IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO42/2014

[2016] SCSC 663

THE REPUBLIC

versus

FRED MALBROOK
Accused

Heard:	6, 8, 9 October 2015, 3, 17 February, 20 May 2016
Counsel:	C Jayaraj, Principal State Counsel for the Republic A Amesbury for the accused
Delivered:	1 September 2016

RULING

Dodin J

[1] The accused, Fred Malbrook, stands charged with one count of manslaughter contrary to section 192 and punishable under section 195 of the Penal Code, and one count of causing death by dangerous driving contrary to section 25 of the Road Transport Act.

[2] On the 8th of June, 2014, the accused who is a police officer, in the company of another police officer, Nerrick Delcy, was driving motor vehicle S18085 from Grand Anse to Anse Kerlan. Whilst going past the Cousin Island Office at Amitie, an accident occurred when a young boy, Braynon Reco Esther, crossed the road in the path of the vehicle

being driven by the accused and the boy died. It is not in dispute that Master Esther died as a result of coming into contact with the moving vehicle driven by the accused and that at no time did the vehicle leave the road or its side of the road. The bone of contention is whether the vehicle was being driven on the road at speed or in a manner dangerous to the public having regards to all the circumstances of the case.

[3] Learned counsel for the accused submitted at the close of the case for the prosecution that no offence has been proved by the prosecution and therefore the Court should rule that the accused has no case to answer. The prosecution on the other hand contends that there is enough evidence to show that the accused drove the vehicle at speed and therefore in a dangerous manner taking into account the nature, condition and use of the road as well as the amount of traffic which was or which might reasonably be expected to be on the road.

[4] Learned counsel for the accused submitted that the test laid out in the case of *R v Stivens* for the upholding of a submission of no case to answer has two limbs; firstly: that the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly: where the evidence adduced in support of the prosecution's case has been so discredited as a result of cross-examination, or is so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury might safely convict upon it.

[5] Learned counsel for the accused submitted that on a charge of manslaughter the prosecution must satisfy the Court that the death of another was caused by an "unlawful act or omission" of the accused; so the question is whether or not the death of Braynon Esther the 9 year old was caused by such unlawful act or omission. Hence on the charge of causing death by dangerous driving the prosecution must satisfy the Court based on the test above that the accused was driving dangerously or was driving negligently or did some other negligent act.

[6] Learned counsel concluded that the prosecution has failed to prove that the death of the minor was caused by an unlawful act or omission of the accused or that the accused did drive dangerously or negligently in all the circumstances of the case. He should therefore be acquitted, and the submission of no case to answer must be upheld.

[7] Learned counsel for the prosecution submitted in reply that at this stage the law requires the prosecution to prove that there is sufficient evidence to put the accused on defence. The prosecution is obliged at this stage only to establish that there is a prima facie case against the accused and not to establish proof beyond reasonable doubt.

[8] Learned counsel submitted that the submission of no case to answer would succeed only if the prosecution has not proved an essential element of the offence charged or when the evidence is so discredited by cross examination or unreliable that a reasonable tribunal would not convict safely on it. At this stage it is a question of whether evidence is such that a reasonable Court might convict but not whether the Court would convict or acquit the accused.

[9] Learned counsel submitted that the evidence adduced by the prosecution established that there is sufficient evidence against the accused that he committed the offences of manslaughter due to gross negligence in as much as he omitted his duty to take care of the road user on that day and by driving the vehicle dangerously causing the death of Braynon.

[10] Learned counsel submitted that although the defence repeatedly tried to establish that there was a duty to care for the deceased by the adult family members who accompanied the deceased and that the boy ran into the car thus trying to establish the contributory negligence on the part of the victim, but contributory negligence is not a defence to charge of manslaughter or to the charge of causing death by dangerous driving.

[11] Learned counsel submitted that according to eye witnesses, the accused drove vehicle S18085 speedily, there was another vehicle in front or behind him; he had lights on; yet he failed to see the boy crossing the road and hit the boy with such impact that the boy hit the wind screen and fell on the bonnet and was seen flying by more than one eye witness who corroborated each other. Learned counsel submitted that no reasonable person who is in charge of a motor vehicle and driving on the road can afford to be so grossly negligent that the accused's negligence directly contributed to death of the victim.

[12] Learned counsel hence move the Court to find that the prosecution has established a prima facie case against the accused and that the accused has a case to answer.

[13] The prosecution called 22 witnesses.

[14] Detective Inspector Robin Omblime testified that he was the crime scene forensic expert and that he took several photographs of the crime scene, the vehicle involved, S18085 and the deceased's body before and during the post-mortem.

[15] Marie-Michelle Malbrook, Sylvie Nathalie Malbrook, Mella Esther and Amia Esther all testified that they were with the deceased at the seaside on that day and whilst they were packing up to leave the beach, the deceased crossed the road to the mountain side to pass water. They saw the deceased about to cross the road back to the seaside but did not see the initial impact although they reacted immediately to the noise of the impact to witness the deceased body being hurled through the air from the windscreen of a car and coming to rest on the roadside.

[16] Dorothy Onezime's testimony is consistent with the testimony of Marie-Michelle Malbrook, Sylvie Nathalie Malbrook, Mella Esther and Amia Esther except that she further testified that she actually witnesses the deceased crossing the road and saw when the car hit him throwing him further down the side of the road and maintained that the car was coming at speed.

[17] Gerry Bastienne testified that on that day he was driving from Anse Kerlan to Amitie with a colleague. Along the way he saw a vehicle coming from the other direction. He was travelling at less than 40 kph and the oncoming vehicle was travelling a bit faster. It was a bit dark and both vehicles had their lights on. Whilst approaching the oncoming vehicle, he heard a loud sound of impact and saw something fly past his vehicle landing on the side of the road and he stopped immediately. His colleague said it was a boy. The other vehicle also stopped further down the road and the driver, now identified as the accused got off and spoke to the other persons who were on the seaside of the road. He also got off and observed the scene but did not intervene to do anything.

[18] The other witnesses, Roy Esther, the father of the deceased, was informed of the accident and went to the Baie Ste Anne Hospital where he learnt that his son had died. Robert Esther and Manuella Julie also heard the impact and went to the scene and observed the deceased motionless at the side of the road and saw the accused and the vehicle at the scene but they were not at the scene at the time of the accident.

[19] PC Nerrick Delcy testified that he was a passenger in vehicle S18085 driven by the accused. Arriving near the Cousin Island Office he heard an impact sound and saw the head of a person hit against the front windscreen and that person fell on the road. The accused and the witness got out and saw a little boy. They called for the ambulance and police assistance and they both stayed at the scene until help arrived. He maintained that the accused was driving at a speed of between 40 and 60 kph.

[20] The other police witnesses who testified established that the accused co-operated fully from the time of the accident until completion of the investigation and that test carried out on him showed that he was not under the influence of alcohol at the time.

[21] The accused gave a statement in which he stated that he was travelling at a speed of between 50 and 60 kph when suddenly he saw a boy crossing the road from the mountain side towards the seaside. He swerved to avoid hitting the boy but felt something hit his front windscreen and he immediately stopped and together with PC Delcy they got out to see what had happened. He saw a little boy lying on the side of the road, still breathing but not moving.

[22] Jason Rusteau, a mechanic and manager of the Vehicle Testing Station testified that the tests conducted on the vehicle after the accident showed that the vehicle and its brakes were in good working order except for the damages to the body which are consistent with the impact testified to by the eyewitnesses.

[23] Dr Paresh Bharia testified that according to the post-mortem report, the cause of death of Braynon Esther was multiple injuries namely subdural and subarachnoidal haemorrhage, skull fracture, multiple external injuries and bilateral food bronchi-aspiration due to motor-vehicle accident.

[24] The accused stands charged with one count of manslaughter under section 192 of the Penal Code and one alternative count of causing death by dangerous driving under section 25 of the Road Transport Act.

[25] Section 192 of the Penal Code reads:

> *192. "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "manslaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."*

[26] Section 25 of the Road Transport Act reads:

> *25. "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 5 years."*

[27] The Court must now decide whether on the evidence adduced, the prosecution has established a prima facie case on both or at least one of the charges leveled against the accused. The relevant principles on how to approach a submission of no case to answer has been well laid out in several cases of which the statement of Lord Lane C.J in *R v Galbraith [1981] 1 WLR 1039* is often quoted as herein below:

> *"How then should a judge approach a submission of 'no case'? If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a*

jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

See also the cases of *Green v. R [1972] No 6, R v. Stiven [1971] No 9 and R v. Olsen [1973] No 5*.

[28] Where the Prosecution's evidence fails to address a particular element of the offence at all, then no conviction could possibly be reached and the Court should allow the application of no case to succeed. Where there is some evidence to show that the accused committed or must have committed the offence but for some reason such evidence seems unconvincing, the matter is better left for the end of the trial where the evidence would be weighed and the Court would reach a verdict after assessing the witnesses' credibility together with all available evidence.

[29] In addition to the above, where the evidence available to be considered has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case must also succeed.

[30] In general, to be convicted of vehicular manslaughter in most jurisdictions, the prosecution must prove, beyond a reasonable doubt, that:

- the driver operated a motor vehicle in a reckless or grossly (severely) negligent manner, and
- the driver's conduct caused a fatality.

[31] Reckless or grossly negligent conduct poses a more severe and obvious threat of death than mere carelessness or simple negligence. Recklessness and gross negligence can be shown in a variety of ways, such as driving under the influence of drugs or alcohol or violating certain traffic laws, like speeding, texting while driving, or deliberately running

a red light. The extent of the danger created by the driver's actions will usually determine whether the accused is convicted of vehicular manslaughter or the lesser offence of causing death by dangerous driving. Mere negligence or carelessness would not result in a charge of vehicular manslaughter. For example, suppose a driver causes a fatal accident while going five miles over the posted speed limit on a clear day, even if analysis shows that speed was a factor in the accident, this excess speed is unlikely by itself to support a charge of vehicular manslaughter, although it could be the basis for the lesser offence of causing death by dangerous driving or some other misdemeanor.

[32] In this case, there is no dispute that the deceased died as a result of being in contact with the vehicle driven by the accused and that the impact of the collision between the deceased and the vehicle caused damages to the front and windscreen of the vehicle and propelled the deceased through the air and that his body landed between 18 and 26 meters from the estimated point of impact and that the vehicle came to a stop about 23 meters from the estimated point of impact. There is also no issue with the assertions that the deceased was in the process of crossing the road from the mountain side to the seaside when the accident occurred on the seaside lane of the road. It is also not disputed that the accused at all times was driving on the correct side of the road and also that darkness was falling and hence the lights were on. Test also showed that the accused was not under the influence of alcohol or other substance. There remains only one outstanding issue in contention; speed.

[33] The question that the Court must determine is whether the evidence adduced in relation to the speed of the vehicle was such considering the circumstances and situation on the road at the relevant time would sustain either of the charges brought against the accused.

[34] With regard to the first count of manslaughter, the prosecution must establish by evidence the element of recklessness or gross or severe negligence of the accused which is the cause of the death of Braynon Esther. Considering the evidence adduced, it is obvious that the only available evidence weighing against the accused was that of speed as testified to by PC Nerrick Delcy who gave the speed at between 40 and 50 kph; Gerry Bastienne who testified that the accused's vehicle was travelling a bit fast whilst his

vehicle was travelling at less than 40 kph and from the accused's own statement in which gave his speed as between 50 and 60 kph. Except for Gerry Bastienne who testified that there was a sign indicating that the speed limit was 40 kph, no other evidence was brought to that effect.

[35] Considering the totality of evidence adduced I am satisfied that there is sufficient evidence to establish a prima facie case that the accused was negligent or careless to drive however slightly above the speed limit but such evidence fall short of establishing a prima facie case of gross negligence or severe carelessness or recklessness that is required by law to establish the element of the offence of manslaughter.

[36] Consequently, I find that the prosecution has failed to establish a prima facie case against the accused on the 1st count of manslaughter and I acquit the accused accordingly of that count.

[37] However on the alternative count of causing death by dangerous driving, I am satisfied that the prosecution has brought sufficient evidence to establish a prima facie case of possible negligence or carelessness on the part of the accused. Whether such level of negligence or carelessness is sufficient to secure a conviction for the 2nd count of causing death by dangerous driving is a matter that the Court should determine at the end of the trial.

[38] I therefore find that the accused has a case to answer on the 2nd and alternative count of causing death by dangerous driving.

[39] This submission is therefore partially upheld and the accused is hence called upon to make his defence on the 2nd and alternative count.

Signed, dated and delivered at Ile du Port on 1 September 2016

G Dodin
Judge of the Supreme Court