

PUBLIC PROSECUTOR

-v-

FRED TOKA

Coram: Chief Justice, Vincent Lunabek
Counsel: Mrs Losana Timakata for Public Prosecutor
Mr Colin Leo for the Defendant

REASONS FOR VERDICT

This is the judgment in this case. Defendant Fred Toka is initially charged with one Count of reckless driving causing death, contrary to section 12 of the Road Traffic (Control) Act [Cap 29] and One Count of unintentional harm causing death, contrary to section 108(c) of Penal Code Act [Cap 135].

Defendant Fred Toka entered not guilty pleas on both counts. Defendant Fred Toka was discharged of the offence of reckless driving causing death as charged in count 1 upon the prosecution entering a nolle prosequi.

Mr Fred Toka was tried only on one count of unintentional harm causing death as charged in count 2.

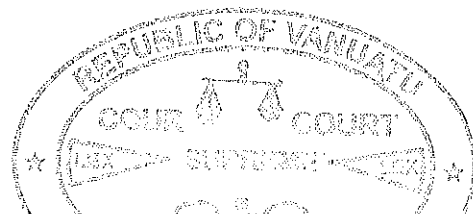
The crux of the prosecution case is that on 28 April 2013 in early morning of that day at about 5.00am o'clock, Defendant Fred Toka caused the death of another person (Sam Pasua) who was laying on the road drunk.

The defence or response of the charge is that the Defendant, Fred Toka, denied causing the death of the victim, Sam Pasua. The Defence says that the victim Sam Pasua had died already before his body was run over by the Defendant in the early morning of 28 April 2013. The defence says that the victim's death was caused by a direct assault the victim received as a result of which he died.

This is a criminal trial. The law is for the prosecution to prove each and all essential elements of the offence charged against the Defendant beyond reasonable doubt. If there is a reasonable doubt at the end of the trial, I must consider that doubt in favour of the Defendant and if it is a reasonable one I must discharge the Defendant of that offence. If I am satisfied the prosecution has met all the required burden of proved on the criminal standard of beyond reasonable doubt, I must convict the Defendant as charged.

For the Defendant to be found guilty of the offence charged under section 108(c) of the Penal Code Act, the prosecution must prove on the standard of beyond reasonable doubt the following elements of that offence:

1. That on 28 April 2013 in the early morning of that day at about 5.00am o'clock, Defendant Fred Toka, caused damage to the body of another person (victim deceased Sam Pasua).



2. That the damage caused was unintentionally caused resulting in the death of another person (Sam Pasua).
3. That the damage caused resulting in the death of another person was caused through recklessness or negligence or failure to observe any law.

AGREED FACTS OR FORMAL ADMISSION

Following facts are agreed or formally admitted by the Defence:

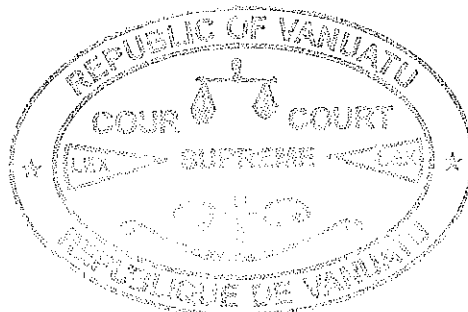
1. On the morning of 28 April 2013, the defendant Fred Toka, was the driver of a Grey Toyota Prado Registration number 5934.
2. In the early hours of the morning of 28 April 2013 the Defendant was enroute to Port Vila International Airport from Havanaah Harbour via Mele road
3. In the vehicle the defendant was with two tourists.
4. At the time, it was still dark, there was no other vehicle on the road and the defendant was driving at a speed of 60KM/Hr.
5. Along the same road (Mele road) he saw three boys on the left side of the road, drunk and not in total control of themselves.
6. While driving along with the same speed he kept his eyes on the three boys taking care not to hit them as he drove past.
7. As the defendant passed the three boys he turned to see a green object on the road.
8. As the defendant ran past the green object he realised that he had run over a person.
9. The defendant braked for a short time but did not stop thinking of the safety of the two tourists.
10. The defendant went straight to the airport to drop off the tourists for their flight to Australia.
11. The defendant left the airport and went straight to the police station to surrender himself to the police.

EVIDENCE

The details of the evidence are recorded in the notes of evidence contained in the court file record. What follows is a summary of relevant prosecution evidence and defence evidence.

Prosecution Evidence

The prosecution has called 9 witnesses.



Doctor Joe Warsal is the first prosecution witness. He is a Doctor at Vila Central Hospital at the Surgical Department. He is a doctor for about 10 years. He was with surgical department since 2010. On 28 April 2013, he was at the hospital to issue a death certificate. He had examined the body of the deceased Sam Pasua. The victim died already when his body was in the hospital. He found bleeding on his right chest-dall skin – bruises. To his observation, there were injuries sustained on the body of the patient. The patient was hit on the right side by a blind object and on the history of the incident leading to his death, it was evident the patient was hit by a truck.

He examined the body of the patient, he died already. The injuries on the body of the patient and the hit on his right side was consistent with the history of the incident that he was run over by a truck.

He was cross-examined. He denied that the blind object could be a stick or knife. The blind object is not a sharp object. It is not an object with sharp edges or teeth. He gave a description of what he saw on the body. The evidence of the injuries on the body came in line with the history of road accident. He was challenged as he said in his report that the patient died on the spot. He answered that is not his point in the report as he had checked a dead body. He did not make any further examination.

He said he did not make any further enquires if the patient was hit by any other object. He was asked to examine only the body. He made his findings on what he saw on the body of the patient when he examined it.

Orlando Kawari is a constable. He is next in the witness box. He is now working with Traffic Road Department at Police station. He was on duty shift on the night of 27 April 2013. In the early morning of 28 April 2013, he was told there was a road accident.

The driver of the truck involved in the accident was at the police station. He met with the driver. The driver said to him that he drove with two tourists guests from Havannah on his way to airport. He ran over a person. He told the driver to wait. He went to investigate. He attended the scene. He went to Prima bridge, 200 meters from the bridge, he went to Samasama store. He went to Mele village and back. The time of accident was about 5-5.30am o'clock in the morning. There was no one on the road. He got information from what the defendant told him.

Samuel Kansen is the next prosecution witness. He lives at Prima Area. He said on 28 April 2013, he saw a vehicle he referred to as "1 bus speed tumas i come sperem small papa blong mi". He could not see its colour. He was with the victim at the time. The victim crossed the road to the other side and laid down on the side of the road. He said "Mi luk save truck Bus ia i speed tumas". He said he and another person named Sam went on the other side of the road and lifted the body of his small papa. He said "Taem we small papa I silip, mi luk se hemi luk sign blong truck ia – mo hemi luk igo antap – hemi wantem kirup be truck i speed tumas". (when my small papa laid down he saw that he (small papa) saw the sign of the truck as he wanted to lift up his head but the truck was too speed).



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The truck hit him and saked his body. He said he run and lifted him up. He said he was one of the three (3) persons who lifted his small papa up. The two (2) others are Sam and Joe. They run to the other side of the road and lifted up the body of his small papa on the other side of the road.

He saw blood coming out from his ears, nose and mouth. After the accident he went to his house. At that time there were people who were with the victim on the side of the road. The father of the victim was with the body of the victim on the road. He said before the truck hit him, the victim was alright.

Under cross-examination, he said he followed Sam Pasua at Prima settlement to the road. At the time, Sam Pasua had some alcoholic drinks. He was not too drunk. He denied that Sam Pasua had been assaulted as he said he was sleeping, he heard Sam Pasua calling he went and followed him on the road. He met Sam Pasua in the morning when he walked with him on the road. Sam Pasua came on the road and shouted. Sam Pasua walked on the road and he followed him some distance back about 7 meters when referring to the size of the trial court room. He followed Sam Pasua. He was alright. He was asked and he confirmed he saw that Sam Pasua went and laid down on the other side of the road. When the truck arrived, he said he wanted to go and pull him out. He saw the vehicle hit him already. But he said Sam Pasua also tried to lift himself up when the vehicle arrived but the truck hit him already.

It was put to him whether he was walking with the two (2) other persons he mentioned in his evidence. He said no. He said he was walking with his small papa only. He said after the vehicle hit him, he said he took Sam Pasua's body to the other side of the road and then returned to his house. He was asked if Sam Pasua drunk alcohol. He said he told the police in his statement that Sam Pasua was drunk but he did not know what sort of alcohol Sam Pasua had drunk that night of 27 April 2013. He said he saw that Sam Pasua was drunk but he was not too drunk.

It was put to him that if Sam Pasua was took drunk, he could see not the light of the vehicle arriving. He answered that he saw Sam Pasua tried to get up from where he had laid down but the vehicle hit him.

It was put to him and he denied there was a fight that night. He said he saw the lights of the vehicle. He was asked, he accepted he did not know how to read or write. He was challenged on his statement to the police but he said he did not know that he told the police that the vehicle run slowly.

In re-examination, he clarified that when Sam Pasua walked to go on the road, he followed him on the road. Sam Pasua went on the other side of the road. He laid down on the side of the road and the vehicle hit him there. He said the vehicle did not stop. He said Sam Pasua was still alive before the vehicle hit him on the side of the road on 28 April 2013.

Sam Alimas was the next witness who gave evidence that he lives at Devils point. On 28 April 2013, he was on his way to Bladinieres, on the road, he saw the vehicle was at a high speed and run over the person who died, the truck stopped for a small time and took off again. He was walking at that time with his small uncle. Time was about 5.00am o'clock. Place was still dark. He walked on the road.



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He saw the truck coming from Mele. He said they walked on the road, a vehicle lights shined the body of a man on the road and he heard a big noise (fire up) the truck applied brakes and then took off again.

He described the distance he was and the body of the victim (the distance of the court trial room from its length). He saw that the man laying on the road was surprised of the truck as he was trying to get himself up but the truck hit him. He was afraid. He did not move. His uncle run off the other side of the road and helped others to take that person to the nakamal. They then went to bladinières.

In cross-examination, he said he walked with his uncle Willie Gideon. He was asked and he said he was running on the side of the road and he did this everytime as he was practicing the sport of boxing.

He was asked when he saw the lights of the vehicle whether he saw anyone again. He answered no. There was no one on the side of the road where the victim was laying down. But there were 2 or 3 men on the otherside of the road. He knew Sam Pasua but he said when the lights of the truck shined on Sam's body, he did not know that it was him. It was only after the truck hit him that people cried out that it was Sam Pasua.

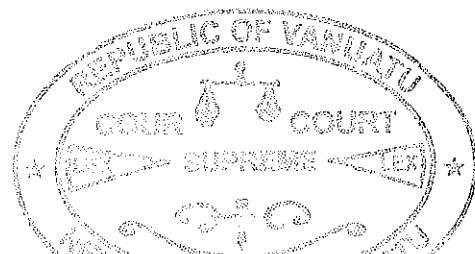
He was asked and he confirmed he saw that when Sam Pasua was laying down on the side of the road, his head was on the road. He confirmed that the vehicle run on the driver's right side of the road at that time.

Willie Bejo gave evidence that he lives at Prima area. In the early morning of 28 April 2013, he run and walked on the side of the road towards Port Vila. He was on the left side of the road. He saw on the right side of the road a vehicle going toward Port Vila. He was with some of his friends – Sam and Joshua. They run toward Port Vila. The lights of the truck shined on a man who was laying down on the right side of the road. He did not know the man. He said when the lights of the vehicle shined that person, that person reacted of the sudden arrival of the truck by lifted his head to get up but the truck hit him. He run and lifted up the person and he recognized that person to be Sam Pasua. Blood coming out from his ears, nose and mouth. Sam Pasua's father and family came and washed him on the tar sealed road. They took a taxi and took Sam Pasua to hospital. He saw the vehicle wanting to stop but then it took off again.

In cross-examination, he said he made a statement to the police. He does not know how to read and write. Time was about 5.00am o'clock in the morning. Sam Pasua is one of his cousin brothers. He was about a distance of 7 meters when the vehicle hit Sam Pasua. He did not recognize Sam Pasua when the lights of the vehicle were on him.

It was put to him and he denied he walked with Sam Kansen. He confirmed he walked with Sam Alimas. It was early in the morning. It was still dark. Before the truck arrived he did not see the man laying down on the other side of the road.

He clarified, the road was a straight road. He could see in front of him. When the truck came closer to the man on the side of the road, he could see that man lifted up his head. The vehicle hit him.



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Joshua Tako gave evidence next. He lives at Ohlen area. On 28 April 2013, he got up early and run along the side of road to Mele Village and back.

It was still dark on his return from Mele. He saw that vehicle hitting the man laying down on the side of the road. He was on the left side of the road, the truck came from Mele toward Port Vila on the right side of the road.

The lights of the vehicle shined the man who was laying down on the right side of the road. That man lifted up his head and the truck hit him. Someone lifted up the body of the man. He saw there were bleeding from his body. He saw the father of that man took him in a taxi to go to the hospital. He saw the vehicle stopped for a short time as he could see the lights from behind the truck were on and the truck took off again.

In cross-examination, he confirmed his evidence in chief. The man who was laying down on the right side of the road tried to get himself up as he tried to lift up his head when the truck lights were on him but the truck hit him.

Johnny Yawake, the father of the deceased gave evidence. On 28 April 2013, he was at his house. In the early morning of that day, he said an accident took place on the road. He was told by the boys that his son Sam Pasua got an accident on the road. He came and took his son in a taxi to go to the hospital. He said when he arrived, he saw his son was still alive. He took him in a taxi. They arrived at La Smet and he could see that his son did not breath anymore.

He was cross-examined. He denied any fight occurring on the night of 27 April 2013. It was still dark. His house was just on the side of the road at Prima Area. He saw people on the side of the road. Sam was still alive when he arrived. He did not know why Sam Pasua laid down on the side of the road. He was asked and he said when he arrived, he did apply the palpate on the hand of his son. He was still alive.

Police constable William Seru is the prosecution last witness. He is a constable. He is a road traffic investigator. On 28 April 2013, there was an accident at Prima. The driver of the truck was Defendant Fred Pakoa. The truck was a Prado Toyota. The deceased was Sam Pasua. He interviewed the Defendant, Fred Toka. He took two (2) tourists that morning. On the left side of the road, there were three (3) young men who were behaving like they were drunk. He focused on them to ensure he did not collide with them. He drove passed them. He saw a green object. He realized he hit a person. He applied brakes and because of the security of the two tourists, he took off and dropped them at the airport and then surrendered himself at the police station. He cautioned him before he took his statement. He did not attend the crime scene. There was no investigation about any fight.

Evidence of the Defence

At the end of the Prosecution case, the Defendant elected to give evidence himself after section 88 of the Criminal Procedure Code Act was read and explained to him.

He gave evidence to the following effect. He is 68 years old. He works at Tour Adventures as a Tour guide and a driver. He was involved in tourism since 1975. He works for the same company since 1998 – (15 years with that company). He has 6 children and so many grand children. He is a minister of church. He was



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ordered in July 1976. He works as a pastor. He works with young people. On 28 April 2013, in the early morning, he was asked to pick up 2 tourists at Havanah Resorts. The departure time is 7.00am in the morning. He was there 15 minutes before 5.00am. He was at Havanah at 4.45am. The two (2) tourists loaded the truck and he took off from Havanah at 5.15am o'clock. There was no vehicle on the road towards Mele – only a person he saw on the road towards Mele. This was before he arrived at Samasama store. He said then there is a curve. He saw three (3) people on the left side of the road.

They were conducting themselves as they were drunk. He put on the head lights of the vehicle to avoid them. He drove on the side road to avoid any collision. When he passed the 3 men, he saw a green object and he was at a speed of 60Km per hour at the same time he run over that green object. He described the distance between the 3 people on the left side of the road and the green object on the right side of the road to be about 5-6 meters. When he run over that green object, he felt that it was not just an object. He felt about the reactions of the 3 persons when he run over the object. He looked at the vehicle interior mirror and he saw 2 boys running towards the green object. They lifted up the green object and that was when he knew the green object was a man.

There was no reaction on the body. There was no movement of the body of the man. The 2 boys tried to lift him up. He thought about the safety of the 2 tourists as he apprehended reactions from people of Tanna on the road, he took off and dropped the 2 tourists at the airport. Time was about 5.40am. He knew that the people on the road were from Tanna Island.

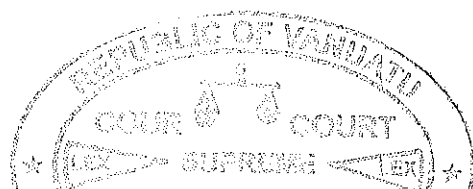
After dropping the 2 tourists at the airport, he went to see his wife and informed her that he was going to surrender himself to the police at the police station in Port Vila. He did then do so. He informed the police about the accident. He told the police that he run over a man. He mentioned the place of the accident and the time was 6.20am o'clock in the morning.

His wife arrived. The police informed him they did not see any man on the road. They did not see any blood on the road as the people of that area have just waken up.

In his cross-examination, he said he is an experience driver, he knows how to drive speed. He accepted that he must have foresight when driving near a school or community settlement. He accepted that in the night he must pay extra care on his driving as during the night, it was dark. He accepted he had full control of his vehicle. He accepted he must pay attention to his driving and look out. He accepted that at 60Km per hour, the vehicle was in a speed. He accepted he left Havanah at 5.15am o'clock and arrived at Prima (place of accident) at 5.40am o'clock. It was 25 minutes. He accepted it was a high speed. He confirmed when he saw the 3 men, his eyes were focused on the three men on the other side of the road.

He was asked at 5-6 meters on the other side of the road, the green object was on the right side of the road. He responded he put on the head lights of the vehicle the green object had no shape.

He was asked when he saw the green object, he run over it. He answered people said the green object tried to get up. He did not see that. When he run passed



the three (3) boys on the other side of the road he saw the green object from 6 meters.

He was referred to his statement to the police at last paragraph of his statement he stated when he run pass the 3 boys, he run on the same speed.

He passed the 3 boys he saw a green object on the road. He run over the green object and realized that he hit a man. He applied the brakes of the vehicle he thought about the safety of the two tourists and took off again.

DISCUSSION ON EVIDENCE

I have considered and assessed the evidence of the prosecution witnesses and the evidence of the Defendant. The facts of this case are not substantially disputed.

I found each and all prosecution witness are credit worthy witnesses. I found that the Defendant's oral testimony conflicted with his statement to the police and confirmed the version of facts advanced by the prosecution. The court rejects the Defence suggestion that Sam Pasua, the victim, was dead before the Defendant run over him. I find that Sam Pasua got drunk and laid down on the side of the road. Sam Pasu's head was on the road whilst his legs were on the side of the road. Sam Pasua was laying on the right of the road near Samasama store area in the direction leading to Port Vila town.

There is overwhelming evidence that Sam Pasua was still alive when he was hit by the vehicle driven by the Defendant on 28 April 2013 in the morning of that day.

APPLICATION OF LAW

The summary of the facts as found show that the place of accident is near a community settlement on the side of the road. It was still dark at 5.40am. There were people on the side of the road. There was a green object on the road. The defendant saw all that. He had full control of the vehicle he was driving on 28 April 2013 in the morning of that day. He was at a speed of 60Km per hour. He tried to avoid the three persons on the left side of the road.

There was no disturbance or interference from his right side of the road. He saw a green object on his right side of the road. He run at the same speed of 60Km per hour. He did not slow down his speed when he saw the green object. The defendant accepted that 60Km per hour was a high speed and in the circumstance of this case, it was an excessive speed at the corner of the road where there is a community settlement on the side of the road, there were people on the road.

The Defendant knew that there was a risk, he decided to take that risk by not slowing down his speed the result of which is that he hit the victim causing injuries on his body which resulted in his death.

That was the evidence of damage caused on the body of another person resulting in the death of that person through recklessness. The prosecution has proved beyond reasonable each and all elements of the offence under s. 108 (c) of Penal Code through recklessness.



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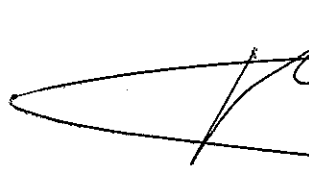
This is sufficient to prove the guilt of the Defendant. The Prosecution has also proved beyond reasonable doubt that Defendant Fred Toka was careless in his driving on 28 April 2013 in the morning of that day as a reasonable man in his situation at that time would do.

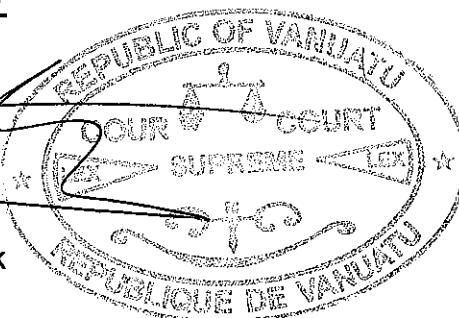
VERDICT

- (1) I found Defendant Fred Toka guilty of the offence of unintentional harm causing death, contrary to section 108 (c) of Penal Code Act.
- (2) I convict Defendant Fred Toka of that offence accordingly
- (3) I shall direct submissions on sentence after this verdict.

Dated at Port Vila, this 6th day of September 2013.

BY THE COURT


Vincent Lunabek
Chief Justice



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written in an arc at the top, and 'REPUBLIQUE DE VANUATU' is written in an arc at the bottom. In the center, the words 'COUR SUPREME' and 'COURT' are visible, along with 'LEX' on the right side. There are two small stars on either side of the central emblem.