IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 42 of 1986

Between:

RAKESH KUMAR
s/o Ranjit Kumar — Appellant

- and -

R E G I N A M — Respondent

Mr. J. R. Reddy for the Appellant
Mr. J. R. Small for the Respondent

Date of Hearing: 22nd October, 1986
Delivery of Judgment: 31st October, 1986

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted of causing death by dangerous driving by the Supreme Court, Lautoka, and fined $200. In addition, he was disqualified from driving for one year.

He appeals against his conviction on two main grounds:-

"1. THAT the Learned Trial Judge erred in law in not upholding a submission of no case to answer at the end of the Prosecution case when there was

no or not sufficient evidence to be put to the assessors and upon which they could properly express an opinion that the Appellant was guilty as charged.

2. THAT the facts proved by the Prosecution did not in law amount to the offence of causing death by dangerous driving. "

The incident in question occurred on Monday 1st July, 1985 at about 8.15 a.m. some distance outside Lautoka on the main road to Ba. A bus from Lautoka stopped to pick up a passenger. As it moved away, a girl, 8 years of age, who had been standing at the back of the bus ran towards a shop across the road and was knocked down by the appellant's car travelling to Lautoka. It was a clear morning with good visibility and the road, a long straight stretch at this point, was dry. The sealed portion is 6.09 metres in width with a white line running down the middle. The bus had occupied most of its half of the carriageway directly across the road from the shop where, on the concrete forecourt a vehicle driven by one Gyanendra Sharma, had just moved to the edge of the road to come out onto it. Directly behind it was an Isuzu digger driven by one Murari Lal waiting to follow Sharma's vehicle onto the road. The prosecution case rested largely on the evidence of these two men, both with considerable driving experience.

Sharma's estimate of the speed of the appellant's car at the time of the impact was "80 kmph or slightly more". He had not noticed it slow down. The girl had started to run across the road when the bus had already gone about half a chain away from where it had stopped. He had heard the sound of brakes being applied before the deceased was hit. Murari Lal's estimate of the speed of the appellant's car, admittedly rough, was 80 to 90 kmph.

According to him the deceased started running across the road after the bus had moved ½ to ¾ of a chain away from where it had stopped. Prior to that she had been standing behind it almost on the white line dividing the road. Neither witness had observed the car until it was near the place of the collision and there was no evidence of any erratic behaviour on its part. There is no speed limit prescribed for this stretch of the road.

At the end of the prosecution case the appellant's Counsel made an unsuccessful submission of no case on the ground that no fault could, on the evidence, be attached to the appellant's driving at the time of the collision and that the deceased, in running across the road when the car was almost upon her, was wholly responsible for her own death.

The appellant, thereafter, elected to remain silent and called no witnesses.

At the end of the learned Judge's summing-up the three assessors' tendered a unanimous opinion of guilty.

As to ground 1 section 293(1) of the Criminal Procedure Code requires the Judge to uphold a submission of no case only if he considers that there is no evidence that the accused has committed the offence. This court in the case of Sisa Kalisogo (52 of 1984) said :-

> "In each instance he has to ask himself and answer the question: is there no evidence that the accused committed the offence?"

There was before the Judge the evidence of approximate speed, of a public service bus stopping for passengers on the sealed portion covering almost the entire half of the road, of another vehicle being at the edge of the road on the opposite side waiting to come onto it. Furthermore, there was the evidence that the deceased had not suddenly darted out from behind a parked bus as claimed by the appellant in his interview with the police but had stood at the white line until the bus had moved half to three-quarters of a chain away from her before starting to run. All this evidence, if accepted by the assessors, would call into question the quality of the appellant's driving at such speed having regard to the traffic he could, from some distance away, have seen and to the pedestrians that, in view of the bus stopping to pick up and drop off passengers, he could reasonably have expected to be on the road in that vicinity. We are, therefore, unable to accept the appellant's contention that the learned Judge erred in deciding that this was a proper case in which to seek the advice of the assessors.

Under the other ground learned Counsel for the appellant dealt generally with parts of the Judge's summing-up to show that the directions to the assessors did not adequately and correctly reflect the law relating to causing death by dangerous driving.

The learned Judge told the assessors :-

> " Now because the little girl was at fault, probably very largely at fault does not of itself necessarily exonerate the accused. He will still be guilty if his own driving amounted to dangerous driving and contributed to what happened. "

No serious objection was taken to this statement.

He then went on the deal with the evidence of witnesses including that of Sharma and of Murari Lal and the record of the appellant's interview with the police.

At the end he directed them in the following terms :-

> " What the Crown says is that given that the little girl largely contributed to the accident, the accused failed to recognise a potentially dangerous situation existing with a bus stopped on one side of the road virtually sealing off that side of the road, and just starting to move off, opposite a shop which customers might be expected to be patronising, and given the possibility of unwary persons crossing the road behind buses or other large vehicles obscuring vision, the accused failed to take any or any reasonable steps to anticipate the potential danger which in fact materialised, and failed to reduce his speed so as to give him any chance of avoiding the accident which did happen. That in effect his driving was not of the standard of a reasonable, reasonably competent, experienced, prudent driver and so constituted dangerous driving, which was one of the causes of the accident resulting in the death of the little girl.
>
> If after considering all the evidence and bearing in mind the onus of proof as I have explained you come to the same conclusion it is your duty to find the accused guilty of the offence charged.
>
> What the defence says is that the accident was caused by the actions of the little girl herself, that the accused's driving did not fall below the standard of a reasonable, reasonably competent experienced, prudent driver, that he did

all that such a driver could be expected to do in the circumstances to avoid the accident, and that to expect any more from him would be to impose an impossibly high standard on him and other users of the road.

If you accept that, or if you are left in any reasonable doubt about it, or whether the Crown has established and proved its case against the accused it is your duty to find him not guilty. "

Learned Counsel submits that the directions contained in the first paragraph are inadequate in that they do not clearly state that at the time of the collision the appellant was driving as any prudent driver would i.e. in his correct lane, in a straight steady course within the speed limit; that what the deceased herself did made it impossible for him to take any avoiding action. We, however, consider that in that paragraph he was putting before the assessors the contention of the prosecution. In the last two paragraphs, while putting the defence case, he certainly made it clear that they should find the appellant not guilty if they found his driving faultless and the deceased responsible for her own death, or even if they had any reasonable doubt on the issue.

The directions were in, our view, adequate and fair.

The appeal is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal