

SEYCHELLES / JUDGMENT

R vs Boniface (Criminal Side No: 31 of 2007) [2013] SCSC 42 (5 April 2013)

[2013] SCSC 42

COURT

Supreme Court

CASE / FILE NUMBER

Criminal Side No: 31 of 2007

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IN THE SUPREME COURT OF SEYCHELLES Page 1 of 15 REPUBLIC V STEVE BONIFACE Criminal Side No: 31 of 2007 Mr. D. Esparon Principal State Counsel for the Republic Mr. D. Lucas Attorney at Law for the Accused

JUDGMENT

Burhan J, The accused in this case was charged as follows; Count 1 Statement of offence Causing death by dangerous driving contrary to and punishable under Section 25 of the Road Transport Act. The particulars of the offence are that Steve Jacques Boniface on the 26th January 2007 at Pointe Larue, Mahe caused the death of another person namely Freeman Frederick Duval by driving a motor vehicle at a speed or in a manner which is Page 2 of 15 dangerous to the public. Count 2 Statement of offence Driving a motor vehicle with alcohol concentration above the prescribed limit contrary to Regulation 3 (1) of the Road Transport (sober) Driving regulation read with Regulation 99 (1) of the same and punishable under Section 24 (2) of the Road Transport Act. The particular of the offence are that Steve Jacques Boniface on the 26 th January 2007 at Pointe Larue, Mahe, drove a motor vehicle on the road with alcohol concentration above the prescribed limit namely 83 micrograms of alcohol in 100 millilitres of breath. The accused denied the charges and trial against the accused commenced with the prosecution calling Sub Inspector Jude Bistoquet who stated at the time of the accident i.e. the 26th of January 2007 he was attached to the Scientific Support and Crime Records Bureau at Mont Fleuri. He further stated he was called to photograph the scene of the accident. Witness produced the photographs to court as P1 (1 to 35) with the relevant negatives. He identified P1 photograph 1in respect of the scene of accident and stated the deceased body was at the point marked as number 1. The point of impact he stated as shown by Corporal Belle was marked as number 3 and the red stains on the ground presumed to be blood was numbered

2. The vehicle involved in the accident was S 6777. Photographs P11 and P12 Page 3 of 15 showed the damage on the vehicle and also showed a piece of yellow cloth on the left side mirror. Photographs P15 showed the injuries on the deceased. Corporal Belle gave evidence stating he received a call on the 26th of January 2007 informing him of an accident and he

had proceeded to the scene at Anse De Genets. He had observed the vehicle in the accident and he had noticed a body on the ground, face upwards on the left hand side of the road and noticed that the blue vehicle involved in the accident parked a distance away. The vehicle had its left side damaged and witness had also found a piece of cloth on the left side door mirror and noticed the left side mirror of the car was damaged. He identified the vehicle, damage caused to the vehicle and the piece of cloth seen by him from the photographs. He identified the point of impact in his sketch plan and stated that the driver had showed him the point of impact and witness further stated that there was debris at the said point. He noted the vehicle had stopped 42 meters away. He produced his sketch plan as P3. After he had finished his procedures, he had informed the accused to accompany them to the guard room to take a breathalyzer test and the accused was taken to the guard room at the airport. He stated Officer Mellon had assisted him at the scene. He had detailed Officer Isaac to the accused. Thereafter they had got down Corporal Doudee to perform the breathalyzer test. Corporal Doudee had informed the accused of the procedures involved prior to conducting the test. After Corporal Doudee had completed the test he had proceed to arrest the accused and inform him of his constitutional rights and had cautioned him. It is apparent from his evidence that he had only heard and seen part of what Corporal Doudee was doing in regard to the breathalyzer test. The survey plan of the incident was thereafter marked as P4. Page 4 of 15 Mr. Neddy Jumaye stated that on the 26th of January 2007, Freeman Duval (the deceased in this case) had called him and told him to come to the airport. He had gone on his bike to meet him. He stated he saw a driver driving a Toyota car towards Victoria and he had seen the vehicle hit Freeman on the leg. According to witness Freeman had already crossed the road and was standing on the side of the road when he had been hit. Witness identified the driver of the vehicle in the dock. When Freeman had been it on the leg, his body slanted to one side and it was at that moment the side mirror had hit him on the head and he had fallen down. When he fell he had been still breathing and witness had stayed with him until the police officers at the airport arrived. He stated the car side was damaged and the mirror had fallen on the grass. He further stated the victim's face had been crushed by the side mirror of the vehicle. It appeared to court at this stage by the demeanor of the witness that the witness seemed to be very strained and distressed by the incident he had witnessed and he was relating about. Therefore court had requested for a medical report to see whether he would be fit to stand the rigors of cross examination (order of 11 th November 2009). After several days on the 26th of July 2010 the witness was recalled as it appeared he was ready to face further cross examination. Neddy Jumaye under cross examination stated that he had no mental illness nor any problems with drugs nor had he any problems with the law. He admitted he had wounds on him which would stress him out and he had a problem with his back as such he could not stand or walk at times. He stated he was working part time with his father. He had worked at the security firm of one Cliff Loizeau. He further stated he was a colleague of the boy Freeman Duval who was involved in the accident who had come to meet him the day of the accident. He stated that he Page 5 of 15 had left the security firm as it was election time and they were having problems. He stated the police had called him and informed that Freeman Duval was coming to his place

and he had gone on his bicycle to the main road at Anse De Genets. He had seen the blue Toyota pass by and hit Freeman and he had fallen down. He further stated he saw the vehicle hit Freeman on his left foot (pg 10 of the proceedings of 26th July 2010) and then the mirror had hit Freeman on the face and he had fallen down. The vehicle he stated was coming from the south towards town. He stated that Freeman had already crossed the road at the time he was hit and he had seen the driver of the vehicle when he had stopped near the bus stop. Freeman had been screaming his name Jumaye. He further stated the car was been driven a bit fast and had stopped at the bus stop after hitting Freeman. Mr. Malliot gave evidence stating that he was a mechanic who examined the vehicle S 6777. He stated looking at his report that the left hand head light was not functioning, the right hand stop light was not functioning and both front indicator lights were not functioning. He stated the defects of the vehicle were not a result of the accident. However although his report indicated that the glass of the left side headlight was damaged, there is no mention of the left hand side headlight lamp light not working. Sergeant Doudee gave evidence to the effect that he had received a call at around eight in the night on the day of the accident to conduct a breathalyzer test on the accused. He had met the accused at the airport. He had asked the accused if he had taken anything the accused had replied he had not. He had explained to the accused how he should do the test. He had broken the seal of the machine used for the breathalyzer test in front of the accused as was the usual procedure. He stated the first test result was 78 milligrams and the time was 22.23 hrs and both he and the accused had signed the slip. The second test reading was 83 milligrams and the time was 22.26 hrs and both he and the accused had signed the slip. He stated the machine was working properly at the time the readings were taken. Page 6 of 15 He further stated that both readings were above the normal level of 35. He stated prior to taking the test a form had to be filled which was done by the investigating officer. He had asked the accused questions regarding the breathalyzer test and the form was filled by the investigating officer. He further stated the machines used for the breathalyzer test were kept with the Land Transport Division and that the machine had been properly calibrated and if it had not, it would have not given a reading. In this case as the machine had been properly calibrated it had immediately given the reading which was correct. He stated that the machine had been calibrated in April 2006 about 9 months earlier. He further stated that on the machine there is an alarm which rings when the time comes for the person to stop blowing into the machine and it was working. Lance Corporal Lucy Melon stated that she was on duty at the airport the day when around 21.25 hrs, she received a call from another police officer informing her there was an accident on the main road near the airport. She had gone to investigate with Lance Corporal Asba. When she arrived on the scene, she found a person lying on the left side of the road close to the pavement on the mountain side. She had seen the vehicle which was involved in the accident parked a distance away. Thereafter she too had examined the vehicle and noted the damage and the driver was brought to the airport. After the breathalyzer test was conducted she issued him with a notice of intended prosecution the documents were marked as P8(a) and P8(b). The victim was brought to the Victoria Hospital. Page 7 of 15 The prosecution also produced the statement under caution of the accused after it was declared admissible after a

voire dire was held. It is to be noted that the evidence given by the accused corroborates many of the inculpatory facts contained in the said statement. In his evidence under oath the accused admitted he was driving around 50 to 60 klm per hour. He admitted consuming alcohol the previous day and on that day he admitted having some wine. He admitted after the test he was informed his level was above the normal level. Thereafter he admitted he had consumed some alcohol but was not drunk. He admitted the point of impact would have been as shown on photograph 9. He further admitted the person who was hit had got thrown onto the grass. He admitted that there were lights on the road. Dr Betsy Chavez stated that she was a pathologist and produced a copy of her certificate P10. She produced the post mortem report prepared by Dr. Xiang Lei who had left the jurisdiction and was not returning as P11. It is clear from the document P11 that Dr. Xiang Lei had conducted the post mortem on the deceased in this case Freeman Duval. It is clear from the doctor's findings that death was due from injuries sustained in a road traffic accident. Thereafter the prosecution closed its case and learned counsel for the accused made a submission on no case to answer. By ruling dated 31st March 2011, this court ruled that the accused in this case had a case to answer in respect of all the charges against him. In defence the accused gave evidence under oath and called Elvis Adrienne as a defence witness. The accused giving evidence under oath admitted that he had been driving his vehicle around 9.00 p.m. from Pointe Larue going towards Page 8 of 15 Cascade. He further stated near the airport he had been travelling at a speed of 50 to 60 klm per hour when he had noticed a vehicle in front of him suddenly swerve. He had not looked to see why the vehicle swerved. The vehicle a car had kept on going. He was following behind when he had heard a noise of something hitting his vehicle. At that time he stated he was driving on the left side of the road and everything happened very fast. He had applied his brakes and stopped his vehicle near the bus stand. He stated the vehicle in front had gone and there was no vehicle behind. He had seen a person on the road. At the time of impact he had not seen anyone in front of him. He had not seen Neddy Jumaye at that time. He admitted the point of impact was about 1.60 metres from the road side. He stated he remained on the scene for about 15 minutes waiting for the police. He admitted he had not told the police about the vehicle in front but had mentioned it in his statement. He stated he could not recall the faces of the police officers present that day. After the accident the police officers had put him in a vehicle and locked him. They had taken him to the airport where the breathalyzer test had been carried out. He stated he could not recall who had done the test on him. He stated at no stage were his rights read out to him. Thereafter the accused called Mr. Elvis Adrienne as a defence witness. Mr. Adrienne stated he was working at the Land Marine and earlier attached to the Seychelles Police for about 29 to 30 years and was the Deputy of the traffic branch and had been working about 18 years in the traffic branch where he used to deal with breathalyzer testing. He had undergone training at St Petersburg for traffic management, speed checks and alcohol testing. He had given training to officers at the police academy with regard to the taking of breathalyzer tests. He stated what was being used now in the Seychelles for the breathalyzer test was the alcohol meter which gave two readings. He stated that the meter has to be calibrated every Page 9 of 15 three months and the battery changed at the time of calibration

as they do not last for three month. He stated that otherwise the readings would be higher or lower. He also stated that the mouthpiece had to be changed after each test. Thereafter the defence closed and both learned counsel made submissions. Having thus carefully considered the evidence before court, it is clear that the accused admits he was driving the vehicle which was involved in the accident. From the evidence of witness Neddy Jumaye and the post mortem report of Dr. Xiang Lei marked through Dr Betsy Chavez it is clear that the deceased Freeman Duval died as a result of injuries sustained form a road traffic accident. The fact that Dr. Betsy Chavez certificate was in the name of Betsy Cupidon has no relevance as the medical report and post mortem examination was not done by her but by Dr. Xiang Li and she only produced his report. The fact that she was one of the current pathologists at the hospital was not contested by the defence. When one considers the evidence of Neddy Jumaye, eventhough he states that Freeman had already crossed the road and was on the left hand side of the road at the time he was hit, Officer Belle states that by the debris on the road, the point of impact was on the left hand side of the road also referred to as the mountain side and the distance from the body which was on the grass on the verge of the road and the point of impact was about 1.6 metres. Therefore it is to be noted that the point of impact as shown on his sketch plan P3 is not at the very edge of the mountain side of the road. In fact Photograph P1(14) clearly shows that the number 3 placed on the road to show the point of impact is not on the very edge of the mountain side of the road by on the road itself, though more towards the mountain side. Therefore this court is inclined not to accept the evidence of witness Neddy Jumaye that the victim had already crossed the road when he was hit by the vehicle Page 10 of 15 driven by the accused. It is clear from the sketch and photograph P1 (14) that the point of impact is on the road itself. The sketch plan and photographs show that the debris was not on the left hand side edge of the road but on the road itself. Therefore it is apparent that the victim had been hit while he was on the road but close to the left hand or mountain side edge of the road. Further the evidence of Neddy Jumaye is that he had got a call from the airport from the deceased telling him to come and meet him and he had gone to meet the victim when he had witnessed the incident. It is apparent therefore that the victim would have had to cross from the airport side to the mountain side to get to where the accident occurred. Witness Neddy Jumaye says the victim was hit on his left leg (Pg 10 of the proceedings of 26th July 2010) and fell side wards and the doctor's report indicate it was the left tibia and fibula which had been fractured both bones on the lower part of the left leg. Further the evidence of the prosecution and it is admitted by the accused, he was driving his vehicle in the direction of Victoria and it was the left side of his vehicle which was damaged. It is the view of this court that on consideration of all this evidence taken together the evidence indicates that the accused while driving towards Victoria had hit the victim at the point of impact with the left side of his vehicle, on the victim's left leg, when the victim was crossing the road from the airport side to the mountain side, resulting in him slanting to a side as described by witness Neddy Jumaye and his face hitting the left side mirror of the vehicle. However it is clear that the accident had not occurred after the victim had crossed the road but on the road itself as borne out by the point of impact. When one considers the evidence of all these witnesses and the evidence of

the accused himself who admits the point of impact these facts are clearly established. It is pertinent at this stage to consider the facts of this case in the background of the case law given below. Page 11 of 15 In the case of *R v Marzetti* 1970 SLR 20 the accused was charged with manslaughter under section 195 of the Penal Code and dangerous driving under section 18(1) (b) and (2) of the Road Transport Act. Sauzier J held that the degree of negligence required to establish manslaughter, must go beyond a mere matter of compensation between subjects and show disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment and proceeded to find the accused not guilty of manslaughter. He also held that he was not satisfied that it had been proved that the accused was driving at a high and dangerous speed. He thereafter proceeded to consider whether the accused was guilty of negligent driving and stated:- "The test, which is an objective test, may be stated as follows; Was the accused exercising that degree of care that a reasonable and prudent driver would exercise in the circumstances? If the circumstances show that the accused's conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved *Simpson v. Peat* (1952) 2Q. B. 24.". Sauzier J, acting under section 159 (2) and 162 of the Criminal Procedure Code, proceeded to find the accused guilty of negligent driving contrary to section 18(1) (b) and (2) of the Road Transport Act and acquit him of the charge of manslaughter. In the case of *The Republic v Raymond Lebon* 1980 SLR 1 Seaton CJ held:- "Regarding the driving of the accused, in my view, the evidence appears to show not so much recklessness - which in the offence of causing death by reckless driving involves foresight of possible consequences and an indifference to risk- but negligence which may be defined as the doing of something which a person of Page 12 of 15 ordinary care and skill under the circumstances would not do, or omitting to do something which a person under the circumstances would do." The accused in the said case was acquitted of the charge of reckless driving and convicted on the count of negligent driving. In this case too, the accused admitted that his speed was 50 to 60 Klm per hour the prosecution has not established that this was over the speed limit. On considering the evidence in this instance case it could be said that the accused had failed to maintain a proper lookout for persons who were crossing the road and considering the fact that there is evidence to show that even the vehicle in front had to swerve to the right in such a situation what a reasonable and prudent person would have done would have been to stop his vehicle and the accused act of failing to maintain a proper lookout and failing to stop his vehicle could be attributed to the fact that he failed to take steps which would be consistent with that of a reasonable and prudent driver. The evidence does not show that the accused was driving at such a high speed or utterly recklessly and with complete disregard to human life. In fact the principal prosecution witness Neddy Jumaye states he was driving a bit fast. The offence of causing death by reckless or dangerous driving involves foresight of possible consequences and an indifference to risk but the accused act in this instant case in the view of this court shows negligence which is the doing of something which a person of ordinary care and skill under the circumstances would not do, or omitting to do something which a person under the circumstances would do. In this instant case the accused failed to maintain a proper lookout for the persons crossing the road and failed to apply his brakes

and stop his vehicle as a reasonable and prudent person would have done in his situation. Further the evidence indicates that the Page 13 of 15 accused had stopped his vehicle a long distance (42 metres) from where the incident occurred. It must also be borne in mind that the victim too was on the road at the time of impact and not on the side of the road as attempted to be shown by the prosecution witness Neddy Jumaye. For the aforementioned reasons in respect of count one, this court is satisfied that the prosecution has established or proved all the ingredients of negligent driving beyond reasonable doubt. Therefore acting under section 156 (2) and in consideration of the provisions contained in section 160 and 161 of the Criminal Procedure Code (Cap 54), this court finds the accused guilty of negligent driving contrary to section 24(1) (b) and (2) of the Road Transport Act (Cap 206) and proceeds to convict him of same. With regard to count 2 it is established from the evidence of Officer Doudee that he had asked the relevant questions prior to taking the Breathalyzer test and explained to the accused the procedure involved. I see no reason to disbelieve the evidence of officer Doudee in this regard. He stated that the readings were 78 and 83 milligrams. He produced the two print out readings it appears that he had erroneously in his evidence stated milligrams and not microgrammes. It appears the print outs though clear at the time of being produced in court have faded thereafter, The defence did not contest the readings but contested that the manner in which the readings were taken were wrong and therefore the readings of 78 and 83 microgrammes of alcohol in 100 millilitres of breath were not accurate. In challenging the manner in which the readings were being taken the defence called an ex Deputy Commissioner of Police Mr. Adeline to give evidence. His main contention was that as the alcohol meter requires calibration every three months, failure to do so would result in the wrong readings being given and the battery Page 14 of 15 running down. He also stated that the mouth piece should be changed after each test. However the evidence of Officer Doudee was that the machine had been calibrated around 9 months prior to the test and that if there was any defect and the machine needed calibration there would be no reading. In the very first reading with the brand new sealed machine, the reading was 78 well above the prescribed limit. In this instant case it is clear the machine had worked properly and the alarm had gone off as required at the time of breathing into it and the reading had been recorded clearly, showing that the battery was not dead and the machine had been properly calibrated and was working properly at the time the test was being carried out. Further Officer Doudee stated that he had questioned the accused whether he had consumed anything 10 minutes prior to the test, the accused had replied no. Even though the accused gave evidence in this case he did not mention he had had something to eat or drink 20 minutes prior to the test being taken. I am satisfied from the evidence of Corporal Doudee that the machine was working properly at the time the readings were taken and therefore the readings were accurate and acceptable to court. For the aforementioned reasons I will reject the evidence of Mr. Adeline and accept the evidence of Officer Doudee in this regard. On his evidence I am satisfied that count two has been proved beyond reasonable doubt. I therefore proceed to find the accused guilty of the charge of negligent driving in respect of count 1 and guilty of the charge as contained in count 2 and convict him on both. Page 15 of 15 M. BURHAN JUDGE Dated this 5th day of April 2013

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