

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

**Criminal
Case No. 19/2278 SC/CRML**

BETWEEN: Public Prosecutor

**AND: Xu Bin
Defendant**

Coram: Justice Aru

**Counsel: Mr. K. Massing for the Public Prosecutor
Mr. N. Morrison for the Defendants**

**JUDGMENT
(VERDICT)**

Introduction

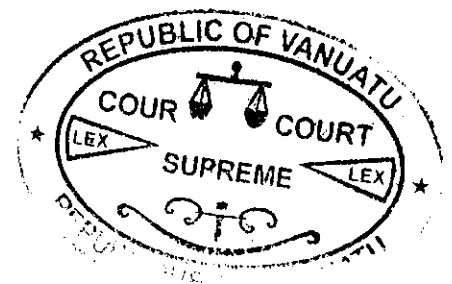
1. On the morning of 12 March 2019 there was a car accident on the road heading towards Eruiti after the Rentabao bridge resulting in the death of late Peter Hewa. As a result of Police investigations the defendant was charged for causing the death of the deceased.

Charge

2. A single charge was laid pursuant s 108 (c) of the Penal Code [CAP 135] namely that the defendant unintentionally caused harm to the body of the deceased resulting in death.

Law

3. The legal ingredients or elements of the charge are that:
 - 1) The defendant caused damage to the body of late Peter Hewa.
 - 2) The damage was unintentional resulting in the death of the deceased.
 - 3) The damage was caused through the negligence of the defendant.



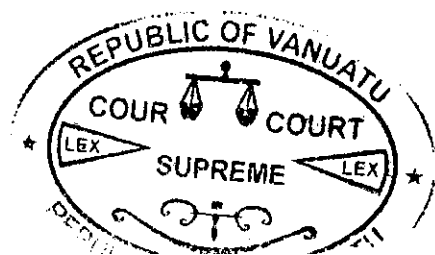
4. The prosecution must prove all three elements. The first and second elements are not disputed and are admitted by the defendant. The only issue relates to the third element. Whether the defendant was negligent in his driving resulting in the death of the deceased.
5. This is the only issue in dispute which the prosecution needs to prove and it must do so beyond reasonable doubt.

Undisputed facts

6. Some of the main facts which are not in dispute are that at the time of the accident:-
 - The defendant was driving his Toyota Hilux Reg: 18250;
 - He had three passengers, John Posen and the deceased were sitting on the tray outside with the sand;
 - Lenny Daniel was with the defendant inside the truck;
 - On the 12 March 2019 the accident happened on the second trip whilst transporting sand from Turtle Bay to the defendants' farm around Eton Area.
 - The defendant had driven over this stretch of road on many occasions prior to the accident;
 - On the stretch of road after the Rentabao bridge but before Eruiti, there were two pot holes in the road;
 - It was not possible to drive safely over them but when the road was clear, vehicles heading towards Eruiti would cross to the left side of the road where there was more space than the right hand side to avoid the potholes

Evaluation of the evidence

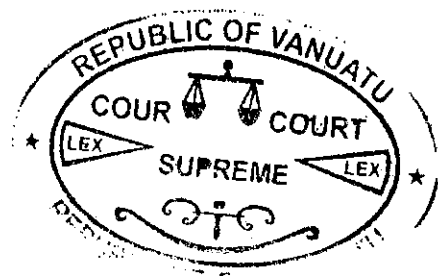
7. I accept as uncontested evidence the fact that at the time of the accident, the defendant had owned the truck for some 18 months and it was in near new condition. He had been driving for over 15 years.
8. The crux of this case is whether the defendant was negligent in his driving. By his own evidence he had been driving over this stretch of road many times. And when taking sand he had driven over 24 times. At the time of the accident he was turning to his left to avoid the pot holes when he heard a loud noise or "boom" then lost control of the vehicle. This was not contested by the prosecution in cross examination. John Posen for the prosecution also said the truck turned left to avoid the pot holes and before it over turned he heard a loud noise from the wheel.



9. The Police investigation was done by Police Constable Mathew Malapa. He gave an honest account of what he did and was cross examined on his evidence. He made two visits to the accident site. First on the day of the accident and again on the 19 March 2019. On the day of the accident he drew a sketch map (**Exhibit P1**) of the accident. Under cross examination he confirmed that the position of the vehicle on the map was not the position it was in immediately after the accident. He admitted that he wrongly understood that the truck had passed the potholes. He also wrongly understood that the vehicle had turned to the right to avoid the potholes contrary to what the defendant and John Posen said.
10. He also admitted that he did not examine the vehicle and did not measure the width of the vehicle relative to the pot holes on either side of the pot holes. And no measurements were taken of the depth of the potholes. On the 19 March he prepared a second sketch map (**Exhibit D1**) of the two potholes which indicate the following. If one was travelling in the same direction as the defendant towards Eruti, the bigger pothole allowed a limited space of 1m 70 cm whereas to the left of this same pothole was a distance of 3m 05cm. The smaller pot hole was almost at the center of the road although slightly to the right. The danger posed to the vehicles was the bigger pot hole. It was common for drivers travelling as the defendant did to cross over to the left at the pot holes. Mike Malesas said he drives along this road every day. On the day of the accident, he saw the vehicle swerving then flew into the air before landing on the ground.
11. Prakash Viran gave evidence as an expert witness. He is the owner of Auto Smash Repairs. He was called by the defendant. No objection was made to his evidence and he was cross examined as well. He was not an eye witness to the accident but happened to be passing along that stretch of road in the afternoon of the accident. He saw the vehicle lying on its roof and no one was around. He took a closer look inside the vehicle and noticed that the radio was missing. He also noticed that on one of the wheels, two bolts holding the ball joint to the steering knuckle were sheared off and took pictures of this. He was later asked to provide a report (**Exhibit D2**) which he did on 30 September 2019. His evidence is essentially that the damaged ball joint caused the vehicle to lose control and turn over.

Findings

12. On the basis of my consideration of the evidence I make the following findings.
 - On 12 March 2019 the defendant, John Posen, Lenny Daniel and the deceased went to get sand at turtle bay. This was one of many trips made before but on that day it was the second trip;



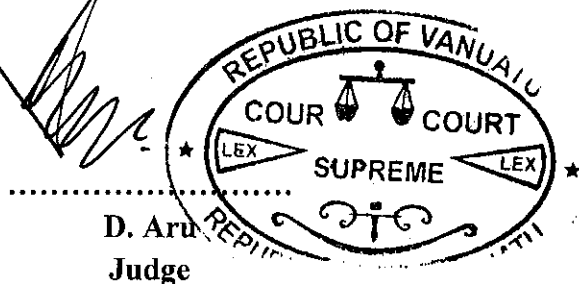
- The defendant was driving and Lenny Daniel was with him inside the cabin. Sitting in the tray of the vehicle was John Posen and the deceased.
- When they approached the section of the road with the pot holes the defendant crossed to the left side of the road to avoid the pot holes;
- As the vehicle was turning two bolts holding the lower ball joint to the steering knuckle snapped off; the defendant heard a loud noise. John Posen also heard a loud noise from the wheel.
- At that instant the defendant lost control of the vehicle and it ended up landing on its roof; Mike Malesas saw the truck swerving out of control before flying through the air.

13. In view of my findings, I am satisfied that the accident was not caused by the negligence of the defendant but caused by mechanical failure of the truck. The prosecution failed to establish the element of negligence beyond reasonable doubt therefore its case must fail.

Verdict

14. I find the defendant not guilty on the charge of unintentional harm causing death and he is hereby acquitted.

**DATED at Port Vila this 9 day of June, 2020
BY THE COURT**



**D. Aru
Judge**