

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

**Criminal Case No. 84/ 2012**

**PUBLIC PROSECUTOR**

**V**

**KALO ROY**

**Trial:** 27 November 2012  
**Before:** Justice Robert Spear  
**Appearances:** Leon Muluntugun for the Prosecution  
Andrew Bal for the defendant  
**Judgment:** 27 November 2012

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**JUDGMENT**

**NO CASE TO ANSWER**

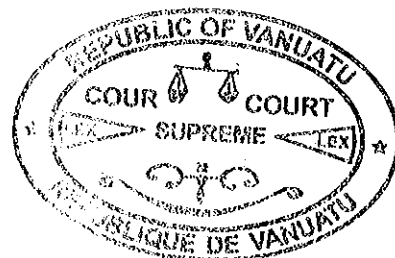
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1. We have reached the stage where all the prosecution witnesses have been called and the question now is whether the defendant should be called upon to answer the charge.
2. The charge is brought under section 12 of the Road Traffic (Control) Act [CAP 29].

**12. Causing death by reckless driving**

*A person who causes the death of another person by driving a motor vehicle on the road recklessly shall be guilty of an offence and shall be liable on conviction to a fine not exceeding VT 500,000 or to imprisonment for a term not exceeding 5 years or to both*

3. This is clearly a serious charge simply having regard to the maximum penalties provided.

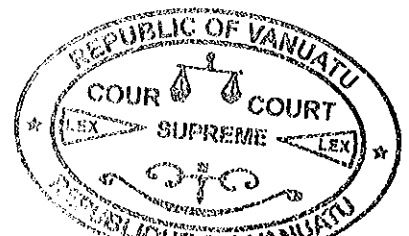


4. A person is reckless if appreciating that by a particular act he will present a risk of harm to person or property, that person decides to so act that risk notwithstanding. In reckless driving cases, this is normally established by the calling of evidence as to the manner by which the defendant was driving and the general circumstances that prevailed.
5. This of course is a traffic case. It involved a little boy of only 1 year and 1 month old; Andre.. His mother had left Andre with his aunt for a very short period of time while she went down to the roadside market to buy taro. While she was away, it appears clear that little Andre tottered out from his home yard and on to the road. This road is a back road servicing a suburban area. It is a gravel road that was described by more than 1 witness as being very rough. Indeed, Police Officer Jack Tom Laan indicated that a vehicle would not be able to safely travel at more than 10 kph because the road was "*so rocky and rough*".
6. Andre's mother, Mrs Jacqueline came back from the market to find the aunt holding Andre who was clearly seriously injured around his head. The defendant's taxi was stopped close by. As Ms Jacqueline took her little boy in her arms, the defendant asked her "*why weren't you looking after him? I didn't see him*". Little Andre suffered serious head injuries to the left front area. He was dead on arrival at the hospital. It is worthy of note that the defendant took mother and child to the hospital in his taxi. They clearly knew each other and indeed he lived down the road just a short distance from Ms Jacqueline and Andre.
7. Nurse Lauren Andrew confirmed that Andre was dead on arrival at the hospital. The injuries did not appear to the two nurses who gave evidence to have been caused by Andre being ran over. They were most professional and simply described their clinical observations which were impact trauma to the left side of his Andre's forehead which was found to be very soft and with signs of bleeding.
8. Police Officer Jack Tom Laan was at another accident site at Forari when he received the call about this tragedy. He arrived at the accident site at Tagabe at approximately 17:35 hours and so about 3 ½ hours after the accident. The taxi was not there at that time nor was a bus that apparently was also packed there at about the time of the accident. The police officer had this explained to him by other police officers who had attended earlier. Police Officer Jack Tom Laan invited the defendant to accompany him back to the police station, he cautioned the defendant telling him that he did not have to make a statement and the defendant indicated that



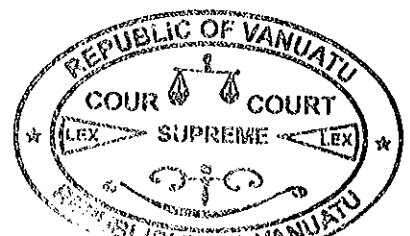
he did not wish to make a written statement. However, he was prepared to make an oral explanation to the police officer. He said that he had collected some football uniforms at his home near the community centre and he was heading back along the main road when he heard a bang on the right side of his taxi. He stopped, got out of his taxi and saw Andre lying on the road. He said that he was driving very slowly as the road was very bad and he did not see anybody on the road before the accident. The police officer found no sign of damage to the taxi.

9. As I have mentioned in one of the earlier rulings, it is surprising that a charge of this seriousness has been brought without any eyewitness at all to the driving. In order for the defendant to be found guilty of reckless driving, there would need to be evidence that he was driving recklessly to the point where that element of the offence was proven beyond reasonable doubt. There is, however, no evidence at all that the defendant was driving recklessly. The only evidence about his driving is his statement to the police officer is that he was driving slowly.
10. The evidence from Andre's mother was to the effect that this was a fine sunny day and visibility was clear. However, it is easily understood that a small, 1 year old child could at times be hard to see particularly if they darted out on to a narrow road such as this was from a neighbouring property. This road, indeed, was only just over 4 meters wide and passed through a residential area where the properties opened out on to the road. There was no footpath or other such barrier or margin between the properties and the road.
11. Andre's mother confirmed that he had just started to walk, that he was not a confident walker and often he would take 2 or 3 steps and then fall over. No one has been able to assist the Court as to exactly what Andre's movements were that day leading up to his tragic death. He was certainly left in care of his aunt and his mother also gave evidence that he was want to walk out of their home yard and she would then have to bring him in off the road.
12. However, sometimes accidents happen and it is difficult to apportion blame or responsibility for the accident on anyone.
13. The real question here is whether there is any evidence of reckless driving. Just because there is evidence, indeed there is a formal admission by the defendant, which points to Andre having collided with the right side of the defendant's car, that in itself is not sufficient for the court to be able to infer reckless driving. The defendant formally admitted through his counsel that there



was an accident whereby the taxi driven by the defendant hit Andre (or Andre hit the taxi) and that Andre died as a result of the injuries he sustained in that accident. That is an admission that the defendant did not have to make but with respect it appears inevitable that that would have been the determination of the Court on the evidence in any event.

14. However, no one has been called to explain exactly what happened in the lead-up to the accident except for the defendant's statement to the police officer that he was driving slowly and that he did not see anybody. There is no evidence that could contradict the possibility that this was one of those tragic cases where a person, driving carefully along the road, does not see a little boy who darts out on to the road in to the path of the motor vehicle.
15. I gave some consideration to reshaping the charge to careless use of a motor vehicle or even for manslaughter under the penal code. That would require a finding that the driving of the defendant dropped below that of the reasonable and proven driver. The evidence simply does not establish that there was any driving fault on the part of the defendant because it has to be accepted that it is possible that little Andre ran out onto the road, or stumbled out onto the road, in circumstances which meant that he is hit by the taxi without any fault on the part of the driver.
16. As I have mentioned, I find it difficult to understand why the aunt was not called to give evidence. Mr Malantugun informed me that she had returned to her home island of Erromango but she may well have been able to assist the Court with an explanation as to who Andre manage to make his way onto the road and how the defendant was driving. That evidence has not been called nor has there been any other evidence called in respect of the way in which the defendant was driving or how little Andre got onto the road in the first place.
17. Essentially, the Court is being asked to determine this case on a circumstantial evidential basis. That is, that because the defendant hit this little boy with his taxi while driving along that road he must have been either reckless or careless. That is the inference that Mr Malantugun must ask me to make. However, it is not necessarily so that this accident may have been caused by reckless driving.
18. In these circumstances, it is conceivable that this little 1 year old boy would have been difficult to see even in a car travelling slowly. The evidence is indeed that Andre was struck by the right hand side of the defendant's taxi and the injuries to Andre were to the left hand side of his head.



The apparent point of impact was in the centre of the road essentially in the middle of a 3 way intersection. That raises the real possibility that Andre tottered out of his home on to the road and was struck by the defendant's taxi without the defendant being able to see him.

19. In these circumstances I do not consider that there is evidence which should require the defendant to remain on trial for this charge or even a charge of careless use of a vehicle. He will not be required to elect whether to give evidence or not.

20. I find that there is no case to answer and the charge is accordingly dismissed.

**BY THE COURT**

