

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case
No.19/893 SC/CRML

PUBLIC PROSECUTOR
v
NIGEL MORRISON

Before: *Justice Jeremy Doogue*

Counsel: *Mr. Ken Massing and Ms. Betina Ngwele for the State*
Mr. Saul C. Holt QC for the Defendant

JUDGMENT
dated 26th September 2019

Background

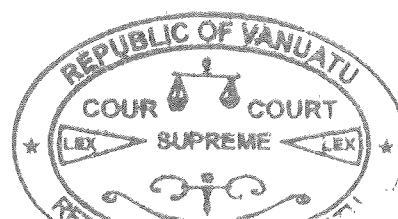
[1] The defendant is before the Court on charges arising from a traffic crash that occurred between the hours of approximately 11 and 12pm on the 18th of March 2018 at a point on the circular Efate road near Havanah Harbour. As a result of the accident a motorcyclist, Christian Lacoste was killed. Mr Lacoste and a group of fellow motorcycle riders were travelling around the island in a counter-clockwise direction. Their intention was to complete the circuit of the island in one day.

[2] At a point on the road near Lelepa Landing are situated two establishments which are mentioned in the following judgment. Mr Morrison together with his partner was travelling to one of those establishments which was Franchesca's Café. The defendant had travelled from Port Vila that morning to go there for lunch. He was travelling in a clockwise direction on the circular road.

[3] Another person, Mr Monvoisin, was driving in the same direction as Mr Morrison. He was intending to go to the Wahoo Bar which was some 40 yards along the road (that is more distant from Port Vila) than Franchesca's.

[4] Mr Morrison's vehicle had been travelling behind that of Mr Monvoisin for some distance and they both arrived at their destinations at about the same time.

[5] In order for Mr Monvoisin and Mr Morrison to enter the respective properties they were going to, they had to make left hand turns which would take their vehicles across the opposing line of traffic and into the entrance ways of the properties.



[6] The evidence establishes that while Mr Monvoisin was waiting to turn into the Wahoo Bar, his vehicle was stationery in his lane. Before he could commence his turn, a motorcycle driven by Mr Lacoste emerged into view coming from the opposite direction. Mr Monvoisin sighted the motorcycle and waited for it to pass so that he could turn into the Wahoo Bar. After the motorcycle passed him, and just before he began his turn or shortly after he had commenced it, he heard a loud crash behind him which was caused by the motorcycle colliding with Mr Morrison's vehicle.

[7] Mr Monvoisin looked in his mirror and saw that the motorcyclist had struck the front of Mr Morrison's truck. Monvoisin moved his vehicle off the road and came back to see what has happened.

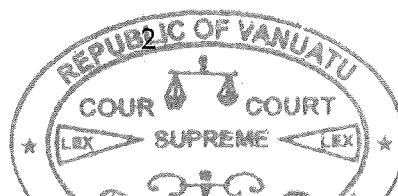
[8] The collision had occurred just outside Francesca's. The distance from the point of impact to the location on the road where the motorcycle had first become visible to Mr Monvoisin was approximately 100 metres.

[9] Evidence from persons at the scene establishes that as a result of the impact Mr Lacoste became detached from the motorcycle in the accident and both he and the machine slid along the road or travelled through the air along in the same direction of travel that he had been riding in before the accident. A gouge on the road marks the path the motorcycle took. The motorcycle travelled approximately 18 metres to the point where it came to rest which was not far from where Mr Lacoste also came to rest.

[10] Mr Lacoste was seriously injured in the accident. He had broken a leg and as it later turned out the force of the accident had caused his aorta to rupture causing internal bleeding. This resulted in his death later that day in the hospital at Port Vila. Mr Holt QC, counsel for Mr Morrison, accepted on behalf of his client that the accident caused the death of Mr Lacoste. He said he recognised that if a person has suffered injuries of the kind that Mr Lacoste had sustained, there was no appropriate medical facility in Vanuatu that could have repaired the damage in time to save his life. He could only have been saved by being taken somewhere else such as New Caledonia to have appropriate treatment. The necessary treatment was not available on Vanuatu.

[11] Quite a number of people in the area came to the scene after the accident and many, as might be expected, did their best to help Mr Lacoste. Contrary to the contentions of the prosecution, I accept that Mr Morrison was one of those who made his way over to Mr Lacoste to speak to him and Mr Morrison also went down to Francesca's to get people to come and assist.

[12] There was an unfortunate delay before Mr Lacoste was removed from the scene. No ambulance could be made available to pick up Mr LaCoste. The only ambulances were already tasked to other jobs at the time. Mr Lacoste lay on the side of the road for



approximately an hour and a half. He was eventually attended to by paramedics and was eventually taken to hospital in Port Vila by car.

[13] The police were informed of the accident and attended and then later on the 28th July 2019, they returned to the scene to carry out a detailed inspection and reconstruction of the events leading to the death of Mr Lacoste.

[14] On the day following the crash and resulting death of Mr Lacoste Mr Morrison voluntarily attended at the Traffic Section of the Police. He gave them a written statement which he had signed which stated amongst other things that he arrived at Francesca's at about 11:15am. The statement continued:

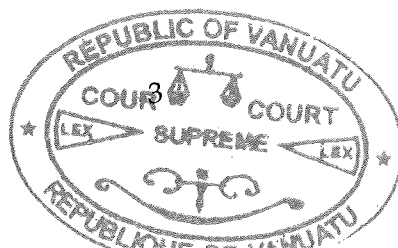
"After checking behind I stopped and indicated a left turn.I looked to the driveway and it was clear. I looked ahead and could see about 80 metres ahead forward to a bend past some billboards and it was clear. I commenced my turn. About two thirds through I was struck by a fast oncoming large motorbike. I only saw when it was upon me. It hit my front driver's headlight or thereabout".

[15] His statement continued that he went to see Mr Lacoste to check on him and in the course of the discussion he said that Mr Lacoste said he was sorry for the accident asking if he, Mr Morrison, was ok and also said something like "sorry I went too fast".

[16] Mr Monvoisin sent Mr Morrison an email on the following day, Tuesday the 20th of March. In it he confirmed that he had been going to the Wahoo Bar and that just before he stopped to turn into the Wahoo Bar, he heard a loud motorbike engine coming. He looked out and he saw Mr Lacoste whom he recognised coming towards him. He said he was coming out of the corner pretty fast and accelerating at full travel. Mr Monvoisin said he waited for him to pass then he turned into the Wahoo Bar but as he was turning, he heard a big impact and saw the crash in his mirror. He recorded that people on the scene called the ambulance/paramedics. He said that other bikers riding with Mr Lacoste all arrived and so he left the scene. He concluded his email by saying:

"The biker was going way too fast, there was no way he could have stopped and avoided the collision with the car behind me. Nigel could not see the biker coming as there was curve on the road ahead of us and he was behind me driving a big 4 x 4. The first thing I said to my partner in the car when it happened was, "if we had been in the car behind us, there was no way that we could have avoided that crash, that biker was going way too fast."

[17] The expressions of opinion contained in the latter part of Mr Monvoisin's email were put in evidence but, in my view, they do not contain admissible opinion which would assist me in coming to a conclusion in this case.



Charges

[18] Two charges were brought in the alternative against Mr Morrison with the first under section 108 of the Penal Code that provides as follows:

108. Unintentional harm

No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.

Penalty :

(a) if the damage so caused is purely temporary, imprisonment for 3 months;

(b) if the damage so caused is permanent, imprisonment for 2 years;

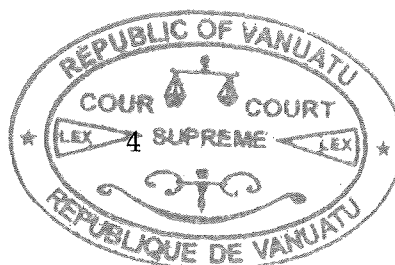
(c) if the damage so caused results in death, imprisonment for 5 years.

[19] The other charge was brought under traffic regulations. It is not necessary to consider the second charge further in this decision because of the result which I have come to.

[20] The case for the prosecution was that the accident was caused by Mr Morrison not keeping proper lookout. Mr Massing and Ms Ngwele for the prosecution laid particular stress on the fact that a reasonable driver would have seen that the vehicle in front of Mr Morrison's, that of Mr Monvoisin, was indicating a left turn and was obviously waiting for an oncoming vehicle. The allegation is that Mr Morrison did not register that fact and notwithstanding that the car in front was waiting for an oncoming vehicle, he turned across the opposing lane.

[21] The prosecution noted the acceptance by Mr Morrison in cross-examination that he was able to see beyond the vehicle in front of him (thus contradicting the opinion of Mr Monvoisin earlier referred to that he could not) and that he could see 80 metres in front of him. Yet, the defendant stated in his evidence, he did not see or hear the motorbike coming. The prosecution assertion was that the only explanation was that Mr Morrison was not concentrating and keeping a proper lookout before making his turn. The prosecution alleged (uncontroversially) that the deceased had a right of way on the road. That is, Mr Morrison did not contend otherwise. Similarly, it was not contested that an unintentional harm had been caused to the body of Mr Lacoste as alleged in Count 1 and nor was it disputed that the damage caused the death of Mr Lacoste.

[22] Much of the evidence in the case concerned the locale in which the accident occurred, the views that the parties involved would have had their events and the speed at which Mr Lacoste was travelling. There was no dispute that Mr Morrison's vehicle had entered the opposing traffic lane and came to a halt there and that the point of impact was on the opposing lane which Mr Lacoste was travelling along.



The explanation for Mr Morrison crossing onto opposing lane

[23] Mr Morrison agreed that he could see down to the bend on the road where the motorcycle was approaching from. His view of the motorcycle would have improved as it approached him. There is no reason to suppose that he was in any less favourable position to see the motorcycle than was Mr Monvoisin who did see it.

[24] He claimed that he looked and the vehicle was not there. In fact, the vehicle was there as the collision demonstrated.

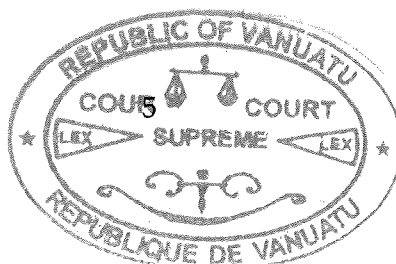
[25] In order for the charge to succeed, the prosecution must establish beyond reasonable doubt that Mr Morrison was negligent, or that he failed to observe a law. As to the latter, the prosecution contended that he failed to give way when he was required to.

[26] Dealing with a negligence claim, it is first necessary to give attention to what duty Mr Morrison breached that could lead to the conclusion that he had been negligent. It was not disputed that the obligation of a driver in the position of Mr Morrison is to take the normal precautions that a reasonable driver would. The test is an objective one. Mr Morrison's actions are to be tested by comparison with what a reasonable and prudent driver would have done.

[27] In my opinion, a reasonable driver is required to carry out a careful check of the roadway in front of him before he makes a turn in the circumstances such as Mr Morrison did. Further, the check that he carries out must be a timely one. The situation can change rapidly when there is traffic approaching. The road might be clear a minute before a turn is commenced but the position might have changed at the time when the turn is actually made so that it is no longer clear. That is one possible explanation as to what happened in the present case. Either Mr Morrison did not carry out the check that he says he did or that if he did, he did so too long before the point in time before he commenced his turn.

[28] I will therefore examine the evidence in relation to both these matters and I will also consider the contentions which the defence made to the effect that Mr Lacoste was driving at excessive speed and assess the evidence in relation to that matter and whether that issue is relevant.

[29] So far as the duty to keep a lookout is concerned, the facts establish that right from the point where the motor cycle came into view it was visible to Mr Monvoisin. In comparison to Mr Monvoisin, Mr Morrison had a more favourable opportunity to detect the presence of the oncoming vehicle. That is because he was more distant from the first point of its appearance than was Mr Monvoisin who undeniably, did see it. Mr Morrison had more time to see it coming and to respond.



[30] It is my assessment that the motorcycle was close to Mr Morrison's vehicle when he began to make his turn. At that point, the motorcycle had passed Mr Monvoisin's vehicle which was only approximately 40 m distant from Mr Morrison.

[31] It would not have taken long for Mr Morrison to move from his lane into the opposing traffic lane. It is relevant to note that Mr Morrison had not completed his turn across the opposing lane. His vehicle was approximately 1/2 to 2/3 of the way across the lane when Mr Lacoste's motorcycle struck it. This underlines that the time involved in the turning manoeuvre would have been brief.

[32] It is my conclusion that Mr Morrison made his turn at a point where the motorcycle was close to the vehicle of Mr Monvoisin or had passed it. It was so close it could not have been missed by a reasonably prudent motorist carrying out a careful check of the roadway in front of his/her vehicle.

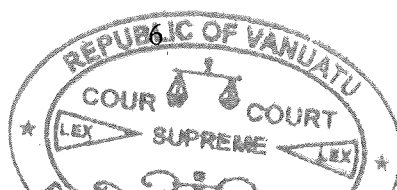
[33] I also agree that had Mr Morrison been paying proper attention he would have noticed that there was a vehicle stopped in the same lane as his ahead of him. That vehicle was plainly intending to make a turn to the left, just as Mr Morrison was. Why the driver of that vehicle had delayed in making his turn ought to have been a matter which Mr Morrison considered. I agree with the prosecution that it was obvious that the reason why Mr Monvoisin's vehicle was stationary was that it was waiting for an oncoming vehicle to go past before making a turn.

THE SPEED AT WHICH MR LACOSTE'S MOTORCYCLE WAS TRAVELLING

[34] The question of whether Mr Lacoste was driving at an excessive speed was the subject of considerable attention by the defendant's counsel. I will now consider the relevance of that matter to the question of whether the accident was caused by the breach of duty on the part of the defendant.

[35] The requirement of the law is that the act of the defendant must have been one of the matters that caused the ultimate harm to the victim. However, a simple but – for test is not on its own to be regarded as the test of causation. In order to limit the range of consequences for which a defendant will be liable, the court will exclude those that were not reasonably foreseeable.

[36] I understand that one of the reasons that the defence considers that Mr Lacoste's speed is relevant is that ml was been driving so that fast that a reasonably careful driver who found himself in Mr Morrison's position would not have expected that Mr Lacoste to be in the region of the road where the accident occurred. Before discussing this matter further, I shall consider the evidence about the speed at which Mr Lacoste was travelling.



Evidence of Mr Lacoste's speed

[37] Part of the defence case was that Mr Lacoste had been travelling at an excessive speed when the accident occurred. Before considering whether or not that is a relevant factor, it is necessary first of all to examine the contention and see whether there was a substantial reason to believe that he was speeding.

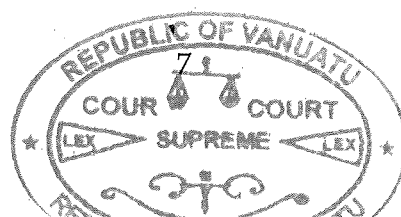
[38] In the first place, the defence did not specify what amounted to excessive speed. It could mean a number of things. It could mean that Mr Lacoste was breaching the speed limit. We do not know however what the speed limit was in the area although it was not a built-up area and an inference available at the speed limit was the usual open road speed.

[39] Nor did there seem to be any ephemeral road conditions present which would require a reduced speed to be adopted. There were no as roadworks, presence of pedestrians on the side of the road excessive traffic density or the state of the road which would have justified a more cautious speed.

[40] But leaving aside the criteria against which the speed is to be judged, there is real difficulty in first estimating what that speed was. Overall, I consider that the evidence of Mr Lacoste's speed is inconclusive. Partly this is because it rests on the opinions of persons who have not demonstrated in anyway any relevant expertise which would equip them to make a reliable estimate.

[41] In some cases, the opportunities for observation of Mr Lacoste's motorcycle were so brief as to make it doubtful that the witnesses were able to make a sufficient observation to put forward such judgment of its speed. This is particularly so in the case of the defendant himself and his partner. Essentially, they had a last-minute glimpse of the motorcycle before it struck the car. They would not in my view be able to form a reasonable and accurate opinion of what speed the motorcycle was travelling at. Further, this was an event of considerable violence which would have shocked both of those two witnesses. Not only did they not have any real opportunity to view the vehicle travelling towards them and thus consider its speed, the intensity of the experience may well have led them to exaggerate the speed because of the violence of the collision. Further, Mr Morrison's rejection of responsibility for the accident may have led him to settle upon an alternative explanation which was that it was caused by Mr Lacoste's speed - a view which will be examined shortly.

[42] There is evidence from two employees at the Francesca's Café. The qualifications of these two persons to given an estimate of speed are not stated. It is not even known whether they hold driver's licences and are themselves actual drivers of road vehicles. Further, their



view of the motorcycle was limited: the motorcycle came into their view just before the accident occurred outside the driveway to the property where they were located.

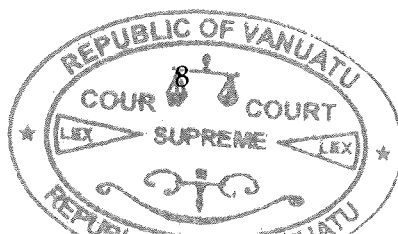
[43] Perhaps the person who is best equipped to give an opinion was Mr Monvoisin. He said that Mr Lacoste exited the corner onto this sectional road where Mr Monvoisin viewed him as being *“pretty fast and he was accelerating full travel”*. He said the *“biker was going way too fast, there was no way he could have stopped and avoided the collision with the car behind me”*. The latter parts of these remarks suggest that Mr Monvoisin thought the speed excessive because a vehicle travelling at such a speed would not have been able to avoid the accident. That however begs the question of how much time the driver of the motorcycle had within which to stop. If, as I consider happened, Mr Morrison’s vehicle appeared abruptly in the path of the motorcycle, then the question of speed was irrelevant in the sense that whether Mr Monvoisin was travelling at 120km/h or 80km/h it is probably unlikely that he could have avoided the crash.

[44] Similarly, the statements by the deceased while he was lying injured on the side of the road might well have been addressed to the same point – that he was going too fast to be able to stop when Mr Morrison drove across the centre line. While on the subject of what Mr Lacoste it is alleged to have said, my assessment is that there are some factors which need to be taken into account when considering the evidential force of what he is alleged to have said after the accident. In the first place, Mr Lacoste was mortally injured and went into a state of shock at an early point. Even if he was in a position to think lucidly about the accident which had occurred so shortly before, it needs to be kept in mind that notwithstanding what he said about his speed, his question whether Mr Morrison would see to the repairs of his motorcycle was not consistent with an acceptance on his part of responsibility for the accident.

[45] To summarise, I do not consider that it would be safe to rely upon this evidence either to prove part of the case for the prosecution or to raise a reasonable doubt in regard to matters that the prosecution was required to prove.

[46] I do not consider that even had there been excessive speed on the part of Mr Lacoste that that could have been relevant to the question of whether Mr Morrison breached his duty of care.

[47] In the first place, if Mr Morrison had properly scanned the foreground along the road before he made his turn, he would have seen Mr Lacoste approaching. That would have been the case even if Mr Lacoste was travelling at a relatively high speed. But my conclusion is from, amongst other things, taking a view of the locale in which, the accident occurred, that even if he was travelling at speed, it would have been possible for a careful driver to see him coming because of the length of clear view that Mr Morrison had in front of his vehicle.



[48] It is possibly the case that the defence view is that the speed of Mr Lacoste's vehicle was relevant because it meant that he could not avoid a collision and therefore responsibility for what happened rested with him and not with Mr Morrison. I will deal with that point next.

[49] I do not accept that there is a general legal requirement that drivers should travel at a speed which would enable them to avoid a collision in all circumstances - including where another driver inexplicably and suddenly turns in front of them.

[50] There is an obligation in general terms in most traffic codes for a driver would travel at a speed where he/she can stop in the roadway visible ahead. However, that can have no application to circumstances like this where a car unexpectedly turns into their pathway.

[51] It can be accepted that in some cases what appears to be a safe clear roadway ahead for a driver to make a turning movement crossing the opposing lane may not be because of the speed of the oncoming vehicle. For example, if a driver makes a turn close to a bend in the road concealing oncoming traffic, and if it is a reasonable assumption that the speed that is reasonably to be expected of oncoming traffic would leave plenty of time for the turn, then a driver may not be in breach if it turns out that an oncoming vehicle approaches at an extreme and unexpected speed.

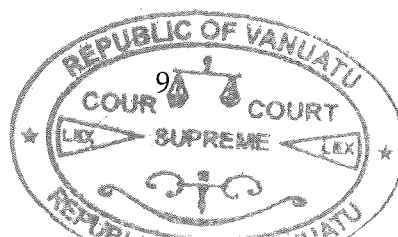
Conclusion on relevance of Mr Lacoste's speed to liability for negligence

[52] Even if I am wrong in disagreeing with the defence concerning the question of whether Mr Lacoste was travelling at an "excessive" speed, the key point is that even if he was speeding that should not have affected Mr Morrison's ability to see him. This contention is established by the fact that Mr Monvoisin had sufficient time to detect the oncoming vehicle. The speed at which Mr Lacoste was travelling does not displace the inference that I consider should be drawn from all of the surrounding circumstances which is that Mr Morrison did not make a proper timely check for oncoming traffic before turning.

[53] I do not consider that this was one of those exceptional cases where the unexpectedly high speed of an approaching vehicle meant that a driver could not be criticised for failing to give way because a speeding vehicle talk him by surprise and appeared at the last minute leaving him with insufficient time to hold back from making a turn.

Speed preventing Mr Lacoste from stopping in time

[54] While the argument was not put in these terms, I understand that the defence contentions may also involve the proposition that the causative link between the carelessness



on the part of Mr Morrison and the accident and resulting harm to Mr Lacoste was broken by the speed at which Mr Lacoste was travelling.


[55] I will not repeat in detail what I said earlier but it is difficult to see how any driver could have avoided an accident in circumstances where, as I believe happened here, a vehicle in the opposing lane suddenly made an unheralded turn into the path of the oncoming vehicle. Even if it could be said that Mr Lacoste failed to take the opportunity to avoid the accident because his speed did not permit him to, (a matter that I have already discussed) the fact is that the dangerous turn that Mr Morrison made was still a substantial contributor to the occurrence of the crash.

Conclusion

[56] I consider that the evidence in this case establishes beyond reasonable doubt that the elements of the charge against Mr Morrison under the first count is established. The determination of the court is that he is therefore guilty under Count one. No conclusions are therefore required in relation to the alternative count.

Dated at Port Vila, this 26th day of September, 2019.

BY THE COURT


J. DOOGUE
Judge

