



## HIGH COURT OF KIRIBATI

*Criminal Case No 2/2017*

**THE REPUBLIC**

**v**

**BWEREATA KAMORIKI**

*Pauline Beiatou, Director of Public Prosecutions for the Republic  
Teetua Tewera for the accused*

*Dates of hearing: 30-31 October and 1 November 2018*

*Date of judgment: 6 November 2018*

### **JUDGMENT**

- [1] The accused has pleaded not guilty to 1 count of careless driving causing death, contrary to section 33(1) of the *Traffic Act 2002*.
- [2] An information was filed with this court by the prosecution on 4 January 2017, charging the prisoner with dangerous driving causing death, contrary to section 31(1) of the *Traffic Act*. A second information (in place of the first one) was filed on 28 March 2018, reducing the charge to the present one. That information did not comply with section 70 of the *Criminal Procedure Code* (Cap.17). On 10 August the Attorney-General rectified the defect by filing a fresh information (in the same terms) signed by her. A minor amendment was made to the information without objection on 29 August (to correct the title of the Act under which the charge is brought).
- [3] There is little dispute as to the facts of this case. At around 8:00pm on 19 October 2016, Timwaua Arawatau and Maria Roote were cycling home to Bonriki in a northerly direction along the Ananau causeway. They were both security guards at the hospital in Nawerewere. Timwaua and Maria had settled down together only a few days previously. Timwaua had been on shift the night before, but had returned to the hospital to meet up with Maria when her shift ended at 7:00pm, so that they could cycle home together. On the causeway they were riding side-by-side, with Maria off the bitumen on the side of the road, and Timwaua riding on the bitumen, but towards the left-hand side of the road. It was a dark night, but the weather was fine, and the road had only recently been resurfaced.

- [4] Without warning, a truck, heading in the same direction, collided with Timwaua's bicycle, sending him flying. He landed off the bitumen on the other side of the road, badly injured. The accused was the driver of the truck. He stopped the truck a short distance down the road, before returning to the scene of the collision. Timwaua, unconscious and bleeding badly, was loaded onto the truck and taken back to the hospital. He was pronounced dead on arrival.
- [5] In addition to Maria, the prosecution called 3 other witnesses: Tebotoa Bwateriki, who was a passenger in the rear of the truck; Maria's cousin, Moori Itinimoa, who arrived at the scene soon after the collision; and the investigating police officer, Senior Constable Arthur Kenneth Kauongo.
- [6] Maria testified that Timwaua had been carrying a torch as he cycled, with the torchlight illuminating the road ahead of them. She recalled that the bicycle had perhaps 2 red reflectors facing rearwards, 1 under the seat and a second near the hub of the rear wheel. From a photograph (exhibit 1), Maria identified the bicycle that was being ridden that night by Timwaua. The photo shows a red speed bike with a badly misshapen rear wheel. The seat post is bent forward. Only 1 reflector can be seen in the photograph, on the right rear fork. In cross-examination, Maria could not be sure that the reflector under the seat was on the bike that night, but she had seen it there on previous occasions.
- [7] Immediately after the collision, Maria went to Timwaua. He was clearly in a bad way, but was still alive. Maria could see a serious injury to Timwaua's leg, and blood was coming from his mouth. There was a lot of blood. By the time Timwaua was loaded on to the truck, Maria could no longer be sure if he was still alive. She went with him to the hospital.
- [8] Tebotoa Bwateriki was a member of the group that owned the truck. The group had spent the day doing maintenance work at the church in Bikenibeu. He had driven the truck to collect the accused and other members of their group from the church. The truck had no noticeable defects, and the brakes and lights were functioning as expected. The accused drove the truck back to Bonriki from Bikenibeu. Tebotoa was with 5 or 6 others in the tray of the truck. There were 3 passengers sitting in the front with the accused – a woman and 2 children. While he could not see the speedometer from where he was, Tebotoa estimated that the truck was travelling at around 60 kilometres per hour on the causeway. He felt the impact of the collision, but thought that the truck had hit a road sign. Tebotoa did not accompany Timwaua to the hospital.
- [9] The windscreen of the truck sustained significant damage in the collision, concentrated on the passenger side. Tebotoa identified the damaged windscreen from a photograph (exhibit 2).

- [10] Moori Itinimoa also worked as a security guard at the hospital. He had worked the same shift as Timwaua the night before the collision, and they had spent the day together. The bike ridden by Timwaua belonged to Moori's brother, Kabuta. He said that there were 2 red reflectors at the back of the bike, 1 on each side of the rear wheel. There was also a battery-powered red light under the bicycle seat, with a switch to turn it on and off. Moori knew that the light was working, because he had replaced the battery only a few days earlier. He was certain that the light and the reflectors were on the bicycle when Timwaua left to go and meet Maria, although Moori saw that Timwaua had not turned on the rear light.
- [11] Immediately after the collision, Moori went to the scene and saw Timwaua lying on the side of the road, seriously injured. Initially, he was still conscious, but not moving. Moori heard Timwaua say something in a low voice, and then he passed out. He went on the truck with Timwaua to the hospital and saw the full extent of his injuries there. The doctor told Moori that Timwaua was dead.
- [12] In the course of his investigation, Senior Constable Arthur Kenneth Kauongo searched the scene of the collision. He testified that he found bits and pieces from Timwaua's bike, along with a torch, a bulb and pieces of broken glass. None of these items were produced, so it is not possible to say what connection they might have had to the collision. He saw no tire marks on the road, or any other evidence to suggest that a vehicle had braked suddenly.
- [13] That brought the prosecution case to a close.
- [14] I formally found that the accused had a case to answer, and informed him of his rights, as required by section 256(2) of the Criminal Procedure Code. The accused elected to give evidence on oath in his own defence.
- [15] The accused is a 51-year-old man. He spent the day of the collision helping with maintenance work at the church in Bikenibeu. He had worked all day and was very tired. When Tebotoa came with the truck, he asked the accused to drive for the return journey, as he had a backache. The accused had 3 passengers in the cab of the truck, with another 5 or 6 in the back. By the time they left Bikenibeu it was after 7:00pm. On the Ananau causeway, the accused was driving at a speed of 50-60 kilometres per hour. The speed limit for the causeway is 60 kilometres per hour. He was on a straight stretch of the causeway, with a slight bend ahead. There were several cars approaching from the opposite direction, so he switched his headlights to low-beam. As soon as the cars passed, the accused switched his lights back to high-beam and was surprised to see 2 bicycles in the lane directly ahead of him. The cyclists were riding side-by-side. He had not seen the bicycles before that moment. A collision was imminent.
- [16] The accused testified that, had he braked heavily or swerved to avoid the cyclists, he feared crashing the truck, with serious consequences for his passengers. He

said that he thought that he was going to hit both bikes, but somehow managed to avoid the bicycle on the left. The accused pulled up a short distance down the road and then returned to the scene of the collision. He helped lift Timwaua onto the truck and transported him to the hospital. He did not stay long at the hospital, as he wanted to report the collision to the police in Bonriki.

[17] Under cross-examination, the accused said that he is a very experienced driver. He had been a bus driver for almost 10 years. He could not explain why he had not seen the cyclists until just before the collision. The accused conceded that he was exhausted after working at the church, and was very keen to get back home. He strongly believed that he had been keeping a proper lookout.

[18] Although there had been a suggestion from counsel for the accused that a defence witness would be called, that witness did not eventuate, and the defence case came to a close.

[19] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.

[20] Section 33(1) of the Traffic Act provides as follows:

A person must not cause the death of another person by driving a motor vehicle on a road or elsewhere without due care and attention, or without reasonable consideration for other persons using the road or place.

[21] As I said earlier, there is little dispute as to the facts of this case. It is clear that the collision between the truck driven by the accused and Timwaua's bicycle was the cause of Timwaua's death. The only question to be resolved is whether, at the time of the collision, the accused was driving "without due care and attention, or without reasonable consideration for other persons using the road".

[22] White J of the South Australian Supreme Court has said that "[t]he legal principles applicable to alleged contraventions of the obligation to drive with due care are well established".<sup>1</sup> He continued:

The issue is to be determined objectively. The obligation to drive with due care is the duty to exercise the standard of care which one would expect of a reasonably prudent driver in the like or similar circumstances. In the assessment of whether a particular driver has departed from that standard, it is immaterial that he or she had been unaware of, or did not advert to, the risks which the manner of driving presented to other road users. The reasonably prudent driver is expected to drive with a defensive outlook, *ie*, a lookout "that not only sees immediate, or immediately developing, danger, but looks well ahead and searches for potential danger".<sup>2</sup>

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<sup>1</sup> *Police v Melisi* [2010] SASC 21, at [17]

<sup>2</sup> *ibid.*, citations removed

- [23] Any regular user of the roads on South Tarawa will know that, particularly in the early evening, it is common to encounter pedestrians or cyclists on the road who may be difficult to see. Few cyclists comply with the obligation set out in the Road Rules to display lights front and rear when cycling at night. It is particularly important for drivers to keep an adequate lookout at these times. Driving within the speed limit will not necessarily protect a driver from a conviction for careless driving if a lower speed would have been prudent in the circumstances.
- [24] This was not a case where a child has emerged suddenly from the side of the road and sought to cross, heedless of on-coming traffic. The bicycles of Timwaua and Maria were on the road ahead of the accused's truck all along. There is no suggestion that they were doing anything other than maintaining a consistent course on a straight stretch of road. They were not veering or swerving, or cycling erratically. It is possible that they could have done more to alert drivers to their presence on the road, but this is a criminal case, and the civil litigation concept of contributory negligence has no place here. Even if the rear light of Timwaua's bicycle was not turned on, I consider that a person driving appropriately for the conditions should have been aware of his presence.
- [25] In my view, at the very least, the 2 bicycles would have been illuminated by the headlights of the oncoming vehicles. A reasonably prudent driver who was keeping a proper lookout would have seen them in time to avoid the collision, while still posing no risk to his passengers. For the accused to assert that he did not see the bicycles until he switched his headlights to high-beam, when it was too late to avoid a collision, can only mean that he was not keeping the lookout expected of drivers in such circumstances.
- [26] I am therefore satisfied, beyond reasonable doubt, that the accused was driving without due care and attention, and that his driving caused Timwaua Arawatau's death. I find the accused guilty of the offence of careless driving causing death, contrary to section 33(1) of the Traffic Act, and he is convicted accordingly.
- [27] I will hear counsel as to sentence.

  
**Lambourne J**  
Judge of the High Court



The seal of the High Court of Kiribati is circular, featuring a central emblem with a sun, a shield, and a banner. The text "HIGH COURT OF KIRIBATI" is written around the top inner edge, and "TEKONI AE E RIETATA I KIRIBATI" is written around the bottom inner edge.