IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO CR28/2013

[2017] SCSC

THE REPUBLIC

versus

TERRENCE STRAVENS
Accused

Heard:	19, 21 May 2015, 21 June 14 December 2016, 27 July, 2017
Counsel:	C Jayaraj, Principal State Counsel for the Republic B Hoareau for the accused
Delivered:	19 October 2017

RULING

Dodin J

[1] The accused Terrence Stravens stands charged with the following offences:

Count 1

Statement of offence

Manslaughter contrary to section 192 of the Penal Code and punishable under section 195 of the same Code.

Particulars of offence

Terrence Stravens of Foret Moire on the 3rd of April, 2013 near Sunrise Guest House, Mont Fleuri, Mahe unlawfully killed Paul George Bibi of Les Mamelles, Mahe.

Count 2

Causing death by dangerous driving contrary to section 25 of the Road Transport Act CAP 206

Particulars of Offence

Terrence Stravens of Foret Moire on the 3rd of April, 2013 near Sunrise Guest House, Mont Fleuri, Mahe cvaused the death of Paul George Bibi of Les Mamelles, Mahe by driving a motor vehicle registration number S8095 on the road recklessly or at a speed in a manner which is dangerous to the public.

[2] S I Maxime Tirant testified that on the 7th April, 2013, he received instruction to go to a scene where there had been a fatal road traffic accident at Mont Fleuri. He was accompanied by Constable Ferley. At the scene he was shown markings which he was told were blood marks and the position of two takeaway boxes as well as the position of the vehicle which he was told was a car registration number S8095 belonging to Mona Khan of Foret Noire. He took measurements and drew a sketch plan as he was not satisfied with the sketch plan that was drawn up by the investigating officer because some measurements were missing. He then went to Mrs Khan's house at Foret Noire and took car S8095 to the vehicle testing station. The car was released to Miss Lindy Orphe, the daughter of Mrs Khan on the 26th April, 2013.

[3] Lindy Orphe testified that on the 3rd April. 2013, she was going home when she came across the accused and her uncle Francis Labiche in her mother's car, a white Scenic Renault. The car was going towards town. Later when she was having lunch at home, she got a call from the accused who informed her that there has been an accident near Sunrise Guest House. She immediately went to the scene and saw the car parked on the pavement on the left side facing town direction. The car's windscreen was cracked, left headlight damaged and bumper loose on left side. The police was already there as well as the accused and her uncle who appeared to be in shock. She took them to hospital and then

they went to the police. Some days later the police took the car away and she went to retrieve the car a week later from the vehicle testing station.

[4] Paul Bastienne testified that on the 3rd April, 2013, he was doing some work at Dominic Chang-Waye's house at Mont Fleuri. Another man he knew by the name of Taffy was also there. He heard a noise and looked in the direction of the road. At the same time, Taffy said "*la sa boug I tap lo mon loto*" (eh this man hit against my car). They both went to the road and saw car S8095 parked on a platform where there used to be a shop and its windscreen had a small crack. He saw a man lying on the ground facing up. There was blood flowing from the back of his head. He saw the accused talking on the phone, then the accused came to the man and raised him in a sitting position and asked him if he was okay. The other people there told the accused not to touch the man and the accused let the man fall back on the ground. A woman who was there called the ambulance.

[5] Francis Charles Labiche testified that on the 3rd April, 2013 he was going to work on the accused's boat in his niece's car S8095, being driven by the accused. They were travelling along the Mont Fleuri road towards town when the accused said the brakes had failed and the accused swerved onto the pavement to avoid hitting a pick-up truck parked in front of them near a shop. At the same time a man walked out of the shop onto the pavement and was hit by the car which kept going and hit against another car and then onto a small wall where it stopped and the engine cut out. The accused got out and went to look at the victim, then the accused called the ambulance. He also observed the man lying on the ground and had blood on his face. There was not much traffic on the road at the time and the car was being driven normally and not at a high speed. He testified that he had known the accused for a long time and the accused has always been a good driver.

[6] Trevor Ferley testified that on the 3rd April, 2013, in the afternoon, he was informed by Sergeant Gamatis that there was an accident at Mont Fleuri opposite Sunrise Guest House. They proceeded to the scene where they met the accused and a friend, another man called Taffy and there were also some members of the public standing around. The accused said someone crossed in front of him and had been hit and he had already called the ambulance which had come and taken the victim away. He took some measurements and drew a sketch plan and made a fair one on the same day but S I Payet was not

satisfied with the sketch plans and told him to go back and relook at the information. He also examined the vehicle S8095 and noticed a cracked windscreen, a dent on the mudguard. He also examine a green taxi mark KIA belonging to Taffy. He then went to the Seychelles Hospital and asked to see the victim but permission was denied as the man was in the ICU. He went back to Mont Fleuri Police station.

[7] Inspector Ronny Julienne testified that on the 3rd April, 2013 he was informed that a car driven by the accused had hit one Paul Bibi at Mont Fleuri. He dispatched Constable Ferley to the scene. The accused was brought to Mont Fleuri Police Station and breathalyser tests were administered which recorded 0mg of alcohol. The accused was cautioned and read his constitutional rights. He requested for a lawyer. Mrs Amesbury, attorney-at-law, told him not to say anything. However he testified that the accused said "sa boug in koup par deryer en transpor, monn ornen, in ale in trounen monn tap li, monn panic e monn akselere" (that guy had crossed from behind a vehicle, I had tooted, he had gone and come back and I had hit him and I panicked and accelerated).

[8] Dr Paresh Bharia, a pathologist, testified that Dr Maria Zlatkovich conducted the post mortem examination and after reviewing the external and internal injuries concluded that the cause of death was fracture of the base of the skull and internal haematoma, (collection of blood on the right side of the brain).

[9] Dr B B Aurora, a forensic expert, testified that he studied the details of the case after having been briefed by S I Maxime Payet as to how the accident happened. He also went to the scene some days later. He concluded that from his analysis, there was not excess of speed but there was a bit of speed and he estimated the speed to be not less than 40kph. He estimated the speed to be closer to 50kph due to the crack of the windscreen which would not have happened if the speed was 30kph or less.

[10] There statements of Josetta Moustache, the partner of the deceased and Donatien Dogley who was close to the scene and observed the immediate aftermath of the accident were admitted on agreement of the parties as being non-contentious. The notice of intended prosecution was also admitted on agreement.

[11] A the close of the case for the prosecution, learned counsel for the accused moved the Court to find that the accused has no case to answer on both counts and in the event of the Court finding the accused having a case to answer on both counts, to rule on the demurrer motion raised against the indictment.

[12] Learned counsel for the accused submitted in order to prove manslaughter, the Court must satisfy itself that the accused committed an act or there was an omission, both of which must be illegal and as a result of the illegal act or omission killed another person. In this case the prosecution must establish a case of gross negligence, which is way above mere negligence in order to establish the elements of manslaughter. Learned counsel submitted that there is no evidence before the Court showing that the accused drove in a manner that showed complete disregard to life or that the accused had foreseen the risks involved in his manner of driving but still went on to take it.

[13] Learned counsel submitted further that in order to prove manslaughter, the prosecution should have established not just the actus reus but also the mens rea whereby the accused saw the risk or had foreseen the risk and took it with full knowledge of its implications. Learned counsel submitted that since the prosecution has failed to establish a crucial element of the offence of manslaughter, the Court must rule that the accused has no case to answer on that count.

[14] On the count of causing death by dangerous driving, learned counsel submitted that no witness testified that the accused was driving recklessly or in a manner dangerous to the public. Learned counsel submitted that one prosecution witness, Francis Labiche, testified that the accused did his best to avoid hitting the shop but that the deceased who was not on the pavement at the time the car got onto the pavement came out of the shop at the same time the accused was avoiding hitting the shop. Learned counsel submitted that from the evidence it cannot be concluded that the accused drove in a reckless manner. Since the element of recklessness has not been established, the Court must find that the accused has no case to answer on that count and acquit the accused accordingly.

[15] Learned counsel also addressed on the demurrer motion, which shall be considered alter.

[16] Learned counsel for the prosecution submitted that in order to determine whether the accused has a case to answer, the Court must only look at whether a prima facie case has been made against the accused. The Court would do that by considering the sufficiency of evidence adduced to establish the elements of the offences charged. Learned counsel submitted that in this case there is enough evidence to call the accused to make his defence on both counts.

[17] Learned counsel submitted that the evidence of Dr Aurora stated that the accused drove at a speed and the evidence also showed that the car climbed onto the pavement and continued on two levels of pavements off the road before hitting another car and climbing a wall and stopped. The fact that the accused drove the car onto the pavement and hit the deceased on the pavement, showed that he was not applying the minimum standard of a reasonable driver. There was disregard and lack of due care to other road users. Learned counsel submitted that driving on the road is a lawful act but driving on the pavement is totally gross negligence as there was no necessity to do so.

[18] Learned counsel submitted that pavements are meant for use by pedestrians and that any reasonable driver who drives on the pavement must be deemed to have reasonably foreseen that such manner of driving would do. In this case it shows nothing less than total disregard to the life of others and therefore so serious that it amounts to culpable negligence.

[19] Learned counsel submitted that in the event that the Court determines that there is no case to answer for manslaughter, the same arguments are advanced for the charged of causing death by dangerous driving. The accused did not take reasonable care expected of an ordinary driver in the circumstances and as a result caused the vehicle to go on the pavement where the deceased was and hit him causing his death. Hence the prosecution has established a prima facie case that the manner of driving of the accused was a danger to others and call the accused to make his defence to that count.

[20] 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."

[21] 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."*

[22] The principles on how to approach a submission of no case to answer has been well established and is encapsulated in the statement of Lord Lane C.J in *R v Galbraith [1981] 1 WLR 1039*:

> *"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."*

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

[24] Where the evidence brought by the prosecution 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.

[25] With regards to the second limb of the test, 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 would also succeed.

[26] With regard to vehicular manslaughter in order to secure a conviction, the prosecution must establish that the driver operated a motor vehicle in a reckless or grossly negligent manner and the driver's virtually illegal conduct caused the fatality. As this Court stated in a similar ruling in the case of *Republic v Fred Malbrook C R 42/2014* :

> *"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".*

[27] There is no dispute in this case that the deceased died as a result of being in contact with the vehicle driven by the accused. There is also no issue with the assertions that the deceased was walking out of a shop when he was hit on the pavement in front of the shop. Test also showed that the accused was not under the influence of alcohol or other substance at the time of the accident. There is also no direct evidence of speed. In fact, the only eyewitness who gave evidence on the speed stated that the accused was driving normally and not at speed. On the other hand, Dr Aurora, the forensic expert expressed the opinion that the vehicle was not travelling with great speed but had sufficient velocity

which he estimated to be not less than 40kph. The Court must determine 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 that would sustain the charge of manslaughter brought against the accused.

[28] Considering the evidence adduced, the deceased was hit on the pavement by the vehicle driven by the accused which had climbed onto the pavement and did not stop until it hit against another car and climbed further over a small wall. Considering the totality of evidence adduced I am satisfied that there is sufficient evidence to establish a prima facie case that the accused could have made a bad judgment to choose to swerve the vehicle onto the pavement or that he could have been negligent or careless in doing so noting that the evidence showed that the deceased was not standing on the pavement at the time but walked out of the shop just as the vehicle got to that spot. Such evidence falls 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.

[29] I also wish to bring to the attention of the prosecution the statement of the Court of Appeal in the case of *Leslie Ragain v Republic Crim App SCA No2/2012*, Fernando J. A. para 25, which has also been raised by the accused in the demurrer motion:

> *"Our law of manslaughter as set out in paragraph **17** above and as explained in paragraph **18** above essentially creates two distinct types of manslaughter, namely constructive manslaughter (manslaughter by an unlawful act) and gross negligence manslaughter (manslaughter by an unlawful omission). We are conscious of the fact that the charge referred to at paragraph **23** above had been framed in accordance with **section 114 (a) (iv) of the CPC** which states that the forms set out in the fourth schedule to this Code ……shall be used in cases to which they are applicable and that nothing more than the particulars as required there in need be given. This provision has now to be read, subject to article 19(2) (b) of the Constitution. We are therefore of the view that in drafting a manslaughter charge it is necessary to state whether it is one of manslaughter by an unlawful act or manslaughter by an unlawful omission, unless the facts reveal that it is manslaughter by both an unlawful act and unlawful omission. Merely stating 'unlawfully killed' as stated in the charge is in our view, not in accordance with article 19(1) (b) of the Constitution. We also tend to think that had the charge been more specific all parties would have had a better understanding as to what the Appellant was pleading to*."

I further note that in the above case, the appellant was an accused in a murder trial, who was in a relationship with the victim (deceased), who had deliberately drove to the place of the deceased, knew that the deceased was walking in front of that bus he was driving and still ran over the deceased causing her death, pleaded guilty to manslaughter but was acquitted on appeal.

[30] Be that as it may, I find that the prosecution has failed to establish a prima facie case against the accused on the 1st count of manslaughter. I acquit the accused accordingly of that count.

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 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 would determine at the end of the trial.

[31] I therefore find that the accused has a case to answer on the 2nd count of causing death by dangerous driving and the accused is called upon to make his defence accordingly.

[32] I now turn to the demurrer motion. In criminal cases, a demurrer may be used in some circumstances to challenge the legal sufficiency of the indictment or other similar charging instrument. Traditionally, if the defendant could admit every allegation of the indictment and still be innocent of any crime, then a general demurrer would be sustained and the indictment would be dismissed. A special demurrer refers to an attack on the form, rather than the substance, of the charge: if the defendant correctly identifies some defect "on the face" of the indictment, then the charges are subject to being dismissed, although usually the indictment can be redrawn and re-presented to the Court. While there are different ways to accomplish the goals of a special demurrer, often an alternative method to challenge the sufficiency of the indictment is an attack on the prosecution's case prior to trial, and is generally made by means of motion to dismiss. However, the Court at its discretion may allow the filing at any time prior to the accused having been called to present his defence.

[33] In this case the challenge is against the 1st count of manslaughter. Considering the above finding that the accused has no case to answer on the count of manslaughter, I do not find it necessary to make a determination on the motion of demurrer as doing so would be purely academic in the circumstances.

[34] In summary, on the motion of no case to answer, I rule that the accused has no case to answer on the charge of manslaughter but that the accused has a case to answer on the charge of causing death by dangerous diving.

Signed, dated and delivered at Ile du Port on 19 October 2017

G Dodin
Judge of the Supreme Court