

**IN THE HIGH COURT OF KIRIBATI ) HIGH COURT CRIMINAL CASE 47 OF 2006**  
**CRIMINAL JURISDICTION )**  
**HELD AT BETIO )**  
**REPUBLIC OF KIRIBATI )**

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**THE REPUBLIC**  
**v**  
**TIOBOA TIMEON**

FOR THE REPUBLIC: MR BIRIMAKA TEKANENE  
FOR THE ACCUSED: MR BANUERA BERINA

DATE OF HEARING: 4 & 5 DECEMBER 2006

**J U D G M E N T**

On Saturday 30 April 2005 the accused, Dr Tioboa Timeon was driving, for hire, a white truck. In the morning he had picked up in Betio a number of KGV/EBS students to take them to sports training at the stadium in Bairiki. In the later afternoon he picked them up again for return to Betio. Estimates of how many were on the truck varied but it seems to have been at least 20 and probably about 30 students. Tioboa made no check: he could not say, even approximately, how many he was carrying:-

**I didn't check how many on back: can't estimate how many on back. Can't estimate a safe load – maybe 20 sitting down.**

Had he checked he may have found there were too many passengers to carry in safety: that the truck was overloaded. If it were overloaded then he, as driver, had a duty to get passengers off until the number on board was safe. That is a responsibility of any driver.

In the afternoon it seems the students were in boisterous and happy mood, singing, some dancing as they came home and with loud music playing, controlled by the driver in the cabin. Between 5 o'clock and 6 o'clock at Temakin point, Betio where the road curves to the right the truck turned over. The students either jumped off, were thrown off

or were trapped underneath. One lad, David Taniera, had his head crushed between some part of the truck and the road. He died. Tioboa pushed out the windscreen and he and the passenger with him in the cabin, Nei Sian Harry, crawled out through the space.

The accused is charged with dangerous driving causing death and driving without a licence. At the close of the prosecution case no evidence having been led of driving without a licence, I found no case to answer on that count.

There was a good deal of evidence to the effect that the accused was driving too fast on the Dai Nippon Causeway, maybe at 60 to 70 kph (he admitted to 50 to 60 kph), that there was yelling to him to slow down which he ignored. He denied hearing any requests to slow down. No one in the back did what I know from long personal experience is the most obvious thing to attract a driver's attention, banged on the roof of the cabin. I doubt whether those on the back made any real attempt to get the driver to slow down. There was evidence as well that at the speed hump by the cemetery at Temakin, Tioboa slowed down but then speeded up again. He said he was driving on the causeway and through Betio at the speed limit (60 kph on the causeway and 40 kph on Betio). It really does not matter very much how fast he was driving so far before the accident. Even the speed hump at the cemetery is at least a half a kilometer before the curve at Temakin point. What matters is his speed as he went into the curve where the truck turned over. His evidence:

**Cemetery – slow down – gained speed – prior to accident – near to 40 – curve ahead – put pressure on brake – took curve – off balance – tried to control – approached curve near to 40 – applied brake – just before entering curve. Felt truck off balance – trying to control – heard screaming. Didn't hear anyone telling me to slow down.**

I have no reasonable doubt that Tioboa went into the curve, which is pronounced – could almost be described as “sharp” - at too high a speed. He could not take the curve. He applied the brakes, lost control and the truck overturned. That there were 20 to 30 young people on the back who would have been thrown about by the braking and the movement of the vehicle to the right may have contributed to the loss of control.

The crux of the case is whether or not the accused was guilty, going into the curve at the speed which he did, of dangerous driving or of negligent driving or of careless driving or of nothing at all.

Indeer Tom, a police motor mechanic, examined the truck:-

**Called to accident. Examined truck while on its top. Examined brakes - shaft - wheels - tested function of brake pedal. No problem with vehicle ..... My inspection shewed no problem with front wheels ..... Front wheel braking system not defective.**

Mr Berina's last witness for the defence was Teuea Ataieta, vehicle mechanic and supervisor at the Public Vehicles Unit. Teuea examined the truck, he thought on the 1<sup>st</sup> June (his report is not dated) - a month after the accident. He reported the "right front wheel is very hard to spin when I rotated it. Examination shewed "the whole releasing mechanism (to release the brake pads from the brake disc) is malfunction." He found the inside bore cylinder "corroded and rusty - not normal":-

**The presence of corrosion inside the bore cylinder confirm that water have reached the inside of the cylinder. Accumulation of corrosion can eventually affect the releasing of the pressure on the brake pad to disengage from the brake disc, when the brake lever is released.**

### Conclusion

**I conclude that the defect (corrosion) on the inside of the bore cylinder as described above is the problem, causing the brake pad on the right-front wheel to remain firmly stuck to the brake disc, even though the driver have released the brake pedal.**

Teuea said that if a vehicle is not used for some time this condition may develop.

I discount Teuea's evidence for several reasons. First, a month had passed from the accident and there was no evidence as to what the truck had been doing in that month, whether it had stood idle or been driven. Second, despite Mr Berina's cross examination of him, I accept

the evidence of Indeer that he did examine the truck and found nothing wrong with the brakes immediately after the accident. Thirdly, Tioboa did not mention the brakes grabbing, either at accident or before. From that I assume Tioboa had not noticed anything wrong. Teuea said it was "possible" the brakes grabbed for the first time at the bend. That would be, I suggest, an unfortunate fluke.

The defence does not have to prove anything: it is for the prosecution to prove beyond reasonable doubt every element of the offence. I find that the prosecution has proved beyond reasonable doubt that the brakes were in good order.

Tioboa as the driver of the vehicle was responsible for the safety of his passengers. I was surprised that he had not checked how many he had on board before he left Bairiki. He should have. However many there were, he was under a duty to drive in such a manner as to make sure of their safety. The more so with a group of boisterous teenagers. Tioboa was under a duty to take special care with that load. A big part of that care was to drive not at the speed limit but at a speed which was safe in all the circumstances and which may have been very much below the speed limit. Even though I doubt there was much, if any, real attempt to ask him to slow down, that does not excuse Tioboa. He had the responsibility. He should not have needed to be reminded of it.

How should his driving be described? Was it "dangerous"? I have had to answer the question before. When doing so I have followed Lord Diplock in *R v Lawrence* (1982 AC 510 @ 526-527). I set out the passage in *Kairaku Ataraoti v The Republic* (CrA 3/2000).

In the *Republic v Kian Tokia* (HCCrC 35/04) considering a charge under section 31 of the Traffic Act I said, "to be guilty the driving must be very bad indeed".

Smith and Hogan ("Criminal Law", 10<sup>th</sup> edition at page 506) under the heading, "*The relevant standard for dangerous driving*" put it this way:-

**It must be proved (i) that the way D drives falls 'far below' what would be expected of a competent and careful driver; and (ii) that it would be obvious to a competent and careful driver that driving in that way would be dangerous.**

Applying those tests to Tioboa's driving I have reasonable doubt that his driving should be described as "dangerous".

That is not the end of it. As I discussed in Kian Tokia's case there are in the Traffic Act 2002 the lesser offences of driving negligently and driving without due care and attention, each of which is comprehended in the offence more serious. I should consider whether Tioboa is guilty of either of these lesser offences.

Doing so, I have concluded that he was guilty of a high degree of negligence in attempting to take that bend (or curve as we have been calling it) at the speed he did. He should have realized that he was going too fast: he should have slowed down before he got to the bend so that he could go round it safely. That he did not makes him guilty of driving negligently.

The accused is not guilty of dangerous driving causing death but guilty of driving negligently pursuant to section 32 of the Traffic Act 2002.

Dated the 6<sup>th</sup> day of December 2006



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**THE HON ROBIN MILLHOUSE QC**  
**Chief Justice**