IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 19/2671 CoA/CRMA

BETWEEN: Nigel Morrison
Appellant

AND: Public Prosecutor
Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru***
Counsel:	*Ms Stephanie Mahuk for the Appellant* *Mr Ken Massing for the Respondent*
Date of Hearing:	***5th May 2020***
Date of Decision:	***15th May 2020***

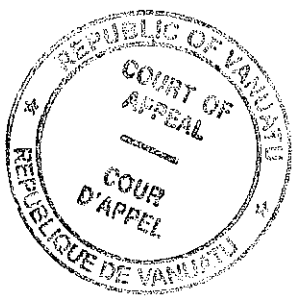
JUDGMENT

INTRODUCTION

1. At about 11:30am on 18th March 2018 the appellant Nigel Morrison's motor vehicle collided with a motorcycle driven by Christian Lacoste. Mr Lacoste was seriously injured and died in hospital some hours later.

2. Mr Morrison was charged under s.108(c) of the Penal Code with unintentional harm causing death and in the alternative careless driving. After a three day trial in the Vanuatu Supreme Court before Justice Jeremy Doogue, on 26 September 2019 he was convicted of unintentional harm causing death. In the sentencing that proceeded on the same day, Mr Morrison was sentenced to six months imprisonment, suspended for a period of twelve months. There was no other penalty imposed.

3. The appeal before the Court is by Mr Morrison, who challenges both the conviction decision, and the sentence.



BACKGROUND

4. The basic facts of the accident are not in contention, save for the issue of the speed of the motorcycle.

5. On the Sunday morning of 18th March 2018, the appellant Mr Morrison, together with his partner Paz Morales, were driving northward in their motor vehicle which was a four–seater truck, from Port Vila to Francesca's Restaurant for lunch. They had travelled on the Efate circular coast road in a clockwise direction. They had reached Havana Harbour and had arrived at the driveway entrance to the restaurant, which was on the left-hand side of the road, on the coast. There was another motor vehicle approximately 40 metres ahead of them which was turning left to go into the driveway of a different establishment, the Wahoo Bar. Thus both vehicles were on the right-hand side of the road about to turn left, where they would cross the part of the road reserved for the line of traffic passing the other way, to which they had to yield. The vehicle ahead of Mr Morrison's vehicle was another truck, driven by Thomas Monvoisin, who appears to have been acquainted with both Mr Lacoste and Mr Morrison.

6. Mr Morrison proceeded to turn his vehicle left, across the road, towards the driveway of Francesca's Restaurant, proceeding on to the side of the road used by traffic coming the other way, as he did so. When he was well into his turn, and straddling the side of the road reserved for traffic coming the other way, with his left bumper approaching the start of the driveway, his car was hit by Mr Lacoste's motorcycle on the front left-hand corner. Mr Lacoste was riding his bike in the opposite direction and was on the correct side of the road reserved for vehicles going in his direction. On impact Mr Lacoste became separated from his motorcycle and he and his motorcycle ended up in different positions, in the foliage about 15 - 20 metres away on the side of the road. In the course of leaving his motorcycle and going through the air, Mr Lacoste's body had impact with a post.

7. Mr Lacoste was conscious and able to speak immediately after the accident, but groaning and in pain. Mr Morrison with Ms Morales got out of his car immediately, and leaving the car on the road, went up to Mr Lacoste where he was lying, and there was a conversation that we will return to.

8. Mr Lacoste's injuries unfortunately were serious. He had broken a leg and damaged his shoulder, and it later turned out that the force of the accident had caused his aorta to rupture causing internal bleeding. He died from the internal injury some hours later in hospital.

THE ISSUE

9. The issue that was before Justice Doogue was whether it was Mr Morrison's negligence that had caused the accident which led to Mr Lacoste's death. It was accepted that the accident was the cause of Mr Lacoste's death, so the only issue was whether negligence by Mr Morrison had been proven by the prosecution to the criminal standard of beyond reasonable doubt.

10. Section 108 of the Penal Code provides:

> *"No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.*
>
> *Penalty: (a)...*
> *(b) ...*
>
> *(c) If the damage so caused results in death, imprisonment for five years."*

11. Section 6(4) of the Penal Code provides:

> *"A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise."*

12. It was not alleged that Mr Morrison had acted recklessly, and the case was not run on the basis that he had failed to observe any law. Rather the case turned on the question of negligence, and in particular as it is set out in s.6(4), whether Mr Morrison failed "to exercise such care, skill or foresight as a reasonable man in his situation should exercise". To put this in terms of the onus and standard of proof, the question was whether the prosecution had proven beyond reasonable doubt that Mr Morrison had failed to exercise the care, skill or foresight that a reasonable man in his situation should exercise.

13. In the Supreme Court the trial judge held that the evidence established beyond reasonable doubt that "the elements of the charge against Mr Morrison under the first count [are] established". The first ground of appeal challenges this conclusion and asserts that the verdict was unreasonable or could not be supported having regard to the evidence because "*it was not reasonably open to exclude Mr Morrison's account of what occurred*". Mr Morrison had asserted that he had checked that the road was clear, and he had seen no vehicle coming towards him until the moment of impact.

14. As a second ground of appeal it is asserted that the trial judge wrongly excluded the evidence of the driver in the car in front, Mr Monvoisin, which had been led by the prosecution without objection.

15. It can however be observed at this point that the issue put in the first ground by Mr Morrison's counsel, Mr Holt QC, slightly over-simplifies the question that had to be determined by the judge. It may have been correct that when Mr Morrison checked up the road that he did not see any vehicle coming towards him, and did not see any such vehicle until very shortly before impact. Obviously if, for instance, ten seconds passed between the look up the road, and commencing the turn, that initial look would not settle the question of whether there was a failure to exercise the care skill or foresight of a reasonable man. The question is, to what degree and how frequently was he looking up the road after he had stopped and then commenced his turn. Did he show the vigilance of a reasonable driver? It is not a question of whether Mr Morrison was or was not correct in his evidence.

16. To put it another way, there can be no doubt that Mr Morrison thought the road was clear when he commenced his turn. There was no suggestion and nor could it be made, that Mr Morrison would have wilfully turned in front of an oncoming motorcycle. There also can be little doubt that he would have checked the road before he commenced the turn. However that does not settle the question of whether the prosecution has proven that the steps he took leading up to the impact were inadequate and fell below the standard care skill or foresight of a reasonable driver.

OUR APPROACH ON APPEAL

17. There is no statutory provision in Vanuatu setting out the circumstances in which a general appeal against conviction should be allowed. This is contrast with the position in New Zealand. In New Zealand, the Criminal Procedure Act 2011 provides in s.232(2) that in the case of a jury trial, an appeal will be allowed if, having regard to the evidence, the jury's verdict was unreasonable, and in the case of a judge-alone trial, whether the judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred. A miscarriage of justice is defined in s232(4) as meaning any error, irregularity, or occurrence in or in relation to or effecting the trial that has created a real risk that the outcome of the trial was effected, or has resulted in an unfair trial or a trial that was a nullity.

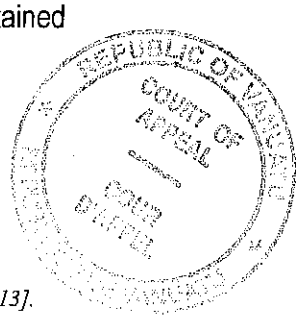
18. The approach to be taken in considering a jury verdict was recently considered by the Australian High Court in *Pell v R*[1].

> *"[43] At the commencement of their reasons the Court of Appeal majority correctly noted that the approach that an appellate court must take when addressing "the unreasonableness ground" was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in M v The Queen*[2]*. The court must ask itself*[3]*:*
>
> > *"whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".*
>
> *[44] The Court of Appeal majority went on to note that in Libke v The Queen, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the M test in these terms*[4]*:*
>
> > *"But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a doubt about the appellant's guilt." (footnote omitted; emphasis in original)"*

19. We recognise that this was not a trial before a jury, but a judge-alone trial as they always are in Vanuatu. A similar approach to that outlined in *R v Pell* is adopted in Vanuatu. For our purposes, we are content to rely on the approach set out in *Dovan v Public Prosecutor* [1988] VUCA 7, quoted in *Ben v Public Prosecutor* [1990] VUCA 7 and other cases, and most recently relied on in *Pakoa v Public Prosecutor* [2019] VUCA 51:

> *"We cannot accept that, in deciding if a verdict is unsafe or unsatisfactory, in asking ourselves if we have a lurking doubt, we can or should hear a virtual repeat of the type of arguments usually presented in Counsel's closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry.... Thus, before it will intervene in such a case, this Court must have some ground for considering the verdict unsafe or unsatisfactory that goes beyond the simple question of whether we feel we might have come to a different conclusion if we had been the trial judge on the appearance of the written record."*

20. Thus it is important to approach this appeal appreciating that this is not just a matter of this Court substituting its own opinion for that of the Supreme Court judge. This Court must analyse the evidence, but in the end rather than apply its own opinion it must ask the question whether it was open to the Supreme Court judge to reach the decision that he did. Before we allow the appeal we must have reached the position that any reasonable decision maker *must* have entertained a doubt about Mr Morrison's guilt.



[1] *[2020] HCA 12*
[2] *(1994) 181 CLR 487*
[3] *Pell v The Queen [2019] VSCA 186 at [19], citing M v The Queen (1994) 181 CLR 487 at 493.*
[4] *Pell v The Queen [2019] VSCA 186 at [21], citing Libke v The Queen (2007) 230 CLR 559 at 596-597 [113].*

21. It is also to be recognised that s.108 under which Mr Morrison was charged, covers a wide variety of acts, from recklessness, which could include extremely dangerous driving, to negligence which could extend to just momentary carelessness. In this case the allegation is essentially of momentary carelessness, in particular an omission to vigilantly check that the road was clear at the commencement of and during a turn across the path of traffic coming the other way.

THE EVIDENCE

The view in front of the stationary car

22. It is common ground that Mr Morrison had stopped prior to making his turn to the left into the driveway. It is also common ground that there was approximately 80 metres of clear road visible in front of him. The visible road came to an end as the road turned into a corner, at which point the sealed surface disappeared behind bush. There was, as we have set out, Mr Monvoisin's car some 40 metres up the road and closer to the corner ahead, waiting to turn into the Wahoo Bar.

23. It is significant that at no point has the appellant suggested that Mr Morrison's view was obscured by Mr Monvoisin's stationary motor vehicle. The photo produced before us by consent and relied on by Mr Holt as showing the view in front of Mr Morrison from where he was stopped to turn into Francesca's, shows that the road could be seen by Mr Morrison going past the stationary car before it disappeared from view on the corner.

24. Mr Morrison in his statement that was given to the Court stated:

> *"We ... arrived at the entrance to Francesca's at about 11.15am. After checking behind I stopped and indicated a left turn. ... I looked at the driveway and it was clear. I looked ahead and I could see about 80 metres ahead to a bend and I could see about 80 metres ahead to a bend past some billboards and it was clear. I commenced my turn."*

The speed of the motorcycle

25. There was a substantial body of evidence before the Court to the effect that the motorcycle was speeding coming around the corner. We have in the case on appeal written emails or statements prepared by some witnesses prior to trial, and the transcribed judge's notes, and the notes of junior counsel for the appellant Ms Mahuk, which are clear and helpful. There was no objection to any of this material.

26. Mr Monvoisin in his written evidence describing the incident, said that when he saw Mr Lacoste (whom he recognised) coming towards him "*he was coming out of the corner right after trees and fishes [a local establishment] pretty fast and he was accelerating at full throttle as soon as he came out of the corner*". He said later in a statement in an email to which we will return, that:

> "*The biker was going way too fast, there was no way he could have stopped and avoided the collision with the car behind me.*
> *Nigel could not see the biker coming as there was a curve on the road ahead of us and he was behind me driving a big 4x4.*
>
> *The first thing I said to my partner in the car when it happened was: "if we had been in that car behind us, there was no way we would have avoided the crash, the biker was way too fast."*

27. As set out, after the impact Mr Morrison got out and went back to the motorbike which was in the bushes about 15 to 20 metres away and saw a man. It was Mr Morrison's evidence that he went to check on him and saw no blood. Mr Morrison said something like "*I am Nigel, sorry for the accident, are you okay?*". He said that Mr Lacoste responded "sorry I went too fast". Later when Mr Morrison had endeavoured to get his car roadworthy, and was waiting for paramedics, Mr Lacoste called to him. Mr Morrison recounted that he went to Me Lacoste again and Mr Lacoste said "*I hope you fix my bike!*".

28. Mr Morrison's partner, Paz Morales, stated that she was in the passenger seat beside Mr Morrison. On arriving at the entrance, which was to the left-hand side of the road, Mr Morrison stopped the car, looked in both directions and started turning left. The road was empty and she saw no vehicle coming towards them. She also said that Mr Lacoste said to her and Mr Morrison that he had been going too fast.

29. Francesca Grillo gave evidence of going up to Mr Lacoste and talking to him. Mr Lacoste said to her that he was speeding, and there was a car.

30. Another witness, Trisha Pakoa, gave evidence that she saw the accident, and the speed of the motorcycle was "*fast*". She saw the impact. She went up to Mr Lacoste after the accident who said that he was speeding and going too fast.

31. We will not refer to all the other witnesses. However it is necessary to recount that Mr Lacoste had been travelling with a group, who regularly ride their bikes together. Stefan Rivier, one of Mr Lacoste's biking companions, gave evidence. Ms Mahuk's notes show that Mr Rivier gave evidence that when he approached Mr Lacoste after the accident, Mr Lacoste was "*angry, lying on his back, and kept*

saying: why did he cut me off/block my way. He's got to have to pay for motorbike".

32. There was a video taken by a dashcam on Mr Rivier's motorcycle helmet travelling in the group, behind Mr Lacoste who was first in the group. It does not show Mr Lacoste who appears to have gone ahead of the other bikes. It does show that when the dashcam came around the corner showing pictures of where the accident had happened, there were already persons in attendance at the scene, indicating that the group of motorcyclists of which Mr Lacoste was the leader, had lagged behind him, and Mr Lacoste had gone ahead a distance in front of them. This would support an inference of speeding as the rest of the group appear to have been averaging over 80 kilometres an hour.

The judge's consideration of speeding

33. It is the tenor of the judge's decision that he disagrees with the defence submission that Mr Lacoste was travelling at an excessive speed. Although the judge does not spell out his finding on speed, this negative attitude to the suggestion of speed can be drawn from paragraphs 45 and 52 of his judgment.

34. The judge set out the conclusion of Mr Monvoisin, which we have not set out, earlier in this decision at [26]. He said:

> *"[17] The expressions of opinion contained in the latter part of Mr Monvoisin's email were put in evidence but, in my view, they do not contain admissible opinion which would assist me in coming to a conclusion in this case."*

35. This is the statement and decision that is the subject of the second ground of appeal. It is submitted that this was an error by the judge that prejudiced the defence.

36. If the judge meant by his statement at [17] that the whole paragraph set out above at [26] where Mr Monvoisin gave his opinion on Mr Lacoste's speed, was inadmissible, then that would have been an error. Laypersons are able to express a view on speed, even though they have no expertise. The speed of a vehicle is something that ordinary people have to assess all the time in their daily lives, just as they have to assess accents, health, pallor and so on without expertise. Laypeople who express such views are not experts, and this of course is taken into account by a judge in terms of the weight that is placed on the evidence. It is an error to refuse to admit the opinion of a layperson who has witnessed an accident, as to speed.

37. However it is not clear that this is what the judge did. Mr Monvoisin's email did contain inadmissible material. He had no expertise entitling him to express an opinion on whether Mr Morrison could have avoided the crash, but that is what he did in the last two paragraphs of the email. What Mr Morrison could see, and could have done, were the ultimate issue for the judge to determine, and involved a very large assessment of matters, including an assessment of the exact view from the position where Mr Morrison was stationery. There was nothing to indicate that Mr Monvoisin had done any research into the issue or had any expertise on the cause of accidents. We suspect that the judge's rejection of the reference to "*the latter part of Mr Monvoisin's email*" was just to the last two sentences, and not to his opinion on speed.

38. Even if we are wrong in this assumption, (and it is regrettable that it is not made precisely clear what evidence was being excluded), as we analyse later, the judge also made findings on the basis that the motorcycle was speeding. The opinion as to speed was the admissible part of Mr Monvoisin's email, and therefore even if his statement on speed was wrongly disregarded by the judge, the end to which it was aimed, namely a finding of speeding, was reflected in the judge's findings. As will be seen, we conclude below that the motorcycle was speeding, and we proceed on that basis. An error on this if there was one has not in our view led to any miscarriage of justice, as any erroneous rejection of the evidence on speed was nullified by a consideration and findings based on the motorcycle speeding.

The judge's view on Mr Morrison's negligence even if the motorcycle was speeding

39. It is to be recognised that despite his negative attitude in the two paragraphs we have mentioned to the defence allegation of speeding, there is an element of recognition in the judgment that the motorcycle was speeding, and parts of the judge's conclusions are firmly reached on that basis. The judge on a number of occasions states that even if Mr Lacoste was speeding, Mr Morrison should have been able to see him coming. This is made quite plain that paragraph 47, where he says that Mr Morrison, if he had properly scanned the foreground, should have seen Mr Lacoste approaching "*even if Mr Lacoste was travelling at a relatively high speed*". He says:

> "*But my conclusion is from, among other things, taking a view of the locale in which, the accident occurred, that even if he was travelling at speed, it would have been possible for a careful driver to see him coming because of the length of clear view that Mr Morrison had in front of his vehicle.*"

40. He makes the same point again at paragraph 52 of the judgment, also making the further point that the ability of Mr Morrison to see the oncoming vehicle at the

speed it was going at was "*established by the fact that Mr Monvoisin had sufficient time to detect the oncoming vehicle*". He then says apparently assuming that for these purposes that Mr Lacoste was speeding:

> "*[52] Even if I am wrong in disagreeing with the defence concerning the question of whether Mr Lacoste was travelling at an "excessive" speed, the key point is that even if he was speeding that should not have affected Mr Morrison's ability to see him. **This contention is established by the fact that Mr Monvoisin had sufficient time to detect the oncoming vehicle.** The speed at which Mr Lacoste was travelling does not displace the inference that I consider should be drawn from all the surrounding circumstances which is that Mr Morrison did **not make a proper timely** check on incoming traffic before turning.*
>
> *[53] I do not consider that this was one of those exceptional cases where the unexpectedly high speed of an approaching vehicle meant that a driver could not be criticised for failing to give way because a speeding vehicle took him by surprise and appeared at the last minute leaving him with insufficient time to hold back from making a turn.*"
>
> *[emphasis added]*

41. He again makes a similar point at paragraph 55 saying he finds it difficult to see how any driver could have avoided an accident where a vehicle in the opposing lane suddenly made an unheralded turn in its path. He stated:

> "*Even if it could be said that Mr Lacoste failed to take the opportunity to avoid the accident because his speed did not permit him to, (a matter that I have already discussed) the fact is that the dangerous turn that Mr Morrison made was still a substantial contributor to the occurrence of the crash.*"

42. There was evidence about speed provided by the witnesses who had seen the motorcycle immediately before the accident, in particular Mr Monvoisin and Ms Pakoa. There was evidence given by no less than four persons, of Mr Lacoste saying that he was speeding. There is also the corroborative evidence of him not being in the view of the body of the motorcycling group, and the fact that he must have outdistanced them in terms of speed. We are satisfied that on an assessment of the evidence, that the motorcycle was speeding was the only conclusion that a reasonable decision maker could have reached. But for the reasons we have set out, the judge's reluctance to accept this is not an error that of itself has led to a miscarriage of justice, as the judge was careful to make findings on the basis that the motorcycle was speeding.

Time available in which to see the motorcycle

43. We have now had evidence provided as to the time it would have taken to travel the 80 metres of road that was visible to Mr Morrison. It was accepted before us that the speed limit was 80kph. The motorcycle had been coming out of the corner and then it accelerated.

44. The judge made a note when hearing a Police witness that at 100kph at vehicle travels at 27.77 meters per second. This was broadly consistent with a consent memorandum as to speed and distance travelled that we were given by Mr Bolt. Accepting Mr Morrison's evidence that he looked and checked that the road was clear and then did not see the motorcycle until it was right upon him about 15 meters away, and accepting that the motorcycle was accelerating and speeding as it came out of the corner and that the average speed travelled over the 80 meters was at least 100 kph, Mr Morrison did not check the road for period of over two and up to three seconds before impact.

DISCUSSION AND CONCLUSION

45. The assessment of what could be seen along the road at the point of impact, and the angle of the preceding bend, and other topographical factors, were all in the purview of the judge, who had been taken to the site of the accident and taken a view. He had had the benefit of seeing and hearing the witnesses who had seen the crash. He had heard Mr Morrison give evidence of what he saw and did.

46. The judge had heard evidence from Mr Monvoisin who had seen the motorbike and stopped for it. The judge noted that he had seen the oncoming motorcycle, whereas Mr Morrison had not. They were in different positions, but the point is not without significance, and properly taken into account.

47. It seems to us that it was open to the Supreme Court judge to conclude that Mr Morrison was not sufficiently vigilant in checking that the road ahead was clear as he commenced the turn and proceeded with it. It was a conclusion that was entirely open to the judge. It was open to the judge to have reached a conclusion that this was a proven omission to do that which a reasonable driver would have done, established beyond reasonable doubt. In essence, there was a failure to check in a timely fashion.

48. The issue is not whether this conclusion is a point on which reasonable minds could differ, or whether we as individual judges may or may not have reached the same conclusion. If it was open to the factfinder to be satisfied beyond reasonable doubt that Mr Morrison was guilty, that is enough. In our view it was open to the judge to reach that conclusion.

49. To put it another way, we do not think that the trial judge here *had* to reach a conclusion that there was a reasonable doubt. It was open to him to find that Mr Morrison omitted to keep a sufficient timely lookout, as he proceeded with the

turn. By his own admission Mr Morrison did not see the motorbike coming. Even though the motorcycle was speeding, it was open to the trial judge to conclude that it was in sight for long enough for an ordinary vigilant driver to have seen it coming, earlier than the moment before impact.

50. Mr Holt's key first ground of appeal was:

> *"The verdict was unreasonable and cannot be supported having regard to the evidence because, on the evidence available, it was not reasonably open to exclude Mr Morrison's account of what occurred."*

51. As we indicated at the outset, the judge quite specifically did not reject Mr Morrison's account of what happened. To the contrary he accepted it. The judge proceeded on the basis of what Mr Morrison said, namely that he checked the road ahead, and saw nothing coming, and saw and heard nothing until just before the moment of impact. The judge found negligence accepting that account. He found negligence on the basis that if Mr Morrison had been more vigilant, and checked the road in a proper and timely fashion, Mr Morrison would have seen the motorcycle coming and not proceeded with his turn.

52. That was a conclusion that was open to the judge.

53. As we have indicated, we also cannot accept the second ground of appeal, which is that there should be a retrial ordered because the learned trial judge wrongly excluded the evidence of Thomas Monvoisin. For the reasons we have set out we consider it unlikely that the judge did reject the evidence of Thomas Monvoisin; he only rejected the last two short paragraphs where Mr Monvoisin gave his opinion on the cause of the accident. However even if the judge had rejected all the evidence of Mr Monvoisin about speeding, we do not consider that this has given rise to a miscarriage of justice. This is because the judge was at pains to couch his judgment on the basis that even if the motorcycle had been speeding, Mr Morrison was nevertheless negligent. We have carried our assessment of the appeal on the basis that the motorcycle was speeding.

54. Therefore for the reasons we have set out, we will dismiss the conviction appeal.

THE SENTENCE

55. First, we recognise the appalling consequences of Mr Morrison's careless act. We acknowledge the death of a citizen of Vanuatu, a father to children and a

partner; he has been deprived of a happy life. His surviving family will suffer for his loss all their lives. This was recognised by the Supreme Court judge.

56. In such a situation, general deterrence, the recognition of the need to stop persons from negligent acts that imperil human life, even if they are of momentary carelessness, must be a factor.

57. Consistent with his acceptance of Mr Morrison's evidence, on sentence the Supreme Court judge concluded that the culpability of Mr Morrison was at the lower end of the scale. He said:

> *"In this case it is my view that the culpability or fault while regrettable was not at the higher end. People who observe only one sentencing case are unlikely to appreciate the wide range of circumstances in which the Courts are required to impose sentences on errant drivers. Some of these include cases where there has been an appalling degree of indifference by the driver or the defendant to his responsibilities. In such a case a firm sentence is called for. In comparison with such cases where [there] may have been reckless driving accompanied by excess of speed, consumption of alcohol and other factors present, this case without in anyway diminishing its significance* ***is at the lower end of the scale*** *and that is where the sentencing must start."*
>
> [emphasis added]

58. The judge appeared in sentencing to take into account at least to a degree, the speed of Mr Lacoste. He said:

> *"It was part of their defence that Mr Lacoste had been driving at a very high speed. In the end as will become apparent for the reasons for judgment, I do not accept that that was a factor which played a great part in what happened."*

59. The judge imposed a sentence of six months' imprisonment, suspended for 6 months, observing that this was a fairly typical approach to take. He acknowledged that Mr Morrison was a first offender with a long history of good driving and good character.

60. Indeed he correctly noted Mr Morrison's background has been exemplary. He is described as a respected professional colleague who has made a high level of contribution to his profession in various significant ways. He has helped law students and young persons and he does a good deal of free legal work for people. He has contributed significantly to the sport of cricket in Vanuatu. We are entirely persuaded that Mr Morrison is entitled to call on his past record in support of a plea for leniency. We also note that Mr Morrison described the day of the accident as the worst in his life.

61. Without objection, we have been asked to take into account a matter that was not before the Supreme Court at the time of sentencing, because it was not

appreciated. Under s.1(m) of the Legal Practitioners Act, when a legal practitioner is sentenced to imprisonment the Law Council is obliged to remove that person's name from the Register of Legal Practitioners kept by the Law Council.

62. The sentence imposed here was a suspended sentence, but it appears to be accepted that there is a substantial risk that the section could be triggered and that Mr Morrison's name removed from the Register. This would deprive him of his profession and livelihood. It would bring to an abrupt end all his professional endeavours in Vanuatu over the last 19 years, and bring to an end all the good work he does within the legal community and make it difficult if not impossible for him to continue to work with law students. He could not provide the free services he presently provides.

63. It is true that suspended sentences of imprisonment are often imposed for convictions under s.108(c) of the Penal Code. However as the Supreme Court judge noted, this offending was at the lower end of the scale. We accept that the motorcycle was speeding, and this diminishes Mr Morrison's responsibility. We consider that this case is distinguishable from the case primarily relied on by the State, *Jenkinson v Public Prosecutor*[5]. In that case the defendant had been driving a truck and hit a man standing one metre from the edge of the roadway. In stark contrast to this case, the negligence was viewed at the "high end" of the scale. The Court of Appeal would have imposed a nine month suspended sentence before personal mitigating circumstances.

64. A considerably lighter sentence would be appropriate here, on a comparative basis, as the negligence and conduct was less serious.

65. There is a need for general deterrence and there has been careless driving, and we again acknowledge the tragedy of Mr Lacoste's death. However, given the substantial risk of Mr Morrison not being able to practice anymore, we consider that a sentence of imprisonment is too severe a penalty, given his level of culpability. The speed of the approaching motorcycle lowers that culpability. Plainly imprisonment for such low level negligence, is a harsh outcome.

66. In our view a lesser sentence, tailored to avoid that consequence of Mr Morrison losing his career and stopping his good works in the law, but nevertheless recognising the need for general deterrence, would be a just sentencing outcome. Such a sentence would be a fine and a period of community work, taking into account Mr Morrison's personal circumstances.

[5] [2000] VUCA 5

67. Accordingly we quash the sentence of six months' imprisonment, suspended, and substitute it with a fine of VT250,000 and 100 hours of community work. We would hope that the community work could be tailored to enable Mr Morrison to continue the good works that he already does in the community.

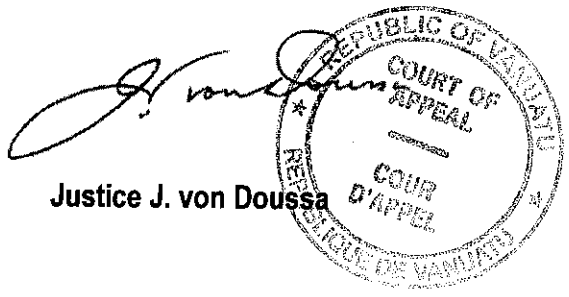
RESULT

68. The conviction appeal is dismissed.

69. The sentence appeal is allowed. The sentence of imprisonment is quashed, and replaced with a fine of VT250,000 and 100 hours community work.

DATED at Port Vila this 15th day of May 2020

BY THE COURT



Justice J. von Doussa