbelt.
- [42] However it is the accused who stands charged with the current offence. I now look to the culpability of the Accused, if any, arising from the incident.
- [43] I find that if the Accused had been driving at a lower speed prior to the appearance of the cat, in taking avoiding action, he may have been able to apply his brakes and bring the car to a stop on the roadway. Alternatively he may still have come to a halt on the grass verge perhaps colliding with the gutter, a tree or the fence but not with such a great force as to cause the fatal injury to Ms Fuhrer and the substantial damage to the car that did occur.
- [44] PW5 estimated that the speed of the car on the road as it travelled north could have been 90 to 95 kilometres per hour. This is, of course, prior to the sighting of the cat. In my view this is only an estimation and I cannot make a definite finding as to the speed other than to say, that based on the evidence, it was excessive in all the circumstances of this case.
- [45] I am led to the irresistible conclusion from all the evidence that the Accused was driving his car at excessive speed prior to the appearance of the cat on the road. As a result he was unable to properly deal with a sudden emergency situation when it occurred. He was unable to control his car while taking avoiding action due to its speed. He was unable to brake. He swerved to his right but then lost control of the car. The car mounted the verge, had numerous collisions and overturned. Ms Fuhrer was thrown from the car and

received a fatal injury. I find the speed of the car was *a* cause leading to the death of Ms Fuhrer. There is no need for the Prosecution to prove that the driving at speed was a substantial cause or a major cause of the accident. It is sufficient if it is *a* cause. Court of Appeal case *R V Hennigan* [1971] 3 AER 133, Judgment of Lord Parker CJ at page 135].

[46] I am satisfied that the Prosecution has proved each and every ingredient of the offence beyond reasonable doubt and I therefore find the accused guilty and convict him of the charge.

Signed, dated and delivered at Ile du Port on 13 August 2014

C McKee
Judge of the Supreme Court