IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0104 OF 2007S
(High Court Criminal Action No. HAC 39 of 2007L)

BETWEEN: RAM KARAN
Appellant

AND: THE STATE
Respondent

Coram: Byrne, JA
Khan, JA

Hearing: Monday, 24th November 2008, Suva

Counsel: Appellant in Person
W. Kurisaqila for the Respondent

Date of Judgment: Thursday, 27th November 2008, Suva

JUDGMENT OF THE COURT

Introduction

1 In the early morning of the 5th of February 2007 a tragic event occurred wherein a young man by the name of Frederick Lewanavanua died shortly after a collision in which he was riding a bicycle and Mr Ram Karan was driving a 10 wheeler truck. At the time of his death, Frederick Lewanavanua was just 15 years old. The collision occurred near the intersection of Ratu Meli Road and VM Pillay Road in Lautoka.

2 Mr Ram Karan was the driver of the 10 wheeler truck which had been parked on the wrong side of Ratu Meli Road. Mr Ram Karan reversed the truck, still on the wrong side of the road, with the apparent intention of trying to back it into VM Pillay Road.

Frederick Lewanavanua was riding his bicycle on Ratu Meli Road on the correct side of the road. He turned into VM Pillay Road and collided with a truck.

3 Frederick Lewanavanua sustained severe injuries to his head and to his chest. Sadly, he died later that day.

A charge is laid

4 On 19 October 2004, following an investigation by the police, Mr Ram Karan was charged with occasioning death by dangerous driving, contrary to section 90 7(2)(3) and 114 of the Land Transport Act, 1998. The particulars of the offence were:

> Ram Karan s/o Chandar Pal on the 5th day of February, 2004 at Lautoka in the Western Division drove motor-vehicle on Ratu Meli Road in a manner which was dangerous to the public having regards to all the circumstances of the case and caused the death of bicycle rider namely Frederick Lewanavanua.

The trial

5 On 28 March 2006 and the charge against Mr Ram Karan was tried before Maika Nakora sitting as a Resident Magistrate in the Lautoka magistrates court. On 13 October 2006, the learned Magistrate convicted Mr Ram Karan. The penalty imposed was a fine of $3000, in default 9 months imprisonment. In addition Mr Ram Karan was disqualified from holding or obtaining a driver's licence for a period of 3 years. He is the Appellant in these proceedings.

6 It is pertinent to note that the Appellant was represented by a lawyer throughout the trial. A submission of no case to answer was made and both counsel for the Appellant and the Police Officer prosecuting delivered written submissions in relation to this which, encapsulated the issues that the learned Magistrate had to decide.

7 The facts of the case reveal that Ratu Meli Road and VM Pillay Road form a T-junction. Ratu Meli Road intersects with VM Pillay Road at approximately 90°. However, looking at Ratu Meli Road from the vantage point of the intersection with VM Pillay Road, Ratu Meli Road is only a 90° intersection for a short distance. Some way up that road, it curves to the right. Further, Ratu Meli Road as it intersects with

VM Pillay Road is a downhill stretch of road. The appellant parties 10 wheeler truck on the incorrect side of Ratu Meli Road. He got in the truck and commenced to reverse it, again on the incorrect side of the road, in the direction of the intersection with VM Pillay Road.

8 At the same time as the appellant was reversing his truck, the 15-year-old Frederick Lewanavanua was riding his bicycle down Ratu Meli Road in the direction of VM Pillay Road. Very shortly before the intersection of Ratu Meli Road with VM Pillay Road, Frederick Lewanavanua must have been cycling past the truck and as he turned left to enter VM Pillay Road, he collided with the left rear of the truck being reversed by the Appellant. The collision spot is marked on a map drawn by one of the police witnesses shortly after the collision. A copy of that map appears at High Court Record page 112. The point of impact that is suggested was marked, tragically, by a pool of blood. Nearby was one of the flip-flops worn by Frederick Lewanavanua. Again by reference to standing in the middle of VM Pillay Road and looking at Ratu Meli Road, the point of collision was estimated to be 1.3 m from the left-hand verge of Ratu Meli Road, very close to the junction with VM Pillay Road.

9 The learned Magistrate analysed the evidence. At paragraph 18 of his judgment, the Magistrate said:

> The essential elements of the offence was whether the accused manner of driving was dangerous and as a result caused the death of the victim. PW1 Inyat Hussain said the victim was turning behind the truck as the accused suddenly reversed and hit him. He accused was on the right-hand side of Ratu Meli Road reversing. He was on his wrong side of the road and couldn't have possibly seen the victim who would have been on the back left-hand side of his truck turning into VM Pillay Road.
>
> In cross-examination, Mr Hussain said the victim was not fast coming down Ratu Meli Road. It must be remembered that the accused was reversing down the slope on his wrong side of the road, the right-hand side. The question to ask is why didn't he drive up Ratu Meli Road, turned around and come down the slope on his correct side and then turn into VM Pillay Road?

10 The learned Magistrate concluded:

> After assessing the evidence, I find that the accused's driving was dangerous in that:-

(i) He was on his wrong side of the road and reversing;

(ii) his vision was obstructed as he couldn't see the back left-hand side of his truck;

(iii) the poles on the back of his tract (Exhibit 2E) also contributed to the obstruction in his vision.

11 After submissions in mitigation and character evidence, the Appellant was sentenced in the manner described above.

Appeal to the High Court

12 By Notice dated 31 May 2007, the Appellant appealed against conviction and sentence to the High Court. The matter was heard before Mataitoga J on 7 September 2007. Mataitoga J dismissed the appeals in a judgment delivered on 28 September 2007.

Appeal to the Court of Appeal

13 On 17 October 2007, the Appellant appealed against the decision of the High Court in respect of both conviction and sentence. His appeal was dismissed. By section 22(1) of the Court of Appeal Act his right of appeal is limited to any ground which raises a question of law only.

Appeal against conviction

The relevant law

14 In order to determine this appeal, it may be helpful to set out in a little detail the law with respect to the offence of dangerous driving occasioning death. Section 97 of the Land Transport Act, 1998 provides as follows:

> **97.** (2) A person commits the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle -
>
> (a) under the influence of intoxicating liquor or of a drug;
>
> (b) at a speed dangerous to another person or persons; or
>
> (c) in a manner dangerous to another person or persons.

The offence as particularised in the charge alleged an offence against section 97(2)(c) of the Act *ie* driving in a manner dangerous to another person or persons.

15 This particular provision is very similar to provisions in England and in a number of States in Australia. (The law has now changed in England but many of the decisions on the previous legislation are of assistance in interpreting section 97 of the Land Transport Act.)

16 In ***Sambhu Lal v R*** (Fiji Court of Appeal Criminal Appeal No: 49 of 1986) held that the English decision in ***R v Gosney*** [1971] 3 All ER 220, (1971) 55 Cr App R 502 was apposite. In *Gosney* it was stated:

> In order to justify a conviction there must be not only a situation which viewed objectively was dangerous but there must also have been some fault on the part of the driver causing the situation.

The Court in *Gosney* went on to note that the fault involved may be no more than slight. These observations were accepted by the Court of Appeal in Fiji which accepted a summing up which included the direction:

> 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.

This was accepted as being a correct statement of the law in *Kumar v State* [2002] FJCA 12.See also in this regard: *R v Spurge* (1961) 45 Cr App R 191.

17 In ***Lasike v State*** [2002] FJHC 159, Shameem J in the High Court was dealing with section 238 of the Penal Code. That section is substantively in the same terms as section 97 of the Land Transport Act. The learned judge observed:

> This section creates three separate offences. One is causing death by reckless driving. The second is causing death by driving at a speed dangerous to the public. The third is driving in a manner dangerous to the public. The prosecution in each case, must choose which offence is being alleged. The test for reckless driving, according to the common law definition of recklessness, is partially subjective. Did the accused know there was a risk, and went on to take

> that risk? The test for causing death by driving at a speed dangerous to the public is an objective one. Similarly, the test for causing death by dangerous driving is an objective one. The offence is proved when the driver drives in a way which falls below the standard expected of a competent and prudent driver, and thereby causes a situation, which viewed objectively, is **dangerous** ***R v Gosney*** [1974] 3 All ER 220, ***Sambhu Lal v R*** Criminal Appeal 49/1986).

The principal difference between section 238 of the Penal Code and section 97 of the Land Transport Act is that there is no reference to reckless driving in section 97(2). The passage has been quoted in full to provide context to the highly relevant observations of Shameem J at the conclusion of the passage.

18 This appears to reflect the position in Australia. In ***McBride v R*** (1966) 115 CLR 44 at pp 49-50, the High Court of Australia considered the construction of 52A of the Crimes Act 1900 (NSW) which in substance creates an offence causing death by driving in a manner dangerous to the public. Barwick CJ said:

> The section speaks of a speed or manner which is dangerous to the public. This imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place.

19 In ***Jiminez v R*** (1992) 173 CLR 572, the High Court of Australia also considered the construction of 52A of the Crimes Act 1900 (NSW). Mason CJ observed:

> The manner of driving encompasses "all matters connected with the management and control of a car by a driver when it is being driven" : ***R v Coventry*** (1938) 59 CLR 633 at p 639. For the driving to be dangerous for the purposes of section 52A there must be some feature which is identified not as a want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by persons who may, on occasions, drive with less than due care and attention: ***McBride v R*** (1966) 115 CLR 44 at p 50 & 51; ***R v Buttsworth*** (1983) 1 NSWLR 658, at pp 686-687.

McHugh J delivered a concurring judgment. His Honour observed:

> The policy of section 52A is to punish drivers for their actual behaviour "at the time of impact". The section "does not require any given state of mind as an essential element of the offence": *R v Coventry* (1938) 59 CLR 633, at p 638. Consequently, a person continues to drive for the purpose of the section even though that person has lost control of the vehicle because his or her mind has

> wandered to a subject remote from driving or has lost control because of excessive speed or some other external matter concerned with the control and management of the vehicle. The policy of the section, therefore, gives no support for drawing any distinction between the driver who is inattentive or who, though attentive, is unable to control the vehicle and the driver who is unable to control the vehicle because he or she has "dozed off".

20 In ***R v Goodman*** (unreported, NSWCCA 10 December 1991) the only issue before the court was whether the appellant was driving his motor vehicle in a relevantly dangerous manner. The NSW Court of Criminal Appeal held:

> The test as to whether the manner of the appellant's driving was dangerous to the public is an objective one. The Crown did not have to prove that the appellant intended the management and control of his vehicle be dangerous to the public, or even that he realised that his conduct was or would be dangerous to the public. His conduct had to be judged according to an objective standard fixed in relation to all users of the public roads generally. The jury had to determine whether the conduct of the appellant amounted to a serious breach of what they considered to be the proper management and control of a vehicle upon a public road, so serious as to be in reality a potential danger to other persons on or in the vicinity of that roadway.
>
> It has been repeatedly emphasised that it is very much a matter for the jury to conclude whether the manner of driving established by the Crown constituted a potential danger to the public...

21 For completeness we note that one possible difference between the position in Australia and the position that operated in the context of the former English legislation is that in Australia there may be a defence of honest and reasonable belief in facts which, if true, constitute a defence available under a charge under section 52A of the Crimes Act: ***Jiminez v R*** (1992) 173 CLR 572. However, Mason CJ observed that the distinction may be more apparent than real. That is not an issue which falls for decision in the present case. If there is a difference, it is almost certainly well past the time when there can be a debate about this topic because the Court of Appeal of Fiji has embraced ***R v Gosney*** [1971] 3 All ER 220, (1971) 55 Cr App R 502 with its reference to a requirement of fault.

Ground one: appeal judge misunderstood the evidence

22 The appellant's complaint is that Mataitoga J was wrong in law in constructing a set of background facts which was different from the evidence adduced trial and/or is based

on a wrong inference of facts in that important and crucial facts were said to be permitted by the Judge. The facts said to be crucially omitted are as follows:

(a) the accident happened on Ratu Meli Road (side road) and at no time had the cyclist turned into VM Pillay Road and collided with a truck;

(b) the cyclist was coming down the slope/sharp end on Ratu Meli Road who made a left turn and hit the back left corner of the truck;

(c) the truck was reversing normally;

(d) the bicycle which the victim was riding at the time did not only had defective brakes but was dangerous to ride because it was fitted with thick and thin tires.

23 This ground appears to misunderstand the task of the magistrate as fact-finding in the case. As will be apparent from the brief recitation of the law set out above, what is critical is that the magistrate is required to determine whether the driving of the Appellant was objectively dangerous by reference to the standards we have attempted to outline above. Further, the magistrate is required to determine whether there was an element of fault. It is critical to pause here and note that it is not required for the prosecution to establish that the accused driver was solely to blame. What is required is the establishment of dangerous driving viewed objectively and an element of fault. The fact that Frederick Lewanavanua may have contributed to the accident is neither here nor there unless it can be said that the element of fault on the part of the accused driver is utterly trivial. In our opinion, that simply cannot be said. While it might be said, as the Appellant submitted, that the truck was reversing "normally" (albeit on the wrong side of the road) it has to be said that the driver was never in a position to see what was going on behind him or what was going on to the left rear of years truck. That is a worrying concept of "normal". The only realistically safe way to turn his truck into VM Pillay Road was to drive forward and make a turn where the vision of the driver was substantially greater. The fact that this was inconvenient or might have taken him out of his way by 50 m or so is not to the point. Reversing with significant blindspots is an egregiously dangerous operation and the magistrate was quite right to come to the conclusion that the driving was dangerous. It seems to us, that no other realistic conclusion was available on the facts as known to the court.

24 Contrary to the assertions in the written submissions of the Appellant, the High Court judge cannot be said to have in any way been guilty of picking and choosing facts to support a conclusion. It seems to us, that his view was an entirely balanced one. No error of law has been demonstrated in this ground and ground one fails.

Ground two: wrong acceptance of the magistrate analysis

25 In ground 2, the Appellant contends that while it was accepted that he was on the wrong side of the road and reversing, there was no legal prohibition on doing so. With respect, that misses the point. It is not an issue of legality or illegality. The issue is simply whether, viewed objectively, the driving was dangerous.

26 This ground also criticises the learned magistrate for concluding that the view of the driver was obstructed so that the driver could not see the back left hand side of his truck. In our view, this was plainly not only a commonsense conclusion by the magistrate that, in the circumstances, it was the only reasonable conclusion. It is not irrelevant to note the pictures of the vehicle which appear at High Court Record page 106. When these photographs are examined, it is perfectly easy to see how the magistrate came to the conclusion that he did. If the Appellant had been carefully watching, possibly through his mirrors, the rear left-hand side of his truck then it is difficult to imagine how he would have failed to see Frederick Lewanavanua and taken appropriate evasive action. Again, the photograph to which we have just made reference demonstrates the wisdom of the observations by the magistrate that the (mostly) vertical poles on the back of the truck of the Appellant contributed to the obstruction in his vision. The conclusion of the magistrate was, in the circumstances, obvious commonsense. It is difficult to see how any other conclusion could have been arrived at.

27 Also under the heading of ground 2, there is a complaint that there was a misuse of certain questions recorded in the record of interview under caution given by the Appellant to the police shortly after the tragic events the subject of this charge. It is suggested, for example, that question 29 should not have been used against the Appellant. Question 29 is in the following terms:

Question 29: do you know that it is very dangerous to reverse a 10 wheeler truck onto the main road from the side road where most of the time people walking up and down?

Answer: yes.

28 While it might be objected that the answer to this does not answer any relevant question in that the knowledge of the Appellant that something is dangerous is not strictly relevant to the elements of the offence, it seems to us that the answer given here confirms the objective judgment of the magistrate. If even the Appellant realised that what he was doing was dangerous then that, it seems to us, is cogent support for the objective conclusion that the learned that Magistrate came to. The same point can be made in relation to Question 44.

29 Finally in this regard, the Appellant complains that the learned magistrate ought or taken into account the answer to Question 50. Question 50 was as follows:

Question 50: According to the evidence in hand it is alleged that the accident happened due to your fault. What do you have to say to this?

Answer: No

All we can say is that the magistrate disagreed. He was right to disagree. It certainly does not demonstrate that the magistrate fell into error. This ground fails.

Ground three: arguments raised before Mataitoga J

30 The arguments here appear to raise many of the points hitherto raised. There is nothing in this ground.

Ground four: no evidence for dangerous driving.

31 This ground complains and that the judge erred in law in upholding the conviction when there was no evidence to prove that the truck was reversed dangerously having regard to all the circumstances of the case. This ground points to passages of the evidence which are said to support the conclusion that the Appellant was not driving dangerously. The passages referred to support no such thing. Moreover, the reference to the individual passages overlooks the compelling and cogent totality of the evidence which demonstrates that the driving was dangerous. Again, perhaps the

underlying assumption of this ground is that the young cyclist may well have contributed to the accident. However, as we have indicated above, that is not to the point. The question is whether the appellant was driving dangerously and whether there was an element of fault in his driving.

32 Further, it is part of this ground that Mataitoga J failed to consider three propositions as follows:

(a) Would there have been an accident at the cyclist not made a left turn?
(b) It was the cyclist hitting the truck and not vice versa;
(c) There is no law which makes the reversing of a truck although on the wrong side [of the road] illegal.

33 Plainly, if the cyclist had not made left turn then there would not have been an accident. This takes the matter nowhere. Again, the unstated basis for this complaint is fault on the part of the cyclist. We have already adverted to this issue. Next the point concerning the contention that the cyclist hit the truck and not vice versa misunderstands the nature of the offence alleged against the Appellant. It does not matter in circumstances such as these who hit who. Clearly, it was the dangerous driving of the Appellant which created a situation of danger and this contributed if not was the substantial cause of the collision. Finally, the comment of that the conduct was not illegal misses the point. The legality or illegality is not relevant to this issue.

Conclusion

34 Both the learned magistrate and Mataitoga J carefully considered the evidence and made no errors of law. There was a clear and compelling case.

Appeal against sentence

Right to appeal to the Court of Appeal

35 The Appellant takes the preliminary point that by its decision in ***Yeung Sze Wai v The State*** [1998] FJCA 20 (citing ***Prem Chand v R*** [1976] 22 FLR 100) an appeal in respect of sentence is limited to appeals complaining that the sentence was beyond the competence or the jurisdiction of the sentencer. The Appellant contends that this

decision prohibits an appeal against the severity of sentence to this Court from the decision of the High Court.

36 The correct position is set out in section 22(1A) of the Court of Appeal Act bars an appeal unless the appeal is on the ground that either:

(a) The sentence was unlawful or passed in consequence of an error of law.
(b) The High Court passed a custodial sentence in substitution of a non-custodial sentence.

37 The Appellant complains that by reason of section 28 of the Constitution. That provides:

> **28.**-(1) Every person charged with an offence has the right:
> (l) if found guilty, to appeal to a higher court.

38 The contention is that section 22(1A) of the Court of Appeal Act is an unconstitutional impediment on the right to appeal.

39 The issue does not arise in the instant case because:

(a) The grounds of appeal against sentence as pleaded make no complaint about the severity of sentence;
(b) Even if there had been appeals against severity of sentence, for the reasons which we will shortly give, they would have been doomed to failure. The sentence levels imposed here are probably below the appropriate levels of sentence. We can only think that the perhaps generous sentencing levels imposed by the learned Magistrate are to be explained by the fact that Frederick Lewanavanua may have to some degree contributed to the cause of the collision.

40 Even if the issue was properly engaged, we think that the section 22(1A) of the Court of Appeal Act is not inconsistent with the Constitution because:

(a) The appeal from the Magistrate to the High Court fulfils the requirements of section 28(1)(l) of the Constitution. Section 28(1)(l) does not guarantee an appeal against the decision on appeal.
(b) Even if section 22(1A) of the Court of Appeal Act is thus inconsistent, we think a cogent argument for validity of that section is that the section is a rational and proportionate derogation from the right guaranteed under the constitution. Judicial time is not infinite and appellate judicial time is also limited. The Court of Appeal is intended to have, in a sense, a supervisory role or a limited nature.

These are only tentative views and this matter is one which may need to be fully argued when, in some future case, the issue is properly engaged.

41 The Appellant contends that in the event, as is the case, that this Court is unwilling to uphold the constitutional argument, that we should remit the matter to the High Court for that court to consider the matter. While there is power in this Court (see section 22(3) of the Court of Appeal Act) to remit to the High Court a matter which started as an appeal to the High Court from the decision of a Magistrate and then proceeds to the Court of Appeal, we do not think that the section permits us to do this as we do not think there is an error of law in the decision of the High Court. In any event, the section makes it plain that this Court has a discretion to do so. We would not have exercised that discretion in any event.

Ground 1: whether disqualification is mandatory

42 The appellant contends that Mataitoga J occurred when he characterised the penalty for an offence under section and 97(2) of the Land Transport Act, 1998 as mandatory. The learned judge said:

> The law is that once there is a conviction for a charge under section 97(2) of the Act, in his mandatory on the sentencer to disqualify the accused from holding a driver's licence for at least six months to life, depending on the circumstances of the case. The discretion is on the length of the disqualification, not on whether to disqualify or not.

The learned judge added:

> In this instance, I find the disqualification of the appellant from holding a driver's licence for three years proper.

43 The learned judge went on to note that paragraph 27 that he considered that the appellant was fortunate not to have been given a custodial sentence in relation to the conduct found against the Appellant. In this regard, the learned judge said:

> In my view, a custodial sentence would have been justified given the selfish disregard of other users of the road, exhibited by the appellant in parking his truck on the wrong side of Ratu Meli Road and then aggravated that humble full act by reversing on the wrong side, which caused the death of the deceased.

44 Earlier in his judgment, the learned judge observed that it was clear that the appellant should have driven his truck in a forward direction rather than choosing to read first it along Ratu Meli Road into VM Pillay Road. That observation makes compelling sense to this Court. Whether or not, as a matter of law, disqualification was mandatory under section 97(2) and that the only debate in such cases following conviction is whether or not to impose something in the way of disqualification greater than six months, we are firmly of the view that in the circumstances which applied in this case that the case cried out for disqualification as part of the penalty. Indeed, as Mataitoga J observed, the driving was such that it would be difficult if not impossible to criticise a sentence of imprisonment as well.

45 In order to make a sentence or a component of a sentence in respect of a particular offence mandatory, clear words need to exist to demonstrate that this was the intention of the legislature. While it may be that the use of the word "mandatory" would put the point beyond argument, the issue as to whether the imposition of a minimum disqualification period of six months is mandatory is ultimately a question of construction and, this being a penal statute, clear words would be required before construing the statute in this way. The competing constructions appear to be as follows:

(a) disqualification is not mandatory but, if there is to be disqualification, the minimum disqualification is six months;

(b) disqualification of six months is a mandatory minimum.

The relevant provision of Schedule 1 to the Act in respect of the penalty for section 97(2) is:

> (a) Minimum - $1,000 disqualification for 6 months
>
> (b) Maximum - $10,000/10 years and disqualification for any period up to life

In practical terms, the real issue is whether the word "Minimum" is the operative to both the reference to $1000 and the reference to "disqualification for six months".

46 It is clear that the legislature contemplated that some disqualifications would be mandatory and some would not. That is evident from section 114(2) of the Act which is as follows:

(2) Unless disqualification is mandatory, if a person is convicted of an offence for which disqualification is part of the prescribed penalty, the court may, if sufficient reason is shown, disqualify the person for a shorter period than that prescribed, or decide not to disqualify the person, and must specify the reason.

47 This issue is one which is easily resolved by reference to other penalties in Schedule 1 to the Act. Immediately below the penalty for section 97(2) is the penalty for sections 97(3) & 97(4). These offences are, respectively, aggravated dangerous driving occasioning bodily harm and dangerous driving occasioning bodily harm. The penalty provision in respect of both of these offences is as follows:

$5,000/5 years and disqualification for 2 years

Plainly, the disqualification is not a minimum disqualification. In our view, when one contrasts this with the manner of expression of the penalty in respect of section 97(2), the legislature intended the penalty in respect of section and 97(2) to be mandatory. That is hardly surprising considering that this has to be about the most serious offence expressly created in respect of the act of driving a motor vehicle. This ground of appeal fails.

Ground 2: whether requirement in law to consider means to pay

48 Ground 2 of the appeal against sentence complains that Mataitoga J erred in law in upholding the fine imposed on the Appellant when the orders of the learned Magistrate were arrived at without consideration of the means of the Appellant to pay a fine of $3,000.

49 An examination of the record of the learned magistrate does not reveal any specific enquiry made as to the means of the Appellant to pay a fine of $3000. At page 66 of the High Court record, what is revealed is the submissions of counsel for the appellant word that that the Appellant is a truck driver in employment and is the sole breadwinner of his family. At page 67 of the record we see in the magistrates notes that the learned magistrate expresses himself to be aware of the minimum fine ($1000) and the maximum fine ($10,000). The learned magistrate said that he took submissions into account and imposed the fine of $3000 in default of payment of which, imprisonment for nine months.

50 It is a well-known principle of sentencing that when a fine is imposed, particularly a fine which has a provision for imprisonment in default of payment, the court must make some enquiry as to the means of the offender to pay a fine. This is well expressed in Thomas on Sentencing (2nd edition) where the learned editor observes:

> Although the principle is not expressed in statute so far as the Crown Court is concerned, a fine should not normally be imposed without an investigation of the offender's means, and the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically be expected to pay. The Court has stated that 'it is axiomatic that where it is decided not to impose a custodial sentence, the court should be careful in imposing a fine not to fix that fine at such a high level that it is inevitable that that which the court has decided not to impose, namely a custodial sentence, will almost certainly follow'.

This passage was endorsed by the Court of Appeal in *Khan v The State* [1994] FJHC 147. It was also endorsed by the Australian Federal Court of Appeal in *Fraser v R* (1985) 9 FCR397; 63 ALR 103. Reference is also made to a very useful summary of the position in *Sentencing Law in NSW* by Roser SC, Veltro & Favretto, published by Lexis Nexis Australia 2003 at [03-360.10].

51 There is no statutory requirement in Fiji for a court to consider the ability of an offender to pay a fine at this stage when sentence is imposed. In some jurisdictions, New South Wales is an example, there is actually a formal requirement imposed by statute. In New South Wales that is section 6 of the Fines Act 1996. (The requirements of section 6 mandatory: ***R v Retsos*** [2006] NSWCCA 85.) However, the Penal Code provides that where enforcement proceedings are taken for non-payment of fines the court must consider the means of the offender to pay before ordering imprisonment. Section 37(1) of the Penal Code permits a court to order a warrant of committal for non-payment of fines. However, section 37(4) provides as follows:

> (4) A warrant of commitment to prison in respect of the non-payment of any sum of money by a person to whom time has been allowed for payment under the provisions of subsection (1), or who has been allowed to pay by instalments under the provisions of subsection (3), shall not be issued unless the court shall first make inquiry as to his means in his presence:
>
> Provided that a court may issue such a warrant of commitment without any further inquiry as to means if it shall have made such inquiry in the presence of the convicted person at the time when the fine was imposed or at any

subsequent time and the convicted person shall not before the expiration of the time for payment have notified the court of any change in his means or applied to the court for an extension of time to pay the fine.

The clear implication of the proviso to section 37(4) is that it is contemplated when in the ordinary course of sentencing procedure that a court would make an enquiry as to means where it was contemplating imposing a fine and before determining the appropriate level of fine.

Further, in this case, the penalty provision in respect of section 97(2) the Land Transport Act, 1998 is to be found in section 114(1) of the Act. That refers to Schedule 1 of the Act which lists the penalties for the various offences under the Act. In relation to the penalty for an offence against section 97(2), Schedule 1 declares:

(a) Minimum - $1,000 disqualification for 6 months

(b) Maximum - $10,000/10 years and disqualification for any period up to life

52 In our opinion, as a strict matter of law, a court is not required to consider the means of an offender to pay a fine where a period of imprisonment in default is to be imposed. That is not to say that such a course is highly desirable and should have been done in this case. Indeed, by reference to our choice of phrase "highly desirable", we are suggesting that this practice should be a matter of routine by a court. Moreover, the court should expressly record that it has considered the means of the offender to pay. A little caution needs to be exercised with respect to the concept of means of an offender to pay. It must not be forgotten that a fine is meant as a punishment. It follows from that, in our opinion, that the intention of penal provisions which provide the option or mandate a fine contemplate that the fine will have some impact if not a substantial impact on the offender. It is, as we say, meant to be a punishment. Accordingly, the means of an offender in this context is not to be construed as limited to ready cash on hand or something the moral equivalent of that.

53 What is the consequence of a court failing to make such an enquiry? Obviously, the legislative scheme of section 37 of the Penal Code contemplates that if there has not been such an enquiry at the time of the imposition of sentence, such an enquiry may

occur at the time of the warrant of commitment. It is highly desirable that such an enquiry is made at the imposition of sentence rather than at the time when section 37 of the Penal Code comes into operation where, in many respects, the offender is staring from the outside of the prison at the open prison gates. Nevertheless, we are firmly of the view that the magistrate in failing to make the enquiry committed no error of law. The invocation by the Appellant of section 23(2) of the Constitution does not take the matter any further.

54 We should add that in our opinion the fine was a moderate one. The assertion that has been made that the Appellant did not have the means to make this fine is in the skeleton argument. In our view, not only is there no error of law, there is no demonstrated injustice. If the Appellant had faced the possibility of prison in default of payment then there would have been a compulsory examination of his means under section 37 of the Penal Code. This ground also fails.

55 For these reasons, the appeal is dismissed.

Byrne, JA

Khan, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent