



IN THE SUPREME COURT OF NAURU
AT YAREN CRIMINAL DIVISION

CRIMINAL CASE NO. 52/2016

BETWEEN

THE REPUBLIC

AND

ALINA BIANG

Before: Khan, ACJ
Date of Hearing: 28 February 2017 and 1 March 2017
Date of Judgement: 3 March 2017

Case may be cited as: *The Republic v Biang*

CATCHWORDS:

Manslaughter- road accident- gross negligence amounting to reckless conduct must be proved-the car hit a pot hole and the defendant lost control – no evidence as to the size of the pot hole-defendant attempted to control the car but unable to do so.
Driving did not fall below the standard of reasonable and prudent driver- the charge of manslaughter not made out.

APPEARANCES:

For the Republic: D Tonganivalu (DPP)
Counsel for the Respondent: R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The defendant is charged with the following offence:

Count 1

Statement of Offence

Manslaughter: Contrary to s.303 of Criminal Code 1899

Particulars of Offence

Alina Biang on 23 January 2014 the defendant at Aiwo District, Nauru unlawfully killed Gilda Caleb.

2. Under s.303 of the Code manslaughter is defined as:

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

3. In Nauru, there was no offence occasioning death by dangerous driving or causing death by dangerous driving, so in the event of death following a motor vehicle accident, the practice has been to prefer the charge of manslaughter.

4. In January 2016, the offence of dangerous driving occasioning death was enacted under s.67A of the Motor Traffic (Amendment) Act 2016 which provides:

“(1) A person is guilty of the offence of dangerous driving occasioning death if the motor vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the motor vehicle:

- a) Under the influence of intoxicating liquor or of a drug; or
- b) At a speed dangerous to another person or persons; or
- c) In a manner dangerous to another person or persons; or
- d) In a manner that is reckless or negligent.

BACKGROUND

5. The defendant was driving a Honda CRV (car) which belonged to Janice Spanner. The car was not registered and the defendant did not have a driver's licence.

6. The car was driven around the island with passengers being picked up and dropped. The driving was done between the defendant and Gilda Caleb (Gilda). They went on a joy ride and were having fun with music being played. Although the car was fitted with seatbelts the driver and the passengers did not wear seatbelts and they did not consume any alcohol.

7. There was an accident at about 3am on 23 January 2014 when the car was driven by the defendant and in its front seat passenger was Gilda and in the back-seat Sambora Adeang (Sambora) on the right-hand side, in the middle seat was Diana May Kakiouea (Diana) and the left hand side passenger was Dili Olsson (Dili).

8. The accident took place on the road leading to Bauda District when the defendant turned left having driven from Aiwo District. She lost control of the car and it tumbled and landed on its left-hand side. Gilda was thrown out of the car and her head was tucked under the car. After the accident, the occupants and the people who arrived at the scene turned the vehicle on its wheels. Gilda had facial injuries and was taken to hospital where she died.

AGREED FACTS – ISSUES FOR DETERMINATION

9. The parties filed agreed facts and issues for determination. The facts outlined as to how the defendant and her passengers went on a joy ride of the island, the manner of the driving and the events leading to the accident, the arrival of the police and the ambulance. The agreed facts also contained copies of medical reports, the record of interview and photographs of the scene of the accident and witnesses' statements.

ISSUES FOR DETERMINATION

10. In the issues for determination the parties posed the question: "whether the defendant's driving on 23 January 2014 was in a reckless manner involving moral guilt?"

CASES ON MANSLAUGHTER

11. (1) The Republic relies on the case of the Republic v Inak Scotty¹ where Thompson CJ held that for manslaughter that caused unintentionally:

"recklessness involving grave moral guilt to be proved."

In that case the facts were the accused was driving a motorcycle more than 30 miles per hour and overtook a Land Rover and a boat trailer and collided with an oncoming motorcyclist. The accused had consumed 1 bottle of whisky within 12 hours immediately before the accident and there was a finding that he was intoxicated.

- (2) The Republic v Ivy Tagadout Adam² where the facts were that the accused allowed a boy sitting on the body of a vehicle to the right of the driver's seat, to control the steering wheel while she kept her hands in her lap and worked the accelerator, footbrake and clutch with her feet. The vehicle driven in that manner ran off the road and collided with some limestone pinnacles. As a result, the accused's younger brother, who was a passenger in the vehicle, was killed. In finding the accused guilty of manslaughter the court held:

¹ Criminal Case No. 3 of 1977

² 1975 NRL(C) 18

"I find as fact in this case that the cause of death of Welwyn Adam was the grossly negligent manner in which the accused failed to exercise proper control over the motor vehicle of which she was in charge and in which he was travelling as a passenger. The gross negligence resulted in the motor vehicle leaving the road and crashing down the embankment into limestone pinnacles. I am absolutely satisfied that the negligence was of such a gross nature, that it amounted to reckless conduct on the part of the accused, that it constituted criminal negligence of the nature and degree which is a necessary ingredient of the offence of manslaughter. Accordingly I find the accused guilty of the offence of manslaughter as charged."

(3) In Nydam v R³ it was held that:

"In order to establish manslaughter by criminal negligence it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous harm would follow the doing of the act merited criminal punishment."

(4) In the Republic v Ribauw⁴ Crucci J at [44], [53], [54], [56], [57] and [58] stated as follows:

"[44] The Prosecution say that the accused's driving exhibited a necessary recklessness as to involve grave moral guilt and pointed the Court to the following:

(a) The accused was driving without a driver's licence. He knew one was required and went onto 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 when just he was stationary outside of the vehicle, but also when the vehicle was in motion and he was driving it;

(c) The accused attributes his lack of memory to having had blackouts whilst driving due to his alcohol

³ 1977 [Vic RP 50]

⁴ 2017 NRSC 11 Crucci J at [44], [53], [54], [56], [57]

consumption. If indeed he did blackout, this points to the level of the accused's lack of care in being in such an intoxicated state while in charge of a vehicle;

(d) The accused was driving one handed in a zigzag manner to have fun. The road was smooth 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 3 to 4 times before coming to a stop illustrates to the Court the accused's negligence in terms of fast speed and deliberate manner of driving.

[53] That the accused understood his behaviour in driving the vehicle whilst intoxicated was wrong as shown by his response as to why he didn't get a sober person to drive: 'They wouldn't want to drive as 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 the motor vehicle knowing he was impaired by alcohol consumption.

[54] I note in evidence that 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.

[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 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 inadvertently grossly negligent because tragically people died and were injured all the circumstances have to be looked at which include those which lead to the vehicle rolling over and his manner of driving.*

[58] *I find that it was the accused's deliberate reckless manner of driving that caused him to lose control of the vehicle, resulting in it rolling over at least 3 times before coming to a halt on its side. This is "recklessness involving grave moral guilt".*

EVIDENCE

12. The prosecution called all the remaining occupants of the car.

DIANA'S EVIDENCE

13. (1) Her evidence was that she asked the defendant to slow down as she was driving too fast. She also asked her to slow down as she did not want to die and the defendant did not say anything to her. Her version of how they turned into the road leading to Bauda District was:

"Alina took a sharp turn. As we turned I was thrown from my seat and I hit my head on the roof of the vehicle. I shouted and Alina turned towards me. She stepped on the brake and then she let go of the brake and was swerving left to right to avoid pot holes. She agreed that the defendant was trying to regain control of the car."

- (2) Having sat in the middle seat of the back she would have had a clear view of the speedometer but she did not see as to how fast the vehicle was travelling except to say that it was travelling fast.

DILI'S EVIDENCE

- (3) Her evidence is that as the defendant turned into the road leading to Bauda the vehicle was still travelling fast and when she asked the defendant to slow down she turned towards her and was still travelling fast and there was a pot hole and she tried to avoid the pot hole and went off the road and the vehicle tumbled on its side. She was unable to say as to how many times it tumbled. Just prior to the collision, she was skylarking and had poked her head out of the car. Although she was seated on the left-hand side she did not see the speedometer despite claiming that the car was travelling fast.

SAMBORA'S EVIDENCE

- (4) His evidence is corroboration of Diana's evidence that the defendant was asked to slow down and the car continued at the same pace and he stated:

"We hit one of the pot holes on the road and that's when the car rolled and landed on its left-hand side."

He confirmed that the defendant tried to avoid the pot hole and tried to control the steering wheel.

14. In this case the prosecution witnesses' evidence is that the accused was driving fast. Although the witnesses had a clear view of the speedometer, they were not able to see the speed. When the accused was interviewed by the police she was asked"

Question: At what speed were you travelling?

Answer: We were at a normal speed.

Question: I put to you that you were driving in a fast speed. Do you agree?

Answer: I did press on both the brake and speed where I released the brake sped up and again pressed the brake, could not recall if I was pressing on the speed.

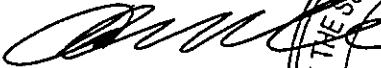
15. In the closing submissions, the prosecution submits at [17] as follows:

"The Republic submits that the defendant unlawfully killed Gilda Caleb. The defendant drove the motor vehicle in a grossly negligent manner and displayed recklessness involving moral guilt. The defendant did not have a driver's licence. This is confirmed on page 3 of her interview to the police where she stated that she did not have a licence. "

16. All the prosecution witnesses have stated that she tried to avoid a pot hole and according to Dilly and Sambora she hit a pot hole and went off the road.
17. In a bundle of photos tendered there is a large pot hole in photographs numbered 2 and 3. It was right in the middle of the road and covered a significant portion of the road. Apart from tendering the photographs, the prosecution has not adduced any evidence as to the size or depth of the pot hole which in my view was very relevant. Photograph number 4 shows phosphate sand deposits and this is very close to where the vehicle went off the road. Again, no evidence was adduced as to whether the phosphate sand was the cause of the vehicle losing control.
18. There is no evidence that the defendant was aware of the road conditions and/or the pot holes and the phosphate sand on the road or the road conditions generally.

19. If as the prosecution witnesses have stated that the defendant hit a pot hole and thereafter tried to control the vehicle but failed to do so, then it cannot be suggested that her driving fell below the standard of a reasonable and prudent driver and in the circumstances the ingredients of the charge of manslaughter is not made out. She is acquitted of the charge of manslaughter.

DATED this 3 day of


Mohammed Shafiullah Khan
Acting Chief Justice

