IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0015 OF 1996S
(High Court Criminal Action No.HAA0032J of 1996)

BETWEEN:

ROHIT RAM LATCHAN
S/O K R LATCHAN — APPELLANT

-AND-

THE STATE — RESPONDENT

Mr G.P. Shankar for the Appellant
Ms N. Shameem for the Respondent

Date and Place of Hearing: **25 November, 1997, Suva**
Date of Delivery of Judgment: **28 November, 1997**

JUDGMENT OF THE COURT

This appeal under s.22 of the Court of Appeal Act is against a judgment of the High Court at Suva of 23 August 1996 in which the Chief Justice allowed the State's appeal against the present appellant's acquittal by the Magistrates' Court on 8 March 1995, under s.210 of the Code of Criminal Procedure. He had been charged with dangerous driving causing death contrary to s.238(1) of the Penal Code (Cap. 17); driving an unlicensed motor vehicle contrary to ss 9(1) and 85 of the Traffic Act (Cap.176); and driving an uninsured motor vehicle contrary to s.4(1) and (2) of the Motor Vehicle (Third Party Insurance) Act (Cap. 177). Under s.22(1) an appeal lies to this Court on a question of law only.

To summarise the prosecution case, the appellant was driving along a relatively busy stretch of road at about 3 p.m. in good visibility and struck a young boy crossing on his way home from a nearby school. There was evidence that he was about three quarters of

the way across when he was hit, and that he may have run out unexpectedly. A witness driving at about 50 kph behind the appellant said he saw the boy as he was crossing from about one and a half chains back and also saw the accident. He said that the appellant accelerated past a bus at a stopping bay. The boy was thrown 5-6 feet into the air and died from head injuries shortly afterwards.

The evidence on the other two charges was not easy to follow from the notes in the record. A licensing officer said the "wheeltax" was invalid at the date of the accident (counsel accepted this as a reference to the car being unlicensed), but conceded it could have been paid at another office, although in that event the details would be fed into the computer. An insurance underwriter gave evidence of the car being insured "earlier on".

At the close of the prosecution case appellants' counsel submitted there was no case to answer. The learned Magistrate traversed the law and the evidence at length in a reserved decision running to 22 pages delivered nearly 4 months later. On the first charge he found that the accident was caused "by the irresponsible conduct of the deceased" and that the circumstances "did not at all point to the accused being responsible for the child's death." On the other two charges he said he was not satisfied that the prosecution had proved its case beyond reasonable doubt. In respect of each of the charges he added that he was not satisfied that the prosecution had made out a case against the accused sufficient to require him to make a defence. This reflects the wording of s.210 of the code reading:-

> ***"S.210. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused."***

Accordingly he acquitted the accused on all charges.

There is a practice note issued in the Queens Bench Division set out in [1962] 1 All ER at page 448. It was quoted by the Magistrate and the Chief Justice and reads:-

> ***"LORD PARKER, C.J.: Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.***
>
> *A submission that there is no case to answer may properly be made and upheld:*
>
> *(a) when there has been no evidence to prove an essential element in the alleged offence;*
>
> *(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.*
>
> *Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."*

We regard this as an appropriate directon for determing the application of s.210 of the Code, and we did not understand Mr Shankar to submit otherwise. It accords with the

guidelines proposed by Lord Widgery in **R v. Galbraith** 73 Cr. App. R.124; [1981] 2 All ER 1060 in relation to criminal jury trials, and was adopted by Grant J in **R v. Jai Chand** (1972) 18 FLR 101. To the same effect in summary trials are the comments of Kitto J. in **Zanetti v. Hill** (1962) 108 CLR 433 at 442.

Although the learned Magistrate purported to act in accordance with these guidelines, His Lordship was rightly satisfied that he had decided the ultimate question of the accused's guilt, not the question under s.210 of whether the evidence was merely such that a reasonable tribunal might convict. We think this is plain from His Worship's conclusions to which we have referred earlier in this judgment. The addition of the formula based on s.210 in each case does nothing to detract from the fact that he had effectively found the accused not guilty.

His Lordship allowed the State's appeal and set aside the order of acquittal, directing that there be a new trial before another Magistrate. It is accepted by the State that this direction cannot stand in view of s.319(1)(b) of the Code stating that the High Court shall not order a new trial in any appeal against an order of acquittal. The appropriate direction in the circumstances was under s.319(1) remitting the matter to the Magistrate's Court with the opinion of the High Court thereon.

In deciding that the learned Magistrate's approach to s.210 was mistaken, His Lordship made the following comments with which we respectfully agree:-

> ***"There appeared to be no attempt by the learned Magistrate in this case to examine the evidence objectively from the point of view of a reasonable tribunal as distinct from a subjective assessment which in my view can only start to operate or come into play after all the evidence (both for the prosecution and defence) is in. This is important in the interest of a fair trial. Prosecution evidence was entitled to be assessed on an objective standard since the question at that stage was whether a reasonable tribunal could or might convict upon the evidence so far adduced. It is of the essence of impartiality or appearance of impartiality of a trial that the judicial process should be seen to be correct and fair. I appreciate that the objective approach may be regarded as artificial where as here a trial Court is both the judge of law and fact. However, it seems absolutely essential if a fair trial is to be achieved in a case such as this which evokes strong human emotions that the proper judicial approach to a submission of no case to answer should be adhered to. In my view it is a necessary safeguard against what may be taken to be hasty or ill-judged adjudication in a serious criminal charge. In these circumstances I find the decision to terminate these proceedings at the conclusion of prosecution evidence without the trial Court directing its mind to the proper test to be applied leaves the adjudication in this trial less than satisfactory."***

Apart from the order for a new trial, we are satisfied that His Lordship was correct in his approach to s.210 and, like him, we are reluctant to embark on a detailed consideration of the evidence on the dangerous driving charge since it is still to be considered by the learned Magistrate who heard the case. However we are satisfied that on the Court record it was "sufficient to require the accused to make a defence," to use the wording of s.210, although this does not mean, of course, that he is obliged to give or call evidence.

On the other two charges the Director submitted that the appellant had the burden of proving the existence of the licence. She referred us to John v. Humphreys [1955] 1 WLR 325 in which it was held that on a charge of driving a motor vehicle without a licence, the defendant had the burden of proving its existence after the prosecution had proved he was the

driver. This conclusion was based on **R v. Oliver** [1944] KB 68 in which the Court of Criminal appeal accepted the principle laid down in earlier authorities that where it is an offence to do an act without lawful authority, the person who sets up that authority must prove it. These cases were followed in Fiji by the Supreme (now High) Court in **Rajgopal Pillai v. R** (1962) 8 FLR 163 in respect of a charge of driving a motor vehicle without third party insurance.

In **R v. Edwards** [1975] QB 27 the Court of Appeal accepted that there were exceptions to the general rule that the prosecution must prove every element of the offence charged, instancing as one category offences arising under enactments prohibiting the doing of an act without the licence of special authorities. The accused in those cases was held to carry the legal (or persuasive) burden of proving the exception. **Edwards** was discussed by the House of Lords in **R v. Hunt** [1987] AC 352, where it was regarded as offering a guide to construction rather than defining an exception. **Hunt** dealt with a prosecution under a section of the English Misuse of Drugs Act 1971, whereby possesson of a named drug in one form was an offence, but in another form it was not. It was held that the burden was on the prosecution to prove that the drug found on the accused was in the prohibited form, otherwise no offence was established. The regulation in question was not one creating an exception to what would otherwise be unlawful, but defined the essential ingredients of the offence.

In the present case the position is similar, the essential ingredients of the two charges being the driving of a motor vehicle which was not duly licensed; and driving one when there was not in force a prescribed policy of insurance. These are negative averments creating the offences, not exceptions to otherwise unlawful conduct, and on general principles of criminal

law, as emphasised especially in **Woolmington v. Director of Public Prosecutions** [1935] AC 462, it could be expected that the burden of proving them would fall on the prosecution.

In **R v Hunt** their Lordships took a different approach from that adopted in **Edwards** and earlier cases, concluding that instead of there being a general rule whereby the burden of proof rested on a defendant in particular cases, it was for the Court to determine the legislative intention about where the burden lay from the construction of the particular statute or regulation. If the language was not plain, it could "look to other considerations such as the mischief at which the provision was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in dis charging the burden" - per Lord Griffiths at p.374, who went on to say that the cases in which the courts have held that the burden lies on the defendant are those in which it could be easily discharged. He cited **R v. Oliver** (above) as an example, where it was a simple matter for the defendant to prove he had a licence on a charge of selling sugar without one, in contravention of wartime regulations.

In prosecutions for driving unlicensed or uninsured motor vehicles, a driver who is the owner should have no difficulty in proving the existence of the licence or policy from his or her own knowledge. The position may be different where the driver is not the owner, as in the present situation, where we understand the appellant was driving a company car. However, other parts of the legislation have a significant bearing on this point. Under s.14(1) of the Traffic Act the licence issued is to be affixed to the windscreen, and any person using or permitting it to be used on a road without the licence being affixed commits an offence (s.14 (3)). This

reflects a legislative expectation that drivers will know or satisfy themselves that there is a valid licence for the vehicle, leading to the conclusion that proof of its existence should be a matter easily capable of discharge by them, whether or not they are the owners. In respect of the insurance charge, s.20(1) of the Motor Vehicle (Third Party Insurance) Act obliges the driver to produce the certificate of insurance when required by a police officer, again demonstrating a legislative expectation that drivers will know or satisfy themselves that there is such insurance, and supporting the view that requiring him or her to prove its existence on a charge under s.4(1) will not impose an undue burden. The offences created are not truly criminal; they fall within the category of public regulatory provisions, so that a departure from the strict application of the burden of proof in criminal cases can be more readily countenanced.

For these reasons we are satisfied that on the charges of driving an unlicensed vehicle, and of driving one without insurance, the burden of proving their existence is on the defendant driver, with the standard of proof being on balance of probability. We are fortified in this conclusion by the fact that this has apparently been accepted as the law in Fiji since **Rajgopal Pillai** was decided in 1962, and the position is evidently the same in England following earlier cases to the same effect. We would add that apart from our conclusion about the incidence of the burden of proof, we are satisfied that there is sufficient in the record of evidence to require the appellant to make a defence on the charge of driving an unlicensed vehicle.

Having regard to our conclusion that s.210 of the code was wrongly applied by the learned Magistrate and that there cannot be an order for a new trial following an acquittal, the appropriate order is one under s. 319(1) remitting the matter for it to be properly determined

by the same Magistrate. Perhaps this may seem a futile exercise, having regard to the conclusion he has already reached about the appellant's guilt. Nevertheless it is important that the correct procedures be followed in such cases, as the learned Chief Justice emphasised in the extract quoted above from his judgment. Even if the defence offers no evidence, His Worship may be persuaded to view the prosecution evidence in a different light on the dangerous driving charge, after hearing submissions about the ultimate issue of guilt, rather than those directed only at the question of whether there was a case to answer.

A matter of real concern is the inordinate - we even say outrageous-- delay that has occurred in the disposal of this case. The accident happened on 6 March 1992. Charges were brought promptly, but for reasons in respect of which Mr Shankar accepted a major responsibility, and because of adjournments at the request of the prosecution, and apparently because of other court commitments, the hearing did not commence until 28 September 1994, 2 ½ years after the accident. It continued on 31 October and on 15 November, when His Worship reserved judgment on the submission of no case. We can see no reason why this should not have been disposed of immediately, or at most after a very brief adjournment; instead it took him until the following March to deliver his decision, reinforcing the conclusion that he used the time to decide that the defendant was not guilty. The State appealed promptly to the High Court and the Director infomed us there was the familiar and unexplained delay by the Magistrates' Court in forwarding the record, which was not certified until April 1996, over a year after judgment. The appeal was heard within a reasonable time by the Chief Justice, who gave his Judgment on 23 August 1996, and the matter has taken another year to reach and be disposed of by this Court. It is still not over.

We raised our concerns about this unhappy saga with counsel, but were persuaded by the Director that there is no risk of a miscarriage of justice occurring as a result of the delay, because the case will now proceed before the same Magistrate on prosecution evidence which has already been given.

Decision

The order made in the High Court for a new trial before another Magistrate is set aside, and instead there will be an order remitting the matter back to the Magistrates Court with this opinion thereon as the opinion of the High Court, in terms of s.319(1) of the Criminal Procedure Code. Otherwise the appeal is dismissed.

.....
Sir Maurice Casey
Justice of Appeal

.....
Mr Justice J.D. Dillon
Justice of Appeal

.....
Mr. Justice I. F. Sheppard
Justice of Appeal

C:\OFFICE\WPWIN\WPDOCS\USHA\AAU0015U.96S