

**IN THE SUPREME COURT OF SEYCHELLES**

**CriminalSide: CO42/2014**

**[2017] SCSC**

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**THE REPUBLIC**

versus

**FRED MALBROOK**

Accused

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Heard: 6, 8, 9 October 2015, 3, 17 February, 20 May 2016, 24 Feb, 26 March, 4 May, 26 May, 2017

Counsel: C Jayaraj, Principal State Counsel for the Republic  
A Amesbury for the accused

Delivered: 28 July 2017

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**JUDGMENT**

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Dodin J

**[1]** The accused, Fred Malbrook stands charged with one remaining count of causing death by dangerous driving after he was acquitted on a no case to answer to the first count of manslaughter. The remaining count reads thus:

***Count 2. (Alternative to count 1)***

***Statement of offence***

*Causing death by dangerous driving contrary to section 25 of the Road*

*Transport Act.*

***Particulars of offence***

*Fred Malbrook of Bel Ombre, Mahe, on the 8<sup>th</sup> day of June 2014 at Amitie, Praslin, caused the death of another person namely Braynon Reco Esther by driving a motor vehicle with registration number S18085 on the road 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.*

- [2] The evidence was thoroughly analysed in a ruling of this Court on a submission of no case to answer and is reproduced here. On the 8<sup>th</sup> 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] The prosecution called 22 witnesses.
- [4] 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.
- [5] 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.

- [6]** Dorothy Onezime's testimony is consistent with the testimonies 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.
- [7]** 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.
- [8]** 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.
- [9]** 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.
- [10]** 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.

- [11] 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.
- [12] 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.
- [13] 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.
- [14] On the count of manslaughter, this Court ruled that the accused has no case to answer as the evidence adduced was not sufficient to establish the level of negligence required to establish a prima facie case of manslaughter. The accused was acquitted of that count.
- [15] On the alternative count of causing death by dangerous driving, learned counsel submitted that the prosecution has proved all the elements of the offence beyond reasonable doubt as the evidence established that the accused was driving the motor vehicle at speed when the vehicle hit the deceased. Such manner of driving was dangerous to the public and fall far below the standard expected of a competent and careful driver.
- [16] Learned counsel for the accused conceded that an element of speed came out in the evidence but that such speed did not amount to dangerous or negligent driving considering the circumstances of the case.
- [17] It is obvious that both the prosecution and the defence case revolve around the speed of the vehicle as the only element of dangerousness or negligence which can be attributed to the accused. The question is whether speed in the circumstances of this case did in fact

amount to the level of dangerousness or negligence required by law to establish a case of causing death by dangerous driving beyond reasonable doubt.

**[18]** 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.”*

**[19]** Section 206 of the Penal Code makes special provisions for persons in charge of dangerous things which may include a motor vehicle.

*“206. It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”*

**[20]** It is therefore accepted norm that a person in charge of a motor vehicle by driving it owes a duty of care to other road users. However this does not mean that whenever a person comes into contact with a motor vehicle and dies, the driver must automatically be criminally liable. The prosecution must establish beyond reasonable doubt that the degree of negligence or lack of care was so grave that it amounts to criminal act.

**[21]** There is no dispute that the deceased died as a result of coming into 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.

[22] The evidence is also consistent that the vehicle was going between 40 and 60 kph on a straight stretch of road and that there were not many vehicles on the road. In fact only one other vehicle driven by Gerry Bastienne was present on the road going in the opposite direction when the accident occurred.

[23] A person is to be regarded as driving dangerously if

1. the way he/she drives falls far below what would be expected of a competent and careful driver, and it would be obvious to a competent and careful driver that driving in that way would be dangerous; or
2. if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

[24] In the case of *Tirant v. The Republic [1982] SLR 28* the court stated:

*“Negligent driving in criminal law means a non-intentional failure to conform to the conduct of a reasonable driver, endowed with ordinary road sense and in full possession of his faculties.*

*The offence of negligent driving is committed when a driver fails to reach the objective standard of a reasonable man, and does not necessarily involve an enquiry into the responsibility of other users of the highway for causing the accident. A person may be held guilty of negligence although his driving was not the sole cause of the accident.”*

[25] The main prosecution evidence relating to the manner of driving by the accused and the circumstances in which the accident took place was given by Nerrick Delcy, a passenger in the accused's vehicle at the time of the accident. He did not see the deceased crossing the road but he saw the deceased's head hit against the windscreen after he had heard something impact on the vehicle. In re-examination he stated that the boy ran across the road and hit against the vehicle. According to him the speed of the vehicle was about 40 to 50 kph. The prosecution also relied on the written statement of the accused in which he stated that he was travelling at between 50 and 60 kph. The accused also did not see the deceased running across the road until the impact against his vehicle. The other persons who were present were on the other side of the road and although they all said the vehicle

was coming at speed, they did not seem alarmed by the speed of the vehicle and were not even watching the road at the time apart from Dorothy Onezime who actually was looking at the road at the time of impact. However her evidence also did not disclose any concern about the speed of the vehicle but rather at the manner the deceased was crossing the road whilst the vehicle was approaching.

[26] As stated by Livesey Luke CJ in the case of *Maposa V. The State 1990 BLR 573 (HC)* (Botswana)

*“In my opinion a person may drive a vehicle at a speed dangerous to the public and yet not in a manner dangerous to the public and vice versa. Not all speed is dangerous to the public. It depends on all the prevailing circumstances at the material time, including the nature, condition, and use of the road, and the amount of traffic on it.”*

[27] The evidence indicates that the appellant was driving at higher than normal speed but not in a manner dangerous to other users of the road. On the contrary, the evidence revealed that the vehicle was being driven at a speed that was not at all alarming until the deceased dashed into the road when the vehicle was a short distance from him. In other words, driving slightly above the speed limit in itself is not sufficient to establish the criminal standard required to prove beyond reasonable doubt the offence of causing death by dangerous driving because by 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 there was nothing that the prosecution could adduce as evidence to establish the criminal act envisaged by section 25 of the Road Transport Act.

[28] It is obvious from the evidence that there was a straight stretch of road where the speed of the vehicle of the accused was not considered unduly high or alarming and that the road was virtually free of traffic at the time. That the deceased unfortunately ran across the road without considering the oncoming vehicle and that from the angle and speed that the deceased attempted to cross the road he was not seen by the accused or his passenger and that the other witnesses on the other side of the road were unable to warn or stop him from crossing the way he did. There is therefore no basis for convicting the accused of the offence of dangerous driving as I am not satisfied that the accused drove without due care and attention or without reasonable consideration for other road users.

[29] In the circumstances I find that the charge against the accused has not been proved beyond reasonable doubt and I find the accused not guilty of the charge and I acquit him accordingly.

Signed, dated and delivered at Ile du Port on 28 July 2017

G Dodin  
**Judge of the Supreme Court**