IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 3 of 1986

Between:

MOHAN LAL
s/o Hanuman — Appellant

a n d

REGINAM — Respondent

Jasbir Singh for Appellant
M.D. Scott and A. Sharma for Respondent

Date of Hearing: 11th March, 1986.

Delivery of Judgment: 21.3.86

JUDGMENT OF THE COURT

O'Regan, J.A.

On 26th July 1983 a motor vehicle being driven by the respondent on Prince's Road, Suva knocked down and caused grave injuries to one Jeke Raturaga. On the same day the police served Appellant with a notice given pursuant to section 41 (c) of the Traffic Act, the relevant parts of which read:

> "where a person is prosecuted for an offence under any of the provisions of this part of this act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving and to careless driving he shall not be convicted unless either -
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> a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of

the provisions aforesaid would be taken into consideration; or

b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person requested as the owner of the vehicle at the time of the commission of the offence".

The text of the relevant part of the notice served on the appellant reads as follows:-

> "In pursuance of the provisions of Section 41 of the Traffic Ordinance (Cap 152) and Section 269 (2) of the Penal Code (Cap 11) I, the undersigned, do hereby give you notice that it is intended to institute proceedings against you for one or more of the offences of CARELESS, DANGEROUS or RECKLESS Driving under Section 36 of the Traffic Ordinance (Cap. 152) or CAUSING DEATH BY DANGEROUS DRIVING contrary to section 269 (1) of the Penal Code (Cap 11) (delete this if death has not occurred in respect of you driving motor vehicle".

At the time the notice was served Jeke Raturaga was alive and accordingly the officer who gave the notice should have, as directed by the words in brackets in the body of the notice, deleted the words "causing death by dangerous driving contrary to section 269 (1) of the Penal Code Cap 11", but he failed to do so.

We digress to observe that the above form of notice is out of date. All the references to statutory provisions are wrong, each of them having been repealed and replaced.

The form should be redrafted and reprinted forthwith and the obsolete forms taken out of use.

On 5th August 1983, Mr. Raturaga died as a result of injuries he had sustained in the accident.

Some nine months later, the appellant was charged with the offence of causing the death of Raturaga by the driving of a motor vehicle in a manner which was dangerous to the public, contrary to section 238 (1) of the Penal Code. No further notice pursuant to section 41 (c) was served on him subsequent to the death of Raturaga.

The appellant pleaded not guilty to the charge which was duly heard in the Magistrates Court on 10th May 1985. After hearing the evidence, the learned magistrate found the charge proved but adjourned the case for the hearing of argument in respect of a submission by the appellant that no notice of intention to prefer a charge pursuant to section 238 (1) having been served on him within the time prescribed in section 41 (c), no conviction should be entered.

The learned magistrate in a short judgment held that he had no jurisdiction to enter a conviction. He said:

> "Having considered the submissions of Counsel and two Supreme Court decisions Mani Lal v. R, (Criminal appeal No. 86 of 1978) and Wong v. R (Criminal appeal No. 25 of 1983 I am firmly of the view that I have no jurisdiction to enter a conviction in this case. The notice of intended prosecution in this case was served before the victim died and before the offence became complete. Not surprisingly he was not warned that he would be charged with the present offence, dangerous driving causing death as required by S.41 of the Traffic Ordinance. Since a notice of

> intended prosecution, albeit a defective one, was served on accused it might be argued that accused has suffered no great prejudice. However the two Supreme Court decisions make it clear that compliance with the requirement of S. 41 is mandatory and when one considers the mischief at which it is directed as discussed by the Learned Chief Justice in Mani Lal's case, there are good reasons why this should be so. There having been imperfect compliance, I find that I have no jurisdiction to enter a conviction notwithstanding my findings of fact ".

From that determination the Director of Public Prosecutions appealed.

In allowing the appeal the learned Chief Justice observed that it was a necessary consequence of the trial magistrates' opinion that a new or fresh notice was necessary to support the prosecution for causing death by dangerous driving and that he also considered the original notice to be defective. It accordingly followed that the crucial question for consideration on the appeal was whether the initial notice was indeed defective. In considering that question the learned Chief Justice referred to and considered the observations of Lord Goddard C.J. made when delivering the leading judgment of the Court of Appeal in Pope v. Clarke (1953) 2 All ER 704 in which a notice required under section 21 (c) of the Road Traffic Act 1930 - a provision identical with S 41 (c) - was under consideration. Lord Goddard first cited with approval the dictum of Lord Coleridge C.J., giving the judgment of the Court in Woodward v. Sarsons (1875) L.R. 10 C.P. 733.

> "...the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially".
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> and then himself expressed the opinion (which was concurred in by Parker and Donovan JJ) that the mandatory part of S.21 (c) is the serving of the notice of intended prosecution.

It follows that the part of the section dealing with the contents of the notice are merely directory.

In Venn v. Morgan (1949) 2 All ER 563 Oliver J, said, at p. 564;:-

> "a notice under S. 21 (c) should not be considered a formal document like a summons or conviction (sic). The object of the notice is to call the attention of the driver of the motor-car to the time and circumstances in respect of which he may be charged, as to give him, as my Lord has said, an opportunity, in good time while memories are still fresh, to prepare his defence"

In Arun Kumar v. Reginam 19 FLR 32 Mishra J, following Pope v. Clarke (supra) held that service of the notice specifying the nature of the offence was the mandatory part of section 41 (c) of the Traffic Ordinance and the furnishing of other particulars was merely directory in nature. And he went on to say:

> "the test of whether the requirements of the section were complied with depends upon the sufficiency or otherwise of the information contained in the notice to direct the mind of the driver to the incident in relation to which he is to be prosecuted".

Section 41 of the Traffic Act itself does not make reference to the offence of causing death by dangerous driving or indeed any of the other offences proscribed by S.238 (1) of the Penal Code. Subs (2) of that section provides:

> "The provisions of sections 30, 31, 32 and 42 of the Traffic Act relating to disqualifications from holding or obtaining a driving licence, the endorsement of driving licences and restrictions on prosecution

shall apply to prosecutions under the provisions of subsection (1)".

Section 42 of the Act has nothing to do with any of the several offences referred to in subsection (1) and sections 30, 31, 32 have nothing to do with "restrictions on prosecution". Section 41, of course, has to do with restrictions on prosecution. It is manifest and indeed is accepted by Counsel that the figure "42" in this subsection is an obvious misprint. Having regard to those factors we reject the incorrect section number and proceed as if the number 41 had been inserted. (See R. v. Wilcock (1845) 7 Q.B. 317, 338).

It follows that the first paragraph of S.41 must be read as if after the words "to careless driving" there appeared the words "or under the provisions of section 238 of the Penal Code relating respectively to the causing of death of a person by reckless or dangerous driving or by driving at a dangerous speed".

The purpose for which Parliament provided when enacting S. 41 can be fully achieved at the time of commission of an alleged offence merely by warning the person concerning that "the question of prosecuting him for any offence under some one or other of the provisions aforesaid would be taken into consideration". It is so provided by section 41 (a). When the provisions of S. 238 (2) of the Penal Code and their effect upon S.41 of the Traffic Act are taken account of - the "one or other of the provisions" referred to in S.41 (a) could relate to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, or causing death by driving recklessly or dangerously or at a dangerous speed. And the section would be fully and effectually complied with by a mere warning that he might be prosecuted for one or more of those seven offences. And that warning

could be given orally. In the light of those factors, we are not disposed to think that a notice pursuant to section 41 (c) required to be given within 14 days of the commission of the offence for the same purpose as a warning under section 41 (a) must be couched in formal language. To the contrary, we think it is sufficient if it achieves the objectives detailed in the cases to which we have referred.

In our view the notice served on the appellant in notifying an intention to institute proceedings for, inter alia, dangerous driving drew his attention to all the elements of the charge ultimately preferred against him except causation. And we think that any defence which might be raised in respect of that element of the charge would not depend on evidence collected at or near the time of the accident; rather, it would depend on medical evidence which necessarily would only be available after the death of the victim. The notice also - using the words of the cases to which we have alluded - gave him the opportunity in good time while memories were still fresh to prepare his defence and it directed his mind to the incident in relation to which he was to be prosecuted.

Bearing in mind, as we do, the object and purpose of the notice we think that the notice served on the appellant on the day of the offence, in the circumstances of the case, sufficiently specified "the nature of the alleged offence" and thus met the prescription of section 41 (c); but in any event was an adequate warning in terms of S.41 (a).

Before taking leave of the matter we wish to refer to the two cases relied upon by the trial magistrate. They are both clearly distinguishable. In Wong Criminal Appeal No. 25/83 there had been no compliance with either sections 41 (a) or 41 (b). No notice was served pursuant to S.41 (c) and the police were endeavouring to rely on a proviso to

section 41 to excuse their failure so to do. The learned Chief Justice declined to apply the proviso with the result the non-compliance was not excused. No notice having been served the learned Chief Justice was clearly right in saying that the provisions of section 41 about which he had been speaking were clearly mandatory. In Mani Lal Criminal Appeal No. 86/78 the other case referred to, contrary to what the magistrate said, there was no finding as to S.41 being mandatory. It dealt with an unrelated aspect of the section.

The appeal is dismissed.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal