IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 49 of 1986

Between:

SAMBHU LAL s/o Dharam Raj — Appellant

- and -

REGINAM — Respondent

Mr. V. Parmanandam for the Appellant
Mrs. Aruna Prasad for the Respondent

Date of Hearing: 24th February, 1987
Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

O'Regan, J.A.

On 17th July, 1986 the appellant was convicted of the offence of Causing Death by Driving a motor vehicle on a road in a manner which, having regard to all the circumstances of the case, was dangerous to the public: Contrary to Section 238(1) of the Penal Code (Cap. 17).

The victim was a passenger in a goods van driven by the appellant which came into collision with a truck, travelling in the opposite direction, driven by one Hari Prasad. In evidence Prasad said that he was driving along the highway at Vesikalakala when the collision occurred; that just prior to the accident he had driven up a slight rise and into a bend and that on coming out of the bend he found himself confronted with the appellant's vehicle, some

ten yards away, directly in front of him on his side of the roadway. He also said that he pulled to the right in an endeavour to avoid an accident but did not succeed in doing so. Prasad deposed that at all material times, he was proceeding along the left hand side of the roadway.

The appellant did not give evidence at the trial but a written statement which he made to the police was in evidence. In that statement, he stated that he himself had been proceeding along his correct side of the roadway immediately prior to the accident; that Prasad's vehicle was then on its incorrect side of the road; that in an endeavour to avoid it he first pulled to his left and then to his right; that, as he pulled to his right Prasad pulled to his left, with the result that the two vehicles came into collision. It was common ground that the collision took place on the part of the roadway over which Prasad was lawfully entitled to proceed. The appellant's version of events preceding the accident the accident was put to Prasad in detail in cross-examination and denied by him.

It is to be noted that in both versions of events, the appellant's vehicle is stated to be on its wrong side of the road at the time of the accident. On Prasad's version it was on that side of the road throughout; on the appellant's version it went on to that side of the road at the last moment in his endeavour to avoid a collision with Prasad's vehicle on appellant's correct side of the roadway.

The appellant's first ground of appeal arises from the following passage from the summing-up of the learned Judge:

> "Mr. Parmanandam has submitted that the driving of the accused was at worst - careless and he says that careless driving cannot sustain a charge of causing death by dangerous driving. Remember what I say as being the law is what you

> must accept as being the law and I say to you that is not the law. A person guilty of careless driving can be guilty of causing death by driving in a manner dangerous to the public if his driving created a dangerous situation from which death resulted. So long as there is fault on the part of the driver which creates a dangerous situation, he can be guilty of causing death by dangerous driving - and it matters not whether the driving was careless, dangerous or reckless."

Mr. Parmanandam submitted that the passage we have emphasised amounted to a misdirection. Before discussing that submission, however, it is necessary to record that Mr. Parmanandam informed us from the bar that the concession he made to the effect that the appellant's driving was at worst careless and referred to in the first sentence of the passage quoted, was made in reference to the appellant's driving after he was confronted - as he said he was - by Prasad's vehicle and whilst, as he also said, he was taking evasive action. That being, the case, there has been a misunderstanding and what follows the Judge's recording of the concession proceeds on a wrong premise. The record of what Mr. Parmanandam said is almost cryptic and does not inform us as to what precisely was said and heard by the assessors. The concession was made at the end of Mr. Parmanandam's final address and was thus the last thing they heard from him before the Judge commenced his summing-up.

The course of events was unfortunate particularly as the concession as Mr. Parmanandam intended it, did nothing to promote or to advance the appellant's case. However, we do not think that what has arisen prejudiced the appellant's case. As we will later demonstrate when dealing with the fourth ground of appeal, it is clear that the assessors accepted Prasad's version of events and rejected the appellant's version. Having so decided the principal issue of fact in that way, the assessors then had to evaluate the

appellant's conduct and consider the allegation that he drove dangerously against the background of their finding that his version of events was not accepted and Prasad's version was.

The penultimate sentence of the passage we have quoted seems to us correctly to state the law. It conforms with the well-known passage in the judgment of Megaw L.J. in Gosney (1971) 3 All E.R. 220, 224:-

> "We would state briefly what on our judgment the law was and is on the question of fault in the offence of driving in a dangerous manner. It is not an absolute offence. In order to justify a conviction there must be, not only a situation, which viewed objectively, was dangerous, but there must be also have been some fault on the part of the driver, causing the situation."

Later, in the paragraph in which the above passage is to be found Megaw L.J. adverts to the fact that the fault involved may be no more than slight. It was upon that feature that the learned trial Judge was laying emphasis in the passage we have underlined and which forms the base of the ground of appeal.

The inclusion of the word "dangerous" in the last line of the passage tended to confuse rather than elucidate. That apart, however, we find the passage unexceptionable. Indeed it accords substantially with the observations of Fenton Aikinson L.J. in Evans (1962) 3 All E.R. 1086 at p.1088 where he said:-

> "It is quite clear from the reported cases that, if a man in fact adopts a manner which the jury thinks was dangerous to other road users, in all the circumstances, then, on the issue of guilt, it matters not whether he was deliberately reckless careless momentarily inattentive or even doing his conscientious best."

This ground of appeal accordingly cannot be upheld.

The second ground of appeal has its genesis in the learned Judge's direction to the assessors that the law of this country is that every motorist is required to drive on his left side of the road with the skill and care of a competent and experienced.

Mr. Parmanandam submitted this passage contains a misdirection in the part of it we have emphasised. He submitted that the requisite standard of care is that of an ordinary prudent motorist.

Mr. Parmanandam allowed that the learned Judge's direction was drawn from the Gosney judgment (supra) but drew attention to the fact that Megaw L.J. had in that stated a different standard for the inexperienced driver and the naturally poor driver when, at p. 224 he said:-

> "----thus there is fault of an inexperienced driver or a naturally poor driver, while straining every nerve to do the right thing falls below the standard of a competent and careful driver. Fault involves a failure a falling below the care or skill of a competent and experienced driver. "

At first reading it seems that the court set different standards for inexperienced and naturally poor drivers on the one hand and drivers who fall outside those categories on the other. On deeper consideration, however we do not think such to be the case. The difference is one of words not one of substance.

The difference is that in one formulation carefulness is prescribed and in the other it is not. In that other experience is prescribed in its stead. In our view, however, one of the attributes of the experienced driver would be carefulness.

The apparent differences could, in the future, well give rise to vexatious debate and controversy. To forestall such we declare that the fault element in the offence of driving on a road in a manner dangerous to any person shall be a falling below the standard of a competent and careful driver.

In the present case, having regard to the assessors' findings on the issue of fact, it is incontrovertible that the appellant fell below the requisite standard of driving in which ever if the ways it was formulated in Gosney and accordingly this ground of appeal cannot be upheld.

In the third ground of appeal the appellant submitted that the learned Judge misdirected the assessors in the following passage from his summing-up:-

> "Basically the prosecution case is that at the time of the accident the accused drove on his wrong side of the road. (If on all the evidence you are sure that this was so you will advise me that the accused is guilty). If you have any reasonable doubt about it you will advise me that the accused is not guilty."

Mr. Parmanandam submitted the appellant never denied that the accident took place on less incorrect side of the road. That, of course, is so. As we have earlier noted both the versions as to the course of events immediately prior to the accident had the appellant's vehicle on its incorrect side at the time of the accident. Accordingly, if

the Judge's words are taken literally, whichever of the two versions were to be accepted he was, in terms of the direction to be found guilty.

In our view, however, there was no likelihood of the assessors taking the remark literally. The passage upon which this ground of appeal was immediately preceded by statements of the two versions of events as follows:-

> "He (Prasad) said that he was going on his left hand side. At this point there is a slight climb and a bend. He said on passing the bend he saw the deceased's van coming on the wrong side. He tried to avoid the collision, applied his brakes but it was too late----"

Then, after a brief discussion of a submission made by Mr. Parmanandam as to that evidence, the Judge went on:-

> "In his statement to the police, the accused says the opposite. He said that he was on his correct side and Hari Prasad was on the wrong side. He said he at first tried to go further to his left and when Hari Prasad kept on coming, he swerved to the right. Just then Hari Prasad swung to his, Hari Prasad's left and that is how the accident occurred."

It is manifest from those passages that the Judge in the extract under review, was speaking of the appellant's driving prior to any manoeuvres he made or may have made before the collision. He stated what Prasad said - that the appellant was driving on his wrong side of the road. He then contrasted that with the appellant's version by saying that the appellant said "the opposite".

Whilst it is true that the appellant's version had him his wrong side at the moment of impact he claimed that he was only there because of his last moment swerve in an endeavour to avoid a collision. That, does not convey the notion that he was driving on the wrong side of the road - especially when it is considered in the light of the statements of the opposite versions tendered by Prasad and the appellant immediately preceding the critical passage.

This ground also fails.

The fourth ground of appeal reads as follows:-

> "THE Learned Trial Judge erred in law in failing to direct the Gentlemen Assessors that they must be satisfied of two things firstly that the Appellant was in fact driving a vehicle in such a manner as to create an obvious and serious risk of causing death to some other person who might be using the road and secondly that in driving in that manner the Appellant did so without having given any thought to the possibility of there being any such risk or having recognized that there was some risk involved had nonetheless gone on and taken it. Hence there has been a substantial miscarriage of justice."

The direction which in the appellant's submission, the learned Judge failed to give is clearly a direction applicable to a charge of reckless driving causing death. So much is clear from the last four lines of the ground of appeal.

Mr. Parmanandam submitted that the offences of causing death respectively by dangerous driving and reckless driving both created, as they are, by S.238 of the Penal Code are "of equal standing in that section" and create "commensurate and co-extensive obligations with co-extensive degrees of responsibility in the criminal burden of proof sense--". And

on those bases, he went on to submit that the body of law in which reckless driving has been considered (particularly cases concerned with Sections 1 and 2 of the Road Traffic Act 1972 (U.K.) is applicable to cases involving dangerous driving.

We reject that submission. First, we observe that there is no novelty in offences in the same genus being created by the one section of a statute and rarely, if at all, does anything turn on the fact. Secondly, and more importantly - the two offences, contrary to what was urged upon us involve totally different ingredients. In our view, there is no warrant whatsoever for applying the stated law on the one to the other.

The appeal is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal