

THE REPUBLIC
versus
BETTERO ROUBA

JUDGMENT

The defendant is charged on a two count charge as follows:-

Count One:

"Driving whilst driving efficiency impaired by drink contrary to section 26(1) of the Traffic Ordinance (Cap 98)."

Count Two:-

"Manslaughter contrary to section 192 of the Penal Code (Cap 67)."

At the trial the defendant pleaded not guilty to both counts.

The prosecution called six witnesses in support of its case. The accused gave no evidence and called no witnesses.

The first prosecution witness Nei Beretekira Tamau, a 22 years old housewife, told the court that on 2nd March 1985 she, her mother-in-law, her son, and her brother-in-law's wife were picked up by the accused at Tekaman in Tabnorth to meet another brother-in-law, who was arriving at the airport at Takea Tabnorth. They got there about 9 am.

There were about ten people in the truck when they were coming back. She, Sister Raphael and the accused sat in the front of the truck. Sister Raphael sat to the left of the driver and she was sitting to the left of Sister Raphael, near the door of the cabin.

On the way the accused stopped to drop her sister-in-law, her husband's brother's wife at Eita Catholic mission. About more than half a mile from Eita, the truck crashed.

Before the crash the accused was driving full speed. Suddenly it went off the road and hit a coconut tree on the left side of the road. At the ^{point of} impact she fell unconscious. When she regained consciousness she found Sister Raphael on top of her. She tried to pull her but she did not move. The truck at this time was on its side and Sister Raphael's head was underneath the door of the cabin, ^{and} she was not moving. She climbed out through the driver's side of the cabin and saw some of the occupants of the truck lying unconscious on the road and some walking about with injuries.

After the truck was raised upright, she saw Sister Raphael lying on the ground, dead, with head wounds. Many people rushed to render help. She had ridden on other trucks before. Their speed was not as fast as this truck. The speed was very fast compared with the speed of other trucks.

Sister Mary Consilio (PW2) told the court that on the day in question, Sister Raphael came to meet her at the airport with a truck driven by the accused. On their way back from the airport there were about 12 people in the truck. Sister Raphael, the driver and another lady were sitting in the cabin in the front. She sat in the middle at the back. As they were heading for the Catholic mission which was 10 miles away, the truck stopped three times. At the third stop, and because of the way the driver was driving, she asked him if he could allow her to take over the driving. He declined the offer. She saw that he was not well and not driving well. Sometimes he drove too quickly and not on the main road. The road was quite good, and he was doing about 35 miles per hour. About a mile from Eita the third stop, while the accused was driving at a speed a good bit faster, the back left side wheel hit a coconut tree, skidded along the road and fell on its left side. She and the other occupants were thrown onto the road head first. She saw that Sister Raphael's head was under the side of the cabin. She ordered some one to turn off the engine. Some men then helped to lift the truck upright. People helped her to lift up Sister Raphael's body to a nearby house. Many of the occupants had headcuts and were bleeding.

When asked by the court to clarify her evidence of the driver's driving. She said the driver was driving in a zigzag manner.

PW3 Nawere Makoro, told the court that on the material date at about 10 am whilst on his way home he saw a truck coming towards him on the left side. He quickly jumped out of the way because the truck was travelling fast and heading towards him. He jumped out of the way to avoid being hit by the truck. The accused was the driver of the truck. Soon after the truck passed him, he heard a bang. He looked back and saw the truck on its side. He saw some of its passengers holding their heads and some crying. He lost his mind and ran to inform the villagers. Under cross examination, he said it may be the driver lost control, missed him and hit the tree. When re-examined by the State Advocate he said the road was straight.

PW4 Tuaku Takiro said he examined the truck on 10th March 1985 and discovered no fault. The wheels, tyres, and brakes were OK. He noticed that the right front door was dented and the shafts broken. His conclusions was that the truck hit a coconut tree. Under cross examination he said the coconut was near the Highway.

PW5. Taakebi Takaea, a Special Constable at Utiroa village, said that on that date the accused was brought to him by Iotua an MP for Tabnorth to be locked up in the cell. He noticed that the accused had a scratch on his forehead. His breath smelt of alcohol and he was walking/^{very} unsteady, that is, in a zigzag manner. As soon as he entered the cell he fell asleep.

When it was suggested to him under cross examination that the accused was walking in the manner described because of shock resulting from the accident, he said that was not possible.

FW6 Lotua Ereatata the Detective sergeant who investigated the incident, sought to tender a voluntarily statement and answers to questions put to the accused. Tabanou who was assisting the accused, objected on the ground that the accused read I-Kiribati and had admitted reading and signing the statement which he made. The statement was preceded by the caution statement which he signed after reading and saying he understood it. Beside the statement was taken a fortnight and there was no suggestion that the statement was not made voluntarily. after the incident occurred, I therefore admitted the statement in evidence on the ground that it was made voluntarily. That was the prosecution case.

Mr Tabanou assisting the accused decided not to put his client into the witness box as he was entitled to do.

The general principle is that an accused need not say anything if he so desires.

The onus is on the prosecution to prove its case against the accused.

On the first count, section 26(1) of the Road Traffic Ordinance under which the accused was charged reads as follows:-

"26(1) Any person who drives or attempts to drive or is in charge of a motor vehicle whilst his efficiency as a driver is impaired by drink or a drug shall be liable to a fine of \$200 and to imprisonment for 1 year."

To sustain the charge the prosecution must prove,

- (a) that the accused was driving a motor vehicle or
- (b) was in charge of a motor vehicle whilst his efficiency as a driver is impaired by drink or drug.

The evidence before me clearly show that on 2nd March 1985, the accused did drive the truck belonging to the Catholic mission in Tabnorth. I therefore find this as a fact.

The question which I have to resolve is, was the accused's driving efficiency as a driver on 2nd March 1985 when he drove the truck impaired by drink or drug? Sister Consilio in her evidence thought the accused was not well because of the manner he was driving. She could not say if he was drunk. She asked the driver if he could allow her to drive the truck. He declined the offer. Soon after the request the driver was involved in an accident. Before the accident occurred she said the accused was driving too quickly and not driving on the main road. He was also zigzagging.

FW3 Nawere Makoro, a pedestrian on the road shortly before the accident told the court that the accused's manner of driving made him jump out of the road to avoid being hit by the accused. He said that the truck was travelling at a fast speed. It was soon after the truck passed him that the accident occurred. He also said the road was straight.

Taakabi Takaea the Special Constable who locked up the accused in the cell soon after the incident, said that the accused's breath smelt of alcohol and that as soon as the accused entered the cell he fell asleep. When the accused was walking towards the cell his feet were very unsteady.

The inference I draw from these facts and from the fact of the accident occurring on a straight piece of the road, is that the accused was drunk and that what he drank affected him.

The accused's admission in the voluntary statement which he gave to the police almost two weeks after the incident, reinforces the inference drawn. The manner of his driving on the particular day in question and the accident occurring as a result of that manner of driving indicates that his driving efficiency was impaired by whatever he drank and I so hold.

On the second count, the accused is charged under S192 of the Penal Code.

That section reads as follows:-

"192(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony known as manslaughter."

Underlined mine.

To prove its case under this section, the prosecution has to prove one of two things:-

- (1) that the accused by an unlawful act caused the death of Sister Raphael, or
- (2) by omission where he is under a duty imposed by law caused the death of Sister Raphael."

There is no evidence before me of any unlawful act of the accused which caused the death of Sister Raphael.

The evidence before me and found as a fact, is that the accused was employed to drive the truck in which Sister Raphael was a passenger. His driving on that day was impaired by drink. These facts in my view do not constitute an unlawful act directed against Sister Raphael as to cause her death.

Lord Atkin in *ANDREWS v DPP* [1937] 2 All ER 552 @ 556 said simple lack of care such as well constitute civil liability is not enough, and a very high degree of negligence is required to be proved before the felony is established.

The accused act may have given rise to a civil action in negligence but certainly not to a criminal liability under S192 of the Penal Code.

It may also have given rise to criminal liability under the Road Traffic Ordinance for causing death by dangerous, or reckless driving, that is not the charge against the accused and this court cannot convict him under that Ordinance on the present charge.

Manslaughter for which the accused is charged requires an intentional act and nothing more.

An accused is guilty of manslaughter if it ^{is} proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death.

In this case the evidence is that the back wheel of the truck hit a coconut tree. There was no evidence that the accused deliberately and intentionally hit the coconut tree, therefore what he did was not an unlawful act and I so hold.

Sister Raphael's death, regrettably, and in my view, was caused by misadventure - an accident. It was not caused by any unlawful act or intentional act of the accused.

The prosecution has not proved any intentional unlawful act of the accused directed against Sister Raphael which caused her death. I therefore find the accused not guilty as charged and discharge and acquit him on the charge of manslaughter.

Court: You have been convicted on the first count for driving when your driving efficiency was impaired by drink, What do you have to say before I pass the sentence required by law for the offence which you committed?

Allocutus: I ask for leniency.

Court: You shall go to prison for 3 months.
Sentence to be served in Tabnorth.
Accused to hand over his driving licence to the police for transmission to the Court for endorsement.

The Hon Justice V O Maxwell

CHIEF JUSTICE

29.8.86