

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO81/2013


[2017] SCSC 469

THE REPUBLIC

versus

DAVID LAIMOYE

Accused

Heard: 23 January 2017 and 27 February 2017
Counsel: Mr. Ananth Subramanian, Assistant Principal State Counsel for the
Republic
Mrs. Alexia Amesbury Attorney at Law for the accused
Delivered:  09th
~~12~~ June 2017

JUDGMENT

Burhan J

[1] The accused stands charged according to the amended charge sheet dated 12th February 2016 as follows:

Count 1

Manslaughter Contrary to Section 192 of the Penal Code, punishable under the same

Particulars of offence are that, David Laimoye of Ma Constance, Mahe on the 10th day of October 2013 in the district of Providence, Mahe unlawfully killed Mikel Figaro by an unlawful omission in that he failed to use reasonable care and reasonable precautions in the operation of the crane.

Alternate to Count 1

Count 2

Absence of care and precaution in his duty for taking preservation of life contrary to Section 206 read with 230 of the Penal Code and punishable under Section 230 of the Penal Code.

Particulars of offence are that, David Laimoye of Ma Constance, Mahe on the 10th day of October 2013 in the district of Providence, Mahe while acting as an operator of the crane omitted to take care and proper precaution against any probable danger from a machinery namely a crane which he was solely in charge on the said day and thereby such omission caused harm which resulted in the death of a person namely Mikel Figaro.

- [2] Trial against the accused commenced on the 4th of December 2014 and the prosecution opened its case by calling ASP Yves Leon who stated that he had received training in fingerprinting, photography and scene of crime investigations both abroad and in the Seychelles. He stated that on the 11th of October 2013, he received a call requesting him to proceed to Zone 21 at Point Larue, a place near the airport regarding an incident between a man and a crane. He had met detective Jean Baptiste and SI Rath at the scene and his attention was drawn to a yellow crane and a STAR truck parked on the site. He produced the photographs taken of the scene as P1 (1 to 25). He described the details of the photographs produced which included photographs taken at the scene of the incident and photographs taken at the post mortem.

- [3] Detective Jean Baptiste stated he had gone to the scene of the incident that had taken place at Zone 21 at Pointe Larue, on a call received by him accompanied by Sergeant Dogley and Sergeant Payet. On arriving at the scene Zone 21 which he described was a large reclamation area, he had noticed that a yellow crane and a truck belonging to STAR had crashed together. He identified the truck was S 5337 and the registration number of the crane was S 16723. The accused had identified himself as the person who was operating the crane. They had cordoned off the scene and requested that an officer from the SSCRB (Scientific Support and Crime Record Bureau) and a vehicle examiner be brought on the scene. The accused had stated he had already given a statement to the police and he was not giving any further statements. He had cautioned the accused and informed him of his constitutional rights.
- [4] Corporal Savy stated she had received a call from WPC Hubert and as a result had proceeded to Victoria hospital to examine a man who had been involved in an accident. She was informed he was Mikel Figaro (incorrectly typed as Michael) of Anse Royale and he had a plaster on his hip. Mrs. Bernadette Meriton stated she was working at the Seychelles Licensing Authority and stated that the accused David Lamoye had a driving licence for private vehicles only and not for cranes. She stated that anyone who moved a vehicle needed a licence but was unsure whether a person driving in the garden of one's private home needed a licence.
- [5] Learned counsel for the accused referred to the evidence of Mr. Jason Rusteau in the proceedings of 6th January 2015 being wrongly transcribed and brought it to the notice of court on the 16th of December 2016 and 9th January 2017. Court ordered the proceeding be corrected by the reporter and that learned counsel for the accused be permitted to sit by her side and go through same in order to ensure that the said proceedings were properly typed from the recording (proceedings of 13th February 2017). Thereafter it appears the reporter had done the necessary corrections in the proceedings of 6th January 2015 on the 13th of February 2017 and she has certified same personally. As per the said proceedings, Mr. Marzorchi another witness called by the prosecution stated he was a marine mechanic and his work concerned repair of boats, ships machinery and hiring equipment. He identified the yellow crane in the photographs as belonging to him. He

stated he had hired it out to MPA with and the driver David Lamoye. He further stated the driver the accused had worked for him for a period of 16 years and had never been negligent during this period. He admitted he was present only after the accident had occurred and he was informed of it around 4.00 p.m. on the 10th of October 2013. He had been informed by David Lamoye the accused about the accident. The accused had informed him that he had parked the crane and gone to smoke a cigarette when he had heard screaming and he had come and seen the driver of the truck and the deceased in between the crane and the truck. The accused had told him, he had reversed the crane and helped to look at the person that was on the ground and the ambulance had come and taken the injured person away.

- [6] Under cross examination, witness stated that the hand brake of the crane is a toggle switch. It is similar to a light switch and is switched on or off. He identified from the defence exhibits photograph D1 (2). He stated the hand brake switch was P, the red one on picture number 2. He stated that when it is in brake position, the switch would be up and the position as shown in the picture 3 is the parked position. He stated that if the brake position had not been put, the crane would move depending on the slope it was parked. He admitted he was unable to say whether there was a failure with the braking system. He stated usually when a crane is stopped, the engine is not put off to keep the air in the system full but the toggle is pulled up which is the hand brake. He stated the gear would be kept on neutral. He stated he was unable to state there was any failing within the braking system as he had not checked it.
- [7] Mr. Jason Rusteau, the manager of the vehicle testing station, stated that he was made aware of the accident at Zone 21 on the 11 of October 2013. He had been informed by phone and had proceeded to the site near the airport accompanied by Neil Lasplace and he had met one Inspector Sicobo. He identified the photographs taken by him marked D1 (1 to 3) and stated the 1st photograph is what he took when he arrived at the scene and the 2nd and 3rd photograph is what they took of the brake switch.
- [8] The accused had told him he had taken a call when he had heard somebody shouting and when he turned back, he had seen the crane was rolling and he had rushed to apply the

brakes but it was too late. Mr .Rusteau too stated there was a foot brake and a hand brake. He stated the yellow posts on the crane prevent the weight going on to the tyres when heavy objects are being lifted and spreads the load thereby prevents the weight tilting the vehicle.

- [9] In testing the crane, they had first reversed the crane put the forward gear and accelerated and then applied the foot brakes and the vehicle had stopped. Then they had repeated the procedure and after putting the forward gear and accelerating as the crane was moving they had put the gear to neutral and applied the toggle switch and the crane stopped. In both cases he clarified, the gear had to be put to neutral before either the brake or hand brake was applied otherwise the crane engine would stall. It is clear from his evidence that on several occasions when referring to the tests carried out on the crane, he referred to the crane as the truck.
- [10] The efficiency of the hand brake of the crane he stated was 50 to 60 per cent which would have been sufficient to stop the crane from rolling over considering the gradient of the terrain where the incident occurred. He admitted he could not give a definite reason why the crane had moved and stated it could be possible if there was a backfire as the engine was left running idle but was uncertain. He clarified that had the hand brake been put on the crane would have never moved. He further stated that they did another test, where they left the crane with its engine running for about 5 minutes without applying the hand brake, in the place where it was at the time the incident occurred, to check whether the crane would roll over but it had not.
- [11] The next witness called by the prosecution Steve Mwarua stated he was working as a Supervisor Liquid and Industrial waste at the STAR Seychelles. On the 10th of October 2013, he had been working at Zone 21 and had been driving a truck and identified the truck with a red front and a white back in photographs 2 and 3 as the truck he had used that day. He had been working with Mikel (inadvertently typed as Miguel). He had gone to Zone 21 in the afternoon to pump sewage. He had to do this type of job on an average of five times a day. He had returned a second time to Zone 21 and he had reversed and parked his truck. He identified the position he had parked the truck in photograph 1. At

the time he initially parked the truck, the crane had not arrived. After pumping the sewage they had secured the pipe to the truck as shown in photograph 3. He identified the hose as the black cable going from behind the driver's cabin to the back of the truck. It was Mikel's job to secure the hose on the truck. When he was helping Mikel to secure the hose to the truck, the crane had arrived. The crane that arrived passed the truck turned round and parked in the position shown in photograph 1 but a little bit further back. The crane had been over the truck. He had left Mikel to go and sign the registration book.

[12] Witness identified the place where he had to go to sign the book as shown in the photograph. He suddenly noticed the truck move both directions, it shook, in a side to side direction (Pg 7 & 8 of the proceedings of 17th February 2015). He further stated the wheels did not move but the truck shook. He noticed the top of the crane which was over the truck had moved past the truck. He heard a screaming and had gone around the truck to see what was happening and noticed Mikel had been squeezed between the two transport (Pg 8 of the proceedings of 17th February 2015). The crane had moved from the position it was before. It had come forward closer to his red truck. He showed the place where Mikel had been in photo 3 and described it. He stated he was where the yellow card with a No 1 was. Mikel was still standing but able to move only his shoulders, the head and the arm. Witness had screamed for someone to contact the operator of the crane. The accused had come from behind the crane as fast as possible and while going up to get into the crane had even fallen and then when he got in, he reversed the crane. Witness had noticed Mikel was unable to stand so he had held him and made him lie down. Mikel had stated he had a stomach pain. The ambulance had come. Witness stated he had heard the engine of the crane on before the driver of the crane came. He stated the red brown substance on the photo 7 was what Mikel had thrown up. He stated the ground in that area was uneven but flat. In cross examination he stated the crane was being operated by the accused.

[13] He admitted that he had seen only the truck move and not the crane. Under cross examination he admitted he had stated in his statement he and Mikel had disembarked and pumped the sewage and when they finished, he had helped Mikel pick up the pipes and put it in the truck and he further stated when he left the truck it had been facing the

entrance. He admitted in cross examination he had stated after pumping the sewage he had to sign a paper with an Indian. He stated the place where he signed was about 2 metres away in a container and his back was to the truck at the time he signed and he was unable to see the truck (also referred to as a pickup in cross examination). Witness admitted seeing the two hooks in photo 2. He admitted he could not exactly remember seeing the marks on the body of Mikel. He admitted saying all of a sudden he had seen the pickup move in his statement and, it was then that he had gone to see what was happening. The movement he saw in his truck was the truck going to one side and then back to its original side. He also stated that the crane had moved because his truck could not move sideways. He further stated it was the crane that had got close to the truck and Mikel was in between. The truck had not moved away from the place it was parked, and only shook. Thereafter certain formal admissions were read out in Court in respect to the injuries suffered by the deceased from this incident and the fact that death of Mikel Figaro was as a result of the said injuries sustained from this incident.

[14] Thereafter the prosecution closed its case and learned counsel for the accused made a no case to answer submission. By Ruling dated 6th of March 2015, a defence was called from the accused. Thereafter following negotiations between learned counsel for the accused and the Hon Attorney General, a lesser alternative charge was added as Count 2. The accused in defence chose his right to remain silent. In terms of article 19 (2) (h) of the Constitution no adverse inference should be drawn from the fact that the accused chose his right to remain silent. Both learned counsel for the prosecution and learned counsel for the accused thereafter tendered written submissions.

[15] Learned counsel for the accused in her submissions challenged parts of the evidence of witness Steve Mwarua and that the prosecution had used a badly translated statement to mislead itself. However on careful analysis of the material evidence given in court under oath by this witness as summarised above, it is apparent that the evidence of this witness is that his red truck did move but the movement was from side to side due to the crane and he specifically states the man was squeezed between the two transports and could only move his shoulders head and arm. He further states the wheels of the truck did not move. Therefore the truck had not moved away from the place it was parked, and only

shook. Although he states he did not actually see the crane moving but only when he looked up he states, he noticed the crane had moved from the original place it was parked and had come forward towards his red truck and further states the deceased was squeezed between the two transports. Further witness Mwarua states that the accused had come running and even fallen when he was getting into the crane and reversed the crane. In the light of all this evidence, it cannot be possible come to a finding that the parked truck moved sideways towards the crane as learned counsel contends or that the victim had fallen on the hooks and injured himself.

[16] The accused himself admitted to witness namely Mr. Jason Rusteau that when he turned back he had seen the crane was rolling and he had rushed to apply the brakes but it was too late. I have also considered the admissions made by both parties. For the aforementioned reasons, I am satisfied beyond reasonable doubt that the crane had moved towards the truck and the deceased died of his injuries sustained after been “squeezed” as mentioned by witness Mwarua between both vehicles.

[17] Learned counsel also showed discrepancies in the evidence of Mr. Jason Rusteau in that he was describing the truck and not the crane. It is apparent that Mr. Jason Rusteau in his evidence at times has referred to the crane as a truck. In fact learned counsel for the prosecution has clarified this from him by asking him:

Q. When you refer to the truck are you in fact referring to the crane?

A. Yes the yellow crane.

[18] Learned counsel for the defence also referred to photograph D1 (3) shows that the hand brake was on but these photographs have been taken on the 11th of October 2013 after the incident occurred and the crane been moved. Further the examiner categorically states that had the hand brake (toggle) been put on the crane would have never moved. I also take into consideration the fact that when the examiner kept the engine running in the same place without the hand brake being put the crane had ^{not} moved. (Pg 26 of the proceedings of 6th January 2015) He states it could have been due to a backfire. It is not

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the duty of the prosecution to prove why the crane moved but only that the crane had moved which is clearly borne out in the evidence led by the main witness for the prosecution Steve Mwarua and the admissions made by the accused to Mr. Rusteau. Further it is to be carefully noted that the examiner categorically stated that had the hand brake been put on, the crane would have never moved. Therefore it could be safely concluded that the crane moved as the hand brake had not been put on in the crane.

- [19] 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.*”

- [20] Having considered the evidence of the prosecution, I am satisfied that the prosecution has established beyond reasonable doubt that the accused was in charge of the crane and it was under his control which was established by the evidence of the owner of the crane Mr. Marzorochi. The evidence of this witness further establishes the fact that the accused was the operator of the crane on the date of the incident which is corroborated by the evidence of witness Steve Mwarua. The evidence of the prosecution also establishes the fact that the accused had parked the crane and gone away, when the crane had moved towards the truck resulting in the deceased being pinned between the crane and the truck and sustaining injuries which were of a fatal nature. Mr. Jason Rusteau categorically

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states that had the hand brake switch ~~be~~ put on the crane would have never moved. I am satisfied that the evidence of the prosecution in all these respects could be accepted as though subject to cross examination no material contradictions were evident.

[21] However a key witness Mr. Rusteau states in his evidence that there was no steep slope and further states that when they had parked the crane with its engine running and the hand brake switch off, the crane had not moved. In the light of this evidence it cannot be said that the act of the accused in failing to put his hand brake switch on showed that he had a complete disregard for the life and safety of others as to commit a crime against the state such as manslaughter. Therefore this court holds that the prosecution has failed to prove the high degree of negligence that is required in a case of Manslaughter.

[22] I will next proceed to consider whether the prosecution has been able to prove the elements of the alternate charge in Count 2 based on section 206 and 230 of the Penal Code.

[23] Section 206 of the Penal Code reads as follows:

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.

[24] Section 230 of the Penal Code:

Any person who unlawfully does any act, or omits to do any act which it is his duty to do, not being an act or omission specified in section 229, by which act or omission harm is caused to any person, is guilty of a misdemeanor, and is liable to imprisonment for six months.

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[25] I have considered the evidence and submissions before me in respect of Count 2. I note that learned counsel for the accused has mentioned in her charge that the relevant section would be 229 (g) of the Penal Code.

[26] Section 229 (g) of the Penal Code reads as follows:

Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person –

(g) does any act with respect to, or omits to take proper precautions against any probable danger from, any machinery of which he is solely or partly in charge; or

(h)----

is guilty of a misdemeanor

[27] The prosecution in my view has sought to bring a lesser charge than section 229(g) as section 230 limits the maximum term of imprisonment for the offence to 6 months. The facts as peculiar to this case, indicate that the crane was not a fixed crane but a mobile crane fixed on wheels. Further the death was not caused as a result of the machinery but the movement of the crane which was mobile on wheels. In the light of the facts peculiar to this case the prosecution cannot be faulted for bringing in a lesser charge under section 230 than that suggested by learned counsel for the defence.

[28] In regard to the alternate Count 2 as set out already in para 20 above, the prosecution has established beyond reasonable doubt through the evidence of Mr. Marzorchi that the crane was in his charge and under the control of the accused at the time of the incident. Based on the evidence of the vehicle examiner Mr. Jason Rusteau who states that had the hand brake switch been put on the crane would have never moved and having considered the evidence of Mr. Steve Mwarua and the admissions of the accused to Jason Rusteau, I am satisfied beyond reasonable doubt that the crane did move, resulting in the death of Mikel due to injuries sustained from being squeezed between the truck and the crane. I am therefore satisfied beyond reasonable doubt that there was a failure and omission by

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the accused in his duty to exercise the care and precaution in the use of the crane, when he failed and omitted to put on the hand brake switch, when he parked the crane and left.

[29] Based on the objective test set out in the case of *R v Marzetti (supra)* in paragraph 19 herein and having considered all the aforementioned evidence before me, I hold that the accused had failed to use reasonable care or take reasonable precautions which a reasonable prudent person would take in the parking of a crane, when he failed to put the hand brake on to avoid danger of the crane moving and the consequence of this omission on the part of the accused resulted in the death of Mikel Figaro.

[30] For all the aforementioned reasons I reject the defence and I am satisfied that the prosecution has proved all the elements set out in Count 2 beyond reasonable doubt. I therefore proceed to find the accused guilty on Count 2 and convict him of same.

Signed, dated and delivered at Ile du Port on 09th June 2017



M Burhan
Judge of the Supreme Court