

IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 19/2487 CoA/CRMA

BETWEEN: Armstrong Masanga
Appellant

AND: Public Prosecutor
Respondent

Coram: Hon. Justice John Hansen
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: Henzler Vira for the Appellant
Simcha Blessing for the Respondent

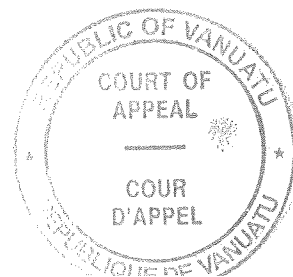
Date of Hearing: 6 November 2019

Date of Judgment: 15 November 2019

JUDGMENT

A. Introduction

1. The appellant was sentenced to an end sentence of 2 years 1 month and 8 days imprisonment on one count of causing death by reckless driving contrary to s. 12 of the *Road Traffic (Control) Act* [CAP. 29]. This offence carries a maximum penalty of 5 years imprisonment.
2. The appeal was based on 2 grounds. Firstly, that the primary Judge considered aggravating features that were not agreed to by the appellant; and secondly, that the primary Judge erred in relying on the case of *Jenkinson v Public Prosecutor* [2000] VUCA 5. On the day of the appeal hearing, Mr Vira abandoned the second ground.



B. Background

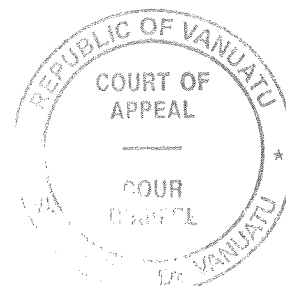
3. The offence was committed at about midnight on 23 December 2018. Mr Masanga was intoxicated and denied entry into the Club Lit night club. He was furious and swore at the security guards and wanted to punch them. He then left angry and aggressive, got into a bus and drove it at the security guards still standing on the footpath in front of the club. Mr Masanga swerved the vehicle onto the footpath, narrowly missed the security guards but hit and killed a member of the public who had just exited the club. He kept driving towards Nambatu area, at high speed.

C. The Decision

14. The primary Judge set out the following aggravating factors in para. 12 of the sentencing decision:

- (i) *You were driving under the influence of alcohol. In the pre-sentence report, you stated that on a scale of 1-10 with 10 being extremely drunk, you rated yourself at 8 on the night of the offence.*
- (ii) *You intentionally diverted from the main road and onto the footpath in front of the club lit entrance where the security guards and other customers were.*
- (iii) *You were using the vehicle Bus Reg. #15926 as a weapon and drove it towards the security guards who were on the footpath as they were not on the road or even at the side of the road which indicate a clear and deliberate intention to cause serious injuries or death.*
- (iv) *You were angry and aggressive towards the security guards. You were not happy because the security guards did not allow you entry into the night club. That was your motive.*
- (v) *You were driving at a high speed.*
- (vi) *You knew and deliberately you were taking risks by driving and controlling your bus onto the footpath towards the security guards.*
- (vii) *There was some degree of planning. You had planned to run into the security guards but narrowly missed and hit the deceased who had just exited the night club and standing outside in front of the entrance of the night club.*

15. These were based on all but one of the aggravating factors submitted by the prosecution in their sentence submissions filed on 11 June and 19 August 2019. The primary Judge did not include as an aggravating factor that Mr Masanga had failed to stop after hitting the deceased. If he had, Mr Masanga's end sentence might well have been higher. The primary Judge set out in the sentencing decision that Mr Masanga's lawyer had accepted the aggravating factors submitted by the prosecution. However, nothing turned on this in the appeal.



D. Appeal Ground

16. The appellant submitted that the primary Judge erred in placing too much weight on factors in relation to the offending that were not in the Amended brief facts that he agreed to before pleading guilty. Firstly, the appellant pointed to the words from the pre-sentence report. He submitted that he had simply given his honest opinion about his level of intoxication on 23 December 2018 and that there was no police evidence about how drunk he was.
17. Secondly, the appellant submitted that the Amended brief facts did not contain any wording that he had used the bus as a weapon. Accordingly, the primary Judge had erred in drawing that implication.

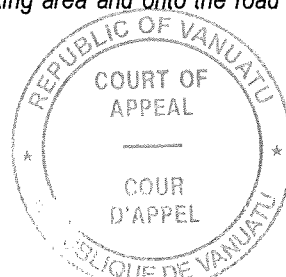
E. Response

18. The prosecution submitted that it was open to the primary Judge to find that Mr Masanga had used the bus as a weapon. It was reasonable, and consistent with what Mr Masanga had agreed to in the Amended brief facts, that a bus being driven intentionally towards people at speed can be described as a weapon. Further, that the primary Judge drew a reasonable inference that a bus intentionally driven at speed towards people, who the appellant bore a grudge against, was done with an intention to cause serious injury. This was reckless driving in that he knew it could cause serious injury but went ahead and did it anyway. The prosecution submitted that there is a difference between a selfish disregard for the lives of members of the public, and with a momentary lapse of judgment; Mr Masanga's offending clearly fell into the former.

F. Discussion

19. As to the first aspect of the appeal, at all material times Mr Masanga accepted that he was intoxicated and drove under the influence of alcohol. The aggravating factor of his offending was that he drove under the influence of alcohol. That was the fact that he agreed to. The words from his pre-sentence report that the primary Judge included were Mr Masanga's own self-description of how intoxicated he was. It was descriptive and did not exacerbate the agreed aggravating factor that Mr Masanga drove under the influence of alcohol. Accordingly in our view, there was no error by the primary Judge in including those particular words from the pre-sentence report.
20. As to the second aspect of the appeal, the Amended brief facts stated:

The accused then crossed the road and walked towards the car park opposite the night club. The accused got into his Hyundai bus registration number 15926 that was parked in the parking lot opposite the Club Lit area. He exited the parking area and onto the road driving towards



Nambatu area. At this point he decided to drive towards the security guards who were on the footpath and would not give him entry to the club.

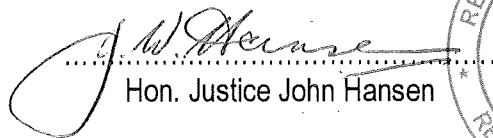
At about the same time, the deceased came out of the club. He was looking at his phone and just standing calmly on the footpath in front of Club Lit. Security footage shows the bus swerved suddenly from the main road, mounted the footpath and narrowly missed the security guards. The deceased who had just walked out of the night club was standing in front of the entrance. The bus narrowly missed the security guards and hit the deceased at exactly 00:32 hrs on 23/12/18. After it missed the security guards and hit the deceased, it swerved back onto the road.

21. Mr Masanga accepted that he was angry at being declined entry into the night club. He was clearly so angry at being denied entry into the club that he swore at and tried to punch the security guards who denied him entry. He then got into his bus and deliberately drove it off the main road and onto the footpath in front of the club, aiming the vehicle at the guards. They were not on the road or even at the side of the road. As the primary Judge set out, this indicated a clear and deliberate intention to cause serious injury or death. This was reckless in that Mr Masanga knew it could cause serious injury but he went ahead and did it anyway. He had no regard for their safety nor that of others. Given Mr Masanga's intoxication, his aggression and mode of driving confirmed by the security footage, the finding by the primary Judge that he used the bus as a weapon was an inevitable inference. The appellant has not made out any error by the primary Judge.

G. Result

22. The appeal is dismissed.

**DATED at Port Vila this 15th day of November 2019
BY THE COURT**


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Hon. Justice John Hansen

