

REPUBLIC v ROSE

(2011) SLR 21

D Esparon for the Republic
B Hoareau for the two accused

Judgment delivered on 23 February 2011 by

BURHAN J: The two accused in this case namely Nelson Rose and Paul Dubois have been charged as follows:

Count 1

Manslaughter contrary to section 195 as read with section 23 of the Penal Code.

The particulars of the offence being that Nelson Rose and Paul Dubois with common intention on 25 July 2009, at Beau Vallon Police Station, unlawfully killed Mervin Pierre.

Count 2

Negligent acts, causing harm contrary to section 230 as read with section 23 of the Penal Code.

The particulars of the offence are that Nelson Rose and Paul Dubois with common intention unlawfully omitted to take proper precaution against any probable danger that could have been caused to Mervin Pierre as a result of them throwing him in a detention cell.

The two accused denied the charges preferred against them, and the trial against the accused commenced on 20 November 2009.

The case for the prosecution is that Mr Mervin Pierre, who subsequently died whilst in police custody, was taken into custody by Police Constable Marcus Jean and the first accused Nelson Rose of the Beau Vallon Police on 25 January 2009 and kept in the custody of the police at the Beau Vallon Police Station. Constable Marcus Jean in his evidence testified to the fact that on the said day while he was on duty at Beau Vallon Police Station, he had received a call from one Elvis Robert that Mervin Pierre was threatening him with a knife and acting on the call he had gone to Pascal Village with the first accused Nelson Rose and arrested Mervin Pierre and taken possession of the knife. Mr Pierre who was smelling of alcohol had been handcuffed with his hands in front and put in the back of the pickup truck and brought to the Beau Vallon Police Station. Inside the police station Mr Mervin Pierre had fallen at the inquiry office and lost consciousness. They had applied water on his face and he had got up and thereafter he was taken and kept in the corridor where the cells were and the doors leading out of the corridor were locked.

Witness Marcus Jean stated that he had thereafter gone to town and when he had come back he had been told by the two accused that they had placed Mr Pierre in a

cell as he was disturbing and annoying the others. The first accused Rose had said that Mr Pierre had bitten him on the hand. The witness further stated under cross-examination that Mr Pierre had fallen again at the time his shorts were being removed. However at that time he had not lost consciousness. On both occasions he had fallen he was assisted by the two accused to stand up. According to the witness Mr Pierre was swaying, smelling of alcohol and in his opinion was a bit under the influence of alcohol.

According to the evidence of prosecution witness Naddy Delorie who was also detained in a cell in the Beau Vallon Police Station at the same time, Mr Pierre while being detained in the corridor of the police station in which the cells were had been banging on the door of the corridor and asking the police officers to release him as he had done nothing wrong. When he continued to bang on the door he was told that he would be locked up in the cell if he did not stop. When he had banged again two officers, that is the two accused, had come in and he had tried to fight them and fallen down. Thereafter the two officers had helped him up and as he was resisting being taken to the cell, each had held one of his arms and dragged him to the cell. They had managed to drag him to the cell and then the first accused had given Mervin Pierre a fist blow and pushed him. At the time the first accused had pushed Mervin Pierre, he had been facing the first accused and only both of them were in the cell while the second accused after placing Mervin Pierre in the cell had gone outside. Mr Mervin Pierre had, on being pushed on his chest, fallen backwards and his head had hit the wall and thereafter he had fallen on the ground and not moved. After that the witness had heard him snoring. Thereafter the police officers had left and they had gone to sleep. The next morning he had woken up and gone to brush his teeth when he noticed that Mr Mervin Pierre had been in the same position he was the night before. After brushing his teeth, he had his tea and had taken the tea for Mr Pierre and tried to call him but he had not answered. The witness had thereafter called a police officer and told him to look at Mr Pierre.

Other inmates who were also detainees, namely Anthony Brioche and Rod Stewart, were called to testify and both witnesses stated that it was the first accused who had pushed Mr Pierre which had resulted in him falling back and hitting his head on the wall of the cell. Witnesses Anthony Brioche and Rod Stewart also testified that prior to the incident in the cell, the first accused had put his hand through the door and held the hair of Mr Pierre who had bitten his hand. They too stated that at the time of pushing Mr Pierre the first accused was the only person in the cell with him.

Witness PC Egbert Camille testified to the fact that he had started duty on the morning of 26 July 2009 and had visited the cells. He stated there were about 11 persons in the cells. Some detainees were still sleeping. Cell number 3 in which Mervin Pierre was in was locked. He had called the detainee but there was no response. He had thought he was sleeping. Mr Pierre had been lying on the ground on his back with his head on the step. When tea was served the tea was placed near his cell but Mervin Pierre had still not responded. On this being brought to his notice he had gone in and noticed Mr Pierre was still in the same position. He knew something serious had happened and he had opened the cell and felt his neck for a pulse and pulled his arm but there was no response. The hand was cold and hard.

He had then phoned Sergeant Dogley who had come and gone into the cell and examined Mr Pierre.

Sergeant Brian Dogley stated that on being informed, he had gone to the cell and seen the body and checked for a pulse. As there was no response he had called the hospital for assistance and informed his superior officers. A paramedic by the name of Esther Francourt had arrived; she too had stated that Mr Pierre was not responding and thereafter Dr Vital had come and stated he was dead. PC Camille had identified the deceased as Mervin Pierre. Thereafter Mr Elizabeth and SI Tirant had come and taken over the investigation. Dr Vital corroborated the facts that he was called to the Beau Vallon Police Station and on examining Mr Mervin Pierre he had confirmed he was dead.

Mr Tirant gave evidence stating that he had conducted investigations at the scene and described the scene in detail and marked photographs of the scene. He stated the body of Mervin Pierre was on the floor of the third cell near the toilet. He was partially in a sitting position with his back against the wall. He had photographed the scene. He produced photographs taken at the scene marked P5 (1-65). Photographs 11, 12 and 13 showed the position of Mr Pierre at the time he arrived on the scene.

The prosecution thereafter produced the edited statement of the second accused through witness Marie Andre Aimable. There were no objections by the defence and the statement was marked P6.

Dr Gundadin testified to the fact that while he was working in the Seychelles he had conducted the autopsy on the deceased Mr Mervin Pierre. He stated further he was presently working as the Chief Medical Officer for the Government of Mauritius and stated his qualifications and further said that by profession he was a forensic pathologist. He described the results of his external examination conducted on the body of the deceased Mervin Pierre. He had noted an abrasion of 2 to 3 centimetres (cms) on the back of the left shoulder, a linear abrasion 10 cms in length and 1 cm wide in an oblique line about 10 cms below the right shoulder blade and a linear abrasion of 3 cms in length and 1 cm wide in an oblique line 4 cms from the tip of the left shoulder. With regard to the internal injuries he stated the scalp was oedematous and there was an irregular scalp haematoma on the frontal and occipital regions. He also stated that under the skull there was a longitudinal fracture starting from the left side of the occipital bone passing through the saggital suture ending on the left side of the frontal bone. He referred to it as an extensive fracture. He stated the fracture was caused as a result of sudden deceleration of a moving head against a hard flat surface. The point of impact he stated would have been on the back of the head. He further stated that for such a fracture to occur a considerable amount of force was necessary. Further explaining the cause of death he stated that due to the sudden stoppage of the skull with the hard surface, the skull would stop before the movement of the brain and there would be a delayed movement of the brain and at the same time a rotational movement of the brain which will lead to the injuries which he had mentioned earlier. In his opinion he stated that death was due to the fracture of the skull with intra-cranial haemorrhages. He further stated that the movement of the head had been stopped by a hard surface which could be a wall or the floor. He mentioned that there was alcohol in the blood and urine tested. He categorically stated it was not possible for the injury to be caused by a person sitting on the flat

surface and his head dropping backwards and hitting the floor. He further stated that in his opinion Mr Pierre was far away from the hard flat surface. If he had been only 1 metre and fallen down backwards this type of injury would not have resulted. His medical report was marked as P7.

The prosecution case rested on the above mentioned evidence. A submission of no case to answer was rejected by a court ruling dated 23 July 2010 and a defence was called in respect of both the accused.

The first accused made a statement from the dock while the second accused chose to remain silent. At this stage the Court warns itself that in terms of article 19(2)(h) of the Constitution of the Republic of Seychelles, no adverse inference should be drawn from the fact that the second accused chose his right to remain silent.

The first accused in his statement from the dock, admitted that he had been on duty at the Beau Vallon Police station and that he had proceeded with PC Marcus Jean to a scene of an incident at Pascal Village. He admits in his statement that they had arrested Mr Mervin Pierre and put him handcuffed into the back of the pickup truck and driven back to the station. He stated that Mr Mervin Pierre was under the influence of alcohol and that he was smelling of liquor and was not standing properly as a sober person would. He further stated that thereafter they had driven a bit fast and reached the station. He had opened the door and Mr Pierre was not in the position he had been in before and the cassettes and the phone in his possession were spread out on the floor. Mr Pierre was taken inside the station and searched. As Mr Pierre was wearing two pants and a belt and he was wet PC Jean had insisted he remove one pant and the belt. When he was opening the door to the corridor he heard something hit his leg and noticed it was Mervin Pierre on the floor.

After PC Dubois had put water on him he had gained consciousness but remained seated on the floor. While he was seated on the floor PC Isaacs had asked Mr Pierre to remove his shoes but Mr Pierre had said he could not as his hands were handcuffed. When Isaacs had tried to lift his feet to remove his shoes he had tilted to the back and hit his head on the wall behind him. Thereafter he had assisted in putting Mr Pierre in the corridor where the cells were and locking the door.

After sometime Mr Pierre had begun to swear and knock at the door. Some of the detainees began to complain that he was disturbing them. Then Mr Pierre had attempted to bite his hand. He had told this to Mr Isaacs who had instructed him to place Mr Pierre in a cell and had requested Paul Dubois to assist him. When they were trying to put him in the cell he had resisted. At the time they were asking him to get in the cell he had been moving backwards and when he reached in front of the gate of the cell he had closed the gate of the cell and locked it. The other detainees had complained to him the way he had been locked in the cell but he had told them he was following orders as he was only a trainee. Prior to handing over, the first accused stated in his statement he had done a cell visit, Mr Pierre had been in the dark but he had heard him snoring. He had made his report to Mr Isaacs and he had left for home. He stated he was never bitten by Mr Pierre and when he was taken to the clinic to be checked there were no bite marks observed on him. The defence closed its case. Thereafter both the prosecution and the defence counsel made oral submissions.

When one considers the defence in respect of the accused, it is counsel's contention that the injury resulting in the death of the accused could have resulted due to the accused sustaining a fall while he was being brought in the pick up truck and when he fell in the police station prior to him being put in the cell. However when one considers the evidence of Dr Gunandin he specifically rules this out and states that the skull had a longitudinal fracture starting from the left side of occipital bone passing through the saggital suture ending on the left side of the frontal bone. He referred to it as an extensive fracture and that death was due to the fracture of the skull with intra-cranial haemorrhages. He stated the fracture was caused as a result of sudden deceleration of a moving head against a hard flat surface. The point of impact he stated would have been on the back of the head. He further stated that for such a fracture to occur a considerable amount of force was necessary. When one considers the evidence of the witnesses in this case, it is in evidence that the first accused pushed or shoved Mr Pierre with considerable force when he was standing in the cell, resulting in the accused falling backwards and hitting his head on the wall behind him and then collapsing to the ground and not being in a conscious state thereafter. It is clear that such a push or shove on Mr Pierre as described by the witnesses by the first accused would be the considerable force which resulted in Mr Pierre falling backwards and hitting his head on the wall of the cell which resulted in the sudden deceleration of a moving head against a flat surface as described by the doctor in his evidence. Therefore considering the evidence in the case and the description of the injuries resulting in the death of Mr Pierre, this Court is satisfied beyond reasonable doubt that the act of the first accused in pushing with a considerable amount of force Mr Pierre within the confines of the cell was the act that resulted in his head hitting the wall and the fracture of the skull and the intra cranial haemorrhage which resulted in his death. The evidence of the doctor clearly rules out that the other falls of Mr Pierre as suggested by counsel for the defence would have caused such an injury resulting in the death of Mr Pierre. Therefore the defence contention set out above is rejected.

When one considers the eyewitness accounts of the detainees in the cell, the fact that it was the first accused who pushed Mr Pierre within the confines of the cell stands corroborated. Though their evidence may be slightly contradictory in respect to certain minute details, in all material matters, namely it was the first accused who with considerable force pushed Mr Pierre while in the cell resulting in him falling backwards and hitting his head on the wall and falling unconscious to the ground, stand corroborated. Therefore one could not come to a conclusion that their evidence should be disbelieved or not accepted by court. They have all frankly admitted that they were detainees at the time due to allegations that they had committed various offences but state they had no specific enmity against the first accused to give false evidence against him. The fact that they disliked the police does not satisfy the court that that they would have given false evidence against the two accused as it is to be noted that they do not state that the second accused who is also a police officer was instrumental in pushing Mr Pierre. Therefore this court is satisfied their evidence could be accepted and the suggestion by the defence that as they disliked police officers they would give false evidence to implicate them bears no merit. For the aforementioned reasons and as the evidence of the prosecution witnesses stand corroborated and uncontradicted in respect of material matters this Court proceeds to accept the evidence of the prosecution.

When one considers the evidence against the second accused Paul Dubois, it is clear from the evidence of the prosecution witnesses themselves that he was as a police officer, called upon to assist the first accused in confining Mr Pierre in the cell. It is admitted by the prosecution witnesses themselves that Mr Pierre was swaying, smelling of alcohol and a bit under the influence of alcohol and banging on the door, telling the officers to release him to go home. Therefore being a police officer himself it was the duty of the second accused to assist in taking Mr Pierre to the cell, especially when he had been given orders to do so. It is in the evidence of the prosecution that Mr Pierre had been unsteady and was resisting being taken to the cell and therefore he had to be dragged to the cell after being supported under his arms on either side by the two police officers, a fact confirmed by eyewitnesses themselves. It could not be imputed that at this stage the second accused had the common intention with the first accused to violently push Mr Pierre when in the cell or that he had the common intention with the first accused to commit manslaughter, as for all purposes he was performing his duties as a police officer and using minimal force to control Mr Pierre and place him in a cell and was acting on orders of a senior police officer to assist the first accused. The facts of this case should be distinguished from one where two persons who are not police officers drag an individual and one violently pushes him resulting in the death of the individual. In this instant case the second accused was a police officer performing his duty which he had been ordered to do, that is to assist the first accused in putting Mr Pierre in the cell.

It is to be further noted that the eyewitness accounts state that after placing Mr Pierre in the cell the second accused after doing what he had been ordered to do had gone out of the cell and was outside behind the first accused. It was at this time the first accused had pushed Mr Pierre with force. The eyewitnesses state at the time he was pushed only Mr Pierre and the first accused were in the cell facing each other and the second accused was outside the cell. Therefore considering the evidence in this case in respect of the second accused, it cannot be said that he had the common intention to commit manslaughter. There is absolutely no evidence to show that both he and the first accused had together thrown Mr Pierre in the cell as a result of which he sustained injuries resulting in death. In fact eyewitnesses state Mr Pierre was still standing at the time he was put in the cell and the second accused had gone out. Therefore this Court is satisfied for the aforementioned reasons that count 1 cannot be maintained against the second accused as the prosecution has failed to prove he had the common intention to commit the act the first accused committed resulting in the death of Mr Pierre. Therefore this Court proceeds to acquit the second accused on count 1.

With regard to the first charge against the first accused it is to be noted that according to *Archbold Criminal Pleading, Evidence and Practice* (2008 ed) at 1858, there are two types of manslaughter namely voluntary and involuntary manslaughter. Voluntary manslaughter occurs when all the elements of murder are present including intent to kill or cause grievous bodily harm but the crime of murder is reduced to manslaughter by reason of provocation, diminished responsibility or death being caused in pursuance of a suicide pact.

Involuntary manslaughter is unlawful killing without intent to kill or cause grievous bodily harm. There are two classes of involuntary manslaughter which could be:

- a) Manslaughter by an unlawful and dangerous act also known as constructive manslaughter.
- b) Manslaughter by gross negligence. This form of manslaughter is satisfied on proof that the accused's conduct which caused the death of the deceased amounted to a breach of duty owed towards the deceased and was so serious as to justify the imposition of criminal liability and includes manslaughter by recklessness which requires that the accused deliberately took an unjustified risk of causing serious injuries.

In *DPP v Newbury* [1977] AC 500 at 506 the House of Lords approved the following dictum from *R v Larkin* (1942) 29 Crim App R 18 at 23 in respect of manslaughter by an unlawful act:

Where the act which a person is engaged in performing is unlawful then if at the same time it is a dangerous act, that is an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.

When one considers the evidence of the eyewitnesses and the medical evidence in this case, this Court is satisfied beyond reasonable doubt that it was the unlawful and dangerous act of the first accused in pushing Mr Pierre with force within the confines of the cell that resulted in injuries which were fatal in nature thereby causing the death of Mr Mervin Pierre. When one considers the evidence of the prosecution in this case, this Court is satisfied that the killing of Mr Pierre was as a result of an unlawful act committed by the first accused. From the evidence led by the prosecution it is clear to this Court that the unlawful act committed by the first accused on Mr Pierre which was the pushing with considerable force of the victim within the limited confines of a cell, in the mind of a reasonable person would have subjected the victim to a risk of physical harm resulting from the said unlawful act. In this case the prosecution evidence has also clearly established that the said unlawful act did result in physical harm namely injuries which caused the death of Mr Pierre.

Therefore on considering the evidence of the prosecution in its entirety this Court is satisfied that the prosecution has successfully proved beyond reasonable doubt all the necessary elements in the charge of manslaughter against the first accused and therefore this Court proceeds to find the first accused guilty on count 1 and proceeds to convict him of same.

With regard to count 2, s 230 of the Penal Code Cap158 reads:

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.

Firstly with regard to the PI accused in this case, this Court is of the view that having found the first accused guilty on count 1 which is a more serious charge, as count 2 for all purposes is a lesser charge, the necessity to find the accused guilty on count 2

which is a lesser charge does not arise. However having acquitted the second accused of count 1 when one considers the evidence against the second accused in respect of count 2 it is the duty of the prosecution to prove the elements of the offence beyond reasonable doubt.

The statement of the offence in count 2 of this instant case reads: "Negligent acts, causing harm contrary to section 230 as read with section 23 of the Penal Code."

Counsel brought it to the notice of Court that the statement of the offence has been improperly laid out by the prosecution and the marginal note referring to negligent acts has been incorporated into the charge whereas the essential elements of the offence namely any person who unlawfully does any act or omits to do any act has been left out. In the case of *David Benoiton v Republic* SCA 15/95 a similar situation was discussed where the statement of offence set out an offence which was not created by the relevant section. It is the view of this Court that the incorporation from the marginal notes of the words negligent acts in the statement of offence sets out an offence which was not created by the relevant section as the section refers to an unlawful act or omission which has not been set out in the statement of offence and not negligent acts. Therefore this Court holds the statement of offence as it stands is misleading and prejudicial to the accused, leading to a miscarriage of justice.

Further this Court has already come to the conclusion that the second accused had no common intention with the first accused in the act of pushing Mr Pierre into the cell or that he acted with common intention. Therefore the essential ingredients set down in the particulars of the offence namely common intention of both accused either before the act of pushing or after has not been proved and thus cannot be inferred. Further the particulars of the offence state "as a result of *them* (emphasis added) throwing him in a detention cell." However when one considers the evidence in this case it is clear that the second accused did not participate in the pushing or "throwing" of Mr Pierre into the detention cell.

Therefore this Court proceeds to acquit the second accused on count 2.

In conclusion, for the aforementioned reasons the first accused is found guilty and convicted on count 1 only while the second accused is acquitted on both counts 1 and 2.