



IN THE SUPREME COURT OF NAURU
AT YAREN
[CRIMINAL JURISDICTION]

Case No. 51 of 2016

Between **THE REPUBLIC OF NAURU**

v.

ROSEN RIBAUW

Before: Crulci J

For the Prosecution: F. Lacanivalu

For the Defence: R. Tagivakatini

Date of the Hearing: 14 – 20 February 2017

Date of Decision: 21 February 2017

CATCHWORDS – *Criminal law – Manslaughter – Grievous Bodily Harm- driving Motor Vehicle - Criminal Negligence – section 289 Criminal Code 1899 – Duty of Persons in Charge of Dangerous Things*

JUDGMENT

1. The defendant Rosen Ribauw is charged with the following offences:

COUNT ONE

Statement Of Offence

Dangerous Driving: Contrary to section 67 (1) of the *Motor Traffic Act* 2014.

Particulars of offence

Rosen Ribauw on the 4th of July, 2015 at YAREN District in Nauru, did drive a motor vehicle Mazda Double Cab white in colour registration number TT187 on a public highway in a manner dangerous to the public.

COUNT TWO

Statement Of Offence

Manslaughter: Contrary to sections 303 and 310 of the *Criminal Code* 1899

Particulars of offence

Rosen Ribauw on the 4th of July, 2015 on the Airport tarmac at YAREN District in Nauru, did unlawfully kill **Drexler Eobob** (also known as **He-Anka**).

COUNT THREE

Statement Of Offence

Manslaughter: Contrary to section 303 and 310 of the *Criminal Code* 1899

Particulars of Offence

Rosen Ribauw on the 4th of July, 2015 on the Airport tarmac at Yaren District in Nauru, did unlawfully kill **Berlasha Dabwido**.

COUNT FOUR

Statement of Offence

Grievous bodily harm: Contrary to section 320 of the *Criminal Code* 1899

Particulars of Offence

Rosen Ribauw on the 4th of July of 2015 on the Airport tarmac at Yaren District in Nauru unlawfully did grievous bodily harm to **Kahiko Harris**.

COUNT FIVE

Statement of Offence

Grievous bodily harm: Contrary to section 320 of the *Criminal Code* 1899

Particulars of the Offence

Rosen Ribauw on the 4th of July, 2015 at the Airport tarmac at Yaren District in Nauru, unlawfully did grievous bodily harm to **Elushen Hubert**.

Offences charged contrary to the Criminal Code 1899

303 Definition of Manslaughter

A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter.

310 Punishment of Manslaughter

Any person who commits the crime of manslaughter is liable to imprisonment with hard labour for life.

320 Grievous Bodily Harm¹

Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

2. On the 20th of October, 2016 the defendant pleaded guilty to Count One and not guilty to Counts 2, 3 and 4.

THE REPUBLIC'S CASE

The following paragraphs 3 – 8 below are agreed between the parties

3. The accused Rosen Ribauw, was born on the 30th of January, 1996 and at the time of the offences alleged was 19 years of age. At all times he was the driver of a white Mazda double cab vehicle. He was not in possession of a Driving Licence.
4. During the early hours of the 4th of July, 2015 he drove around Nauru Island with his friends, fetching them and transporting them in the vehicle to various places including Ace's oval and then on to Wendell's residence in Boe. They were drinking alcohol.

¹ *Criminal Code 1899: 1 Construction of Terms* The term '***grievous bodily harm***' means any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health;

5. When they arrived at Wendell's residence the group of friends consisted of the following people: the accused, Theresa May, Berlasha, Wendell, Elushen, Kahiko and Kinte.
6. John Berg and He-Anka joined them at Wendell's residence. There they continued drinking alcohol for more than an hour until they received information that a relative of Wendell's was involved in a fight in Yaren. They all boarded the vehicle (driven by the accused) and turning left drove from Boe in the direction of Yaren District.
7. The accused was in the driving seat, Theresa May was in the front seat passenger and behind her sat Berlasha. Next to Berlasha on the rear seat, behind the accused, was Wendell. Sitting in the rear tray was He-Anka, Elushen, Kahiko, Kinte and John Berg.
8. The accused drove onto the main road that goes through to the tarmac of the Nauru International Airport in the direction of Yaren District. As a result of the vehicle rolling over He-Anka and Berlasha died at the scene, and Kahiko and Elushen sustained injuries.
9. I find the above facts and the bundle of agreed facts and statements² submitted jointly by counsel to be proved.

Wendell Garabwan

10. The witness Wendell Garabwan told the court that prior to this incident they were all friends. He tells the court that when they were driving in Anabare the accused drove the vehicle in a zigzag manner for fun. He demonstrated this to the Court by using one hand as if on a steering wheel and moving it backwards and forwards in a sharp jerking motion, between ten and two o'clock (clock-face) position.
11. Wendell gave evidence that when they left his place in Boe, after drinking there for an hour or so, that the manner of the accused's driving was as follows: *'Rosen drove to the main road, on the main road he was going fast, he started zigzagging on the road and the car overturned, some of the passengers at the back had fallen away from the truck and I saw that John Berg had fallen'*.

² Amended Agreed Facts, dated 15 February 2017; Witness statements of: Kinte Abouke (28.09.2015); Jodie Edward (09.09.2015); Wilhelm Appi (06.09.2015); Pancia Depoudu (06.09.2015); Goodman Gioura (22.07.2015); Amea Jamaica Adeang (28.07.2015); and Barry Quadina (undated); Exhibits: First Information Report (04.07.2015); Medical report of Drexler Eobob (04.07.2015); Medical report of Berlasha Dabwido (04.07.2015); Medical Report of Kahiko Harris (04.07.2015); Medical Report of Elushen Hubert (04.07.2015); Birth Certificate of Rosen Ribawu (10.03.2016)

12. The witness stated that although the road was clear and smooth and there was no other traffic the accused drove the vehicle from the correct side of the road to the other: *"The car rolled, rolling maybe three or four times over. The car was in the correct lane and then started zigzagging, and it went to another lane and then it tumbled and rolled."*
13. After the others were taken to the hospital this witness and accused were taken to the police station. The witness was asked who was driving and he said he didn't know. He did know who was driving, but says at the time he was in shock, panicked and scared. Wendell was not subject to a breathalyser test, and didn't see the accused take such a test. At no time that evening did the accused tell him that there were any problems with the vehicle.

John Berg Dick

14. John Berg Dick gave evidence to the court that when the accused drove on the main road towards the Airport that the vehicle was travelling fast. After passing by the Dorn Again Church on their left, they started swerving on the road in an 'S' shape, or zigzagging.
15. He said he held onto the back tray with his hands behind him, holding on tightly and he put his head down and closed his eyes because he was frightened and scared due to the manner of the accused's driving. He recalls that they rolled and the vehicle turned over. When he came to, he was laying on the tarmac his leg was sore and his head was paining. He saw the others lying on the tarmac and was told that He-Anka was not breathing.
16. The witness was conveyed to hospital along with Wendell, Kinte and the accused. En route the accused apologised to him and asked him not to tell that he (the accused) was the driver. John Berg replied *"How can you apologise to me if my cousin is not breathing?"*

Kahiko Harris

17. Kahiko Harris told the court that after being picked up by the accused they went to a friend's house to sing 'Happy Birthday' and they were drinking vodka there. They had a drive around the island and then went to Ace's oval near the airport and were again drinking vodka. Kahiko said that prior to arriving at Ace's oval the accused was drinking as he drove the vehicle.
18. He confirmed that after leaving Wendell's residence and heading towards Yaren District the speed of the vehicle was increasing and it was going very fast; after passing the church they started to zigzag. He fell off the

tray when the vehicle rolled. He could see He-Anka lying on the ground and Berlasha was close by vehicle. He walked to the nearby fence and sat down; a lady told him not to move as he was bleeding.

19. Whilst they were waiting for the ambulance the accused asked him not to say that he (the accused) was the driver. Kahiko replied "*I will report you.*" The witness was taken to hospital for treatment, however his injuries were serious and he was flown the next day to Fiji for further medical treatment.
20. Kahiko confirmed that although he was very unhappy at the time, that he has since forgiven the accused and that they are now back together as friends.
21. The injuries sustained by the witness (as agreed by counsel for the accused) were:
 - a) Head – one lacerated wound (18 x 3 cm) from (L) parietotemporal to occipital region
 - b) One swelling (5x5) cm on (L) (left) temporal region
 - c) Abrasion (L) (left) temporal region (4 x 3) cm
 - d) (L) (left) eye lids – bruised & swelling noted
 - e) Abrasion (R) (right) forearm (10x4) cm
 - f) Abrasion (R) wrist (5 x 3) cm
 - g) Abrasion (R) hand (3 x 2) cm
 - h) Abrasion (L) (left) wrist dorsum (3 x 2) cm

Elushen Hubert

22. Elushen Hubert confirms that she and Berlasha were picked up by the accused and they drove around; they were drinking juice mixed with vodka.
23. When they were at Wendell's place she confirmed that John Berg was not drinking. She does not recall much after leaving Wendell's place but recalls the vehicle going over and then she blacked out. When she came to on the tarmac the truck was lying on its side. She remembered the accused coming to her telling her "*to be strong*"; her jaw was dislocated.
24. The injuries sustained by the witness (as agreed by counsel for the accused) were:
 - a) Head
 - one swelling (2 x 2) cm on (R) [right] region
 - Abrasion (2 cm) diameter (R) [right] temporal region
 - One swelling (2 x 2 cm) over (L) [left] mandibular region

- b) Shoulder
 - Abrasion (L) shoulder & back (10 x 4) cm
 - Abrasion (R) [right] shoulder & back (10 x 4) cm
- c) Abrasion (L) [left] waist (10 x 4) cm
- d) Abrasion (R) [right] waist (10 x 5) cm
- e) Abrasion (L) [left] forearm (9 x 6.5) cm
- f) Abrasion (R) [right] leg (5 x 4) cm just below the knee
- g) (R) [right] foot abrasion (10 x 5) cm on dorsum of foot"

Mrs. Alvita Kepae

25. Mrs. Alvita Kepae was not part of the group of friends who were drinking that morning. She was at the International Airport where she worked as security. She confirmed that the area was well lit, and that she was standing on the ground in what is termed the "see off" area. This is a fenced-off area abutting the tarmac.
26. When she saw the vehicle driven by the accused it was coming from the direction of Boe. It was travelling fast, when pressed she said "*it was going fast, I don't know how fast but fast*". She saw the vehicle driven in a wide bend and then it rolled four or five times over before coming to rest on its side. The witness had a clear and unobstructed view of the vehicle rolling, it came to a stop about 10 metres from where she was standing.
27. She went to the tarmac and confronted the accused, asking him who drove the vehicle and he responded "*I don't know I was sleeping*". She tried to comfort Elushen and the others.
28. She saw Kinte stand up and try to pick a fight with the accused. After, she stopped them from fighting she heard Kinte ask the accused: "*What did you do?*" The accused did not reply.

Police Witnesses

29. Police officers attended the scene, the injured were taken by ambulance to hospital first and then the deceased were conveyed to hospital. Whilst in police custody the accused denied that he was the driver of the vehicle. No breath test was administered as the machine was out of date. The accused was interviewed which there were largely 'no comment' responses.

DEFENCE CASE

The defendant Rosen Ribauw

30. The accused elected to give sworn evidence. He was driving the vehicle on that evening with his friends as passengers. They went around the

island drinking, stopping at a friend's place and later Ace's Oval where they were drinking. From the oval they went to Wendell's place and continued drinking. They were joined by He-Anka and John Berg.

31. At Wendell's place the group consisted of Kinte, Berlasha, Elushen, Wendell, Kaihko, Theresa May, He-Anka, John Berg and the accused. Whilst they were there they received information that there was a fight at Yaren.
32. The accused told the Court that they were rushing to Yaren, that he was driving fast and the road was clear. He recalls the vehicle tipping over and when he got out he could see his friends lying around on the ground.
33. He agrees that he went to speak to Elushen to tell her '*to be strong*'; then he went and sat by the fence. There he asked Kahiko and Kinte not to say that he was the driver. He made this request because he was scared and did not know what was going to happen to him. He did not tell the police that he was the driver and lied to police officers, saying that he did not know who was driving the vehicle at the time of the accident.
34. Under cross-examination he agreed that he was drinking whilst driving in the vehicle, that he had been drinking most of the early morning and was drunk. He said he was aware that there were people in the back of the truck; that he always drives fast down that stretch of road. He did not have a driving licence at the time alleged.
35. When pressed for an explanation he said he did not recall driving in a zigzag fashion either at Anabare or on the Airport tarmac because he thinks he blacked out.
36. In response to the question as to why the accused did not call anyone sober to drive them at any stage, including to Yaren, his answer was: "*They wouldn't want to drive us around when we were drinking*".

DEFENCE SUBMISSIONS

37. The defence filed written submissions with the Court and spoke to them. The Court was reminded that the burden of proof is on the prosecution and does not shift. It was emphasised on the accused's behalf that for manslaughter and grievous bodily harm caused by driving, the level is set high as to the criminal negligence required.
38. The defence raises questions in relation to the cause of the vehicle zigzagging on the road. The accused says that he does not know as he

blacked out from being drunk. The question is raised by the defence of the mechanical soundness of the vehicle being driven. The Court was told that the vehicle was hired by the accused's family; after the accident no vehicle inspection carried out.

39. It is put forward on the accused's behalf that all the passengers were drinking, that they knew the accused was drunk when they boarded the vehicle, and at no time tried to stop him from driving the vehicle
40. The case of *Republic v Tsiode*³ is cited as authority for the proposition that a guilty plea to the charge of Dangerous Driving does not necessarily mean also guilty to the charge of Manslaughter.
41. That the offences alleged took place in July 2015, the following year the offence of Dangerous Driving Causing Death was enacted.
42. In all the circumstances the defence say that the prosecution has not adduced evidence sufficient to prove that the accused actions were grossly negligent and seek an acquittal on the charges of manslaughter and grievous bodily harm.

PROSECUTION SUBMISSIONS

43. The prosecution accept that the burden of proof is theirs and does not shift. They point to the accepted evidence that the two deceased and the two victims subject to the grievous bodily harm allegation were injured at the scene, thus the question for the Court is whether section 289 *Criminal Code* 1899 is made out.
44. The prosecution say that the accused's driving exhibited the necessary recklessness so as to involve grave moral guilt and point the Court to the following:
 - a) The accused was driving without a driving licence. He knew one was required and went on to drive in any event. A driving licence is a legal requirement to ensure that all those who operate a motor vehicle on a road are competent to do so and are aware of the road rules;
 - b) The accused had been drinking for a number of hours and was drunk. He was drinking not just when stationary outside of the vehicle, but also when the vehicle was in motion and he was driving it;

³ [1984] NRSC 4

- c) The accused attributes his lack of memory to having had black outs whilst driving due to his alcohol consumption. If he indeed did black out, this points to the level of the accused's lack of care in being in such an intoxicated state whilst in charge of a vehicle;
- d) The accused was driving one-handed in a zigzag manner to have fun. The road was smooth clear and straight. There is nothing else before the Court to explain why the vehicle rolled, other than the accused's grossly negligent manner of driving;
- e) The accused knew that there were passengers in the back tray of the vehicle, and yet went on to drive in a manner that endangered their safety;
- f) That the vehicle rolled three to five times before coming to a stop illustrates for the Court the accused's negligence in terms of his **fast speed** and deliberate manner of driving.

45. The prosecution say that the level of recklessness displayed by the accused considering all the evidence and his actions cumulatively, is sufficient for this Court to find a breach of section 289 *Criminal Code* 1899, and convict him of both counts of manslaughter and both counts of grievous bodily harm.

CONSIDERATIONS

46. Chief Justice Thompson stated in a number of cases⁴ that it is well established in this jurisdiction, for the offence of manslaughter to be made out, the prosecution has to show that liability is established by reference to section 289 of the *Criminal Code* 1899.

47. **Section 289 – Duty of Persons in Charge of Dangerous Things**

“289 Duty of Persons in Charge of Dangerous Things
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.”

⁴ *The Republic v Scotty* [1977] NRSC 9; *The Republic v Detudamo* 10 of 1980, and *The Republic v Tebetang* [1979] NRSC 5

48. Appeals in these cases lie to the High Court of Australia and we are bound by their decisions in relation to section 289 of the *Criminal Code* 1899. The decision in *Evgeniou v The Queen*⁵ affirmed that negligence sufficient to constitute a breach of section 289 must be negligence according to the standard of the criminal law, which (per McTiernan and Menzies JJ. at p. 509) “*may be described shortly as recklessness involving grave moral guilt*”. The recklessness being is “*the deliberate taking of an unreasonable risk of which one is aware; the test is subjective.*”⁶
49. This finding is in accordance with the decision of the House of Lords in *Andrews v Director of Public Prosecution*⁷ (applying *R v Bateman*⁸) where Lord Atkin held:
- "The principle to be observed is that the cases of manslaughter in driving motor cars are but instances of the general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for the purposes of criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied, "reckless" most nearly covers the case...but it is probably not all-embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."⁹
50. Turning to the case at hand, I find that the witnesses for the prosecution whilst reluctant to speak out against their friend, were credible witnesses of truth and I accept their evidence.
51. I find that the accused's evidence was mostly in accordance with those of the prosecution witnesses, except when it came to the manner of his driving and the cause of the accident; here his responses were repeatedly that he did not know as he ‘may have blacked out’.
52. I do not believe the accused's evidence that he does not recall the matters, especially as he went to some lengths immediately after the accident to ask the others not to say that he was the driver, and to

⁵ (1964) 37 A.L.J.R. 508 the the sixth of the have

⁶ *The Republic v Tebetang* [1979] NRSC 5, second last paragraph of CJ Thompson's judgment.

⁷ (1937) A.C. 576,

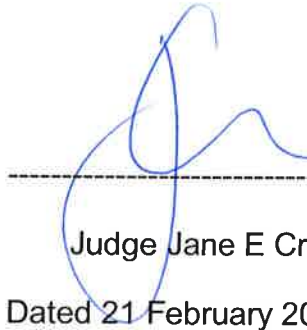
⁸ (1925) 19 Cr App. R. 8

⁹ *ibid*, at 583

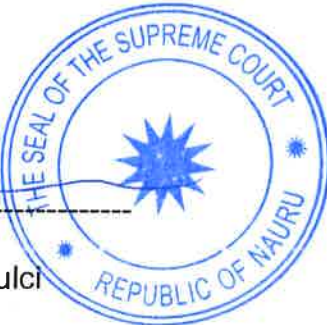
continue this with lie when questioned by the police. He lied immediately afterwards to the witness Mrs. Alvita Kepae when she asked him who was driving when he told her he was asleep in the vehicle. These lies indicate the accused was completely aware immediately after the accident that it was his reckless manner of driving that had caused death and injury to his friends.

53. That the accused understood his behaviour in driving the vehicle whilst intoxicated was wrong is shown by his response as to why he didn't get a sober person to drive: *"They wouldn't want to drive us around when we were drinking"*. His actions show a conscious disregard for the safety of his passengers and other road users by him choosing to drink whilst he drives, and choosing to operate a motor vehicle knowing he was impaired by alcohol consumption.
54. I note that in evidence the accused did not allege that there were any mechanical defects with the vehicle, nor any debris on the road, or other road users to account for the erratic manner (zigzagging) of his driving shortly before the vehicle rolled.
55. On the evidence before the Court I find that the accused knowingly drove a motor vehicle on a road when not in possession of a valid driver's licence. Whilst he was not charged with this offence (likely because of the very serious nature of the other offences charged) the fact of it is relevant, as it paints a picture of the accused's attitude in general towards driving safely and responsibly to others on the public roads.
56. I find that he drove the vehicle on the road at a speed in excess of that which allowed him to have care for the lives and safety of his passengers and other road users; that he deliberately executed zigzagging manoeuvres on a straight clear road swinging the vehicle from side to side on the road. Whilst driving in this manner he was aware that there were passengers with him not just in the vehicle, but also sitting vulnerable and exposed on the back tray.
57. The accused's driving is not inevitably grossly negligent because tragically people died and were injured. All the circumstances have to be looked at which include what led up to the vehicle rolling over and his manner of driving.
58. I find that it was the accused's deliberately reckless manner of driving that caused him to lose control of the vehicle, resulting in it rolling over at least three times before coming to a halt on its side. This is *"recklessness involving grave moral guilt"*.

59. I am satisfied so that I am sure that the prosecution have proved the case beyond reasonable doubt. The degree of negligence exhibited overall by the accused in reckless manner of the accused's driving satisfies the high degree required for it to constitute criminal negligence for the offences of manslaughter of Drexler Eobob (also known as He-Anka) and Berlasha Dabwido. I am also satisfied so that I am sure that the grievous bodily harm sustained by Elusion Hubert and Kahiko Harris was as a result the negligent and reckless driving of the accused.
60. I find as follows:
- (1) Count 1 - Dangerous driving - Guilty on his own plea
 - (2) Count 2 - Manslaughter of Drexler Eobob (aka He-Anka) - Guilty
 - (3) Count 3 - Manslaughter of Berlasha Dabwido - Guilty
 - (4) Count 4 - Grievous Bodily Harm of Elushen Hubert - Guilty
 - (5) Count 5 - Grievous Bodily Harm of Kahiko Harris - Guilty.
61. The Court thanks counsel for their comprehensive submissions.



Judge Jane E Crulci



Dated 21 February 2017