IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0014 of 2018
[High Court of Suva Criminal Case No. HAC 194 of 2016S)

BETWEEN	:	**JOHN SUBRAMANI GOUNDER**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. G. O'Driscoll for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**06 October 2020**
Date of Judgment	:	**07 October 2020**

RULING

[1] The appellant had been charged on one count of **MANSLAUGHTER** contrary to section 239 (a)(b)(c) of the Crimes Act, 2009, one count of **FAILURE TO SUPPLY SUFFICIENT SAMPLE TO BREATH ANALYSIS ON THE DIRECTION OF A POLICE OFFICER** contrary to section 103 (1)(b) and section 114 of the Land Transport Act 35 of 1998 and section 103(1A)(i)(ii) of the Land Transport [Amendment] Decree No. 74 of 2012 and one count of **FAILURE TO COMPLY WITH REQUIRMENTS FOLLOWING AN ACCIDENT** contrary to section 63(1) and section 87 of the Land Transport (Traffic) Regulation 2000 alleged to have been committed on 29 April 2016 at Vuci Road, Nausori in the Central Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

MANSLAUGHTER: *Contrary to section 239 (a)(b)(c) of the Crimes Act 2009.*

Particulars of Offence

JOHN SUBRAMANI GOUNDER *on the 29 day of April, 2016 at Vuci Road, Nausori in the Central Division, drove a motor vehicle registration number LT 4189 along Vuci Road South in a manner that caused the death of* ***SAIRUSI TOSONACAKACAKA VUNAKECE*** *and at the time of driving, the said JOHN SUBRAMANI GOUNDER was reckless as to the risk that his conduct would cause serious harm to another.*

SECOND COUNT

Statement of Offence

FAILURE TO SUPPLY SUFFICIENT SAMPLE TO BREATH ANALYSIS ON THE DIRECTION OF A POLICE OFFICER: *Contrary to section 103 (1)(b) and section 114 of the Land Transport Act 35 of 1998 and section 103(1A)(i)(ii) of the Land Transport [Amendment] Decree No. 74 of 2012.*

Particulars of Offence

JOHN SUBRAMANI GOUNDER *on the 29 day of April, 2016 at Vuci Road, Nausori in the Central Division, upon being required by a Police Officer namely A/CPL 3415 Sikeli to undergo breath analysis, failed to provide sufficient specimen of breath in such a way for the said analysis to be carried out and satisfactorily achieved.*

THIRD COUNT

Statement of Offence

FAILURE TO COMPLY WITH REQUIRMENTS FOLLOWING AN ACCIDENT*: Contrary to section 63(1) and section 87 of the Land Transport (Traffic) Regulation 2000.*

Particulars of Offence

JOHN SUBRAMANI GOUNDER *on the 29 day of April, 2016 at Vuci Road, Nausori in the Central Division, being the driver of a motor vehicle registration number LT 4189 involved in an accident on Vuci Road, Nausori*

failed to stop and give necessary assistance and his name, address and address of the owner and all information as required.

[3] After the summing-up, the assessors had returned a unanimous opinion of guilty against the appellant in respect of all counts on 26 January 2018. The Learned Trial Judge on the same day had delivered the judgment agreeing with the assessors and convicted the appellant of all three counts and sentenced him on 30 January 2018 to 08 years of imprisonment on the first count, 12 months of imprisonment on the second count and 30 days imprisonment on the third count: all sentences to run concurrently with a non-parole period of 07 years.

[4] The appellant's timely notice of appeal against conviction and sentence had been tendered on 23 February 2018. His written submissions had been filed on 09 January 2020. The state had responded on 19 June 2020.

[5] In terms of section 21(1) (a) and (b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal against both conviction and sentence is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The grounds of appeal urged on behalf of the appellant:

'Conviction :

1. That the learned trial Judge erred in law and misdirected the assessors in respect of evidence relative to glass being found on the roadway near the scene of the accident that had no direct evidential link e vehicle allegedly driven by the Appellant as contained in paragraphs 31, 33 and 34 on pages 10, 11, and 12 of the summing up in that there was no evidence that the glass found on the road was from the Appellant's vehicle, particularly in view of the

photographic evidence that did not show that any glass was shed from the vehicle.

2. That the learned trial Judge erred in law and misdirected the assessors in not directing that if they were satisfied that some other act or other intervening act had caused the death of the deceased then the Appellant would not be guilty of manslaughter but of some lesser offence.

3. That the learned trial Judge erred in law and misdirected the assessors in that in respect of the caution interview his comments were so slanted against the Appellant that they had no other option than to find guilt against the Appellant contrary to all rights of the Appellant to fairness in the trial and as such there was a breach of natural justice.

4. That the learned trial Judge erred in law and misdirected the assessors by overly stressing the prosecution's case in the matter and gave little to no consideration of what the Appellant had stated in his sworn evidence, which he treated as a bare denial when it was not leading to a miscarriage of justice.

Sentence

5. That the learned trial Judge erred in law in imposing a sentence of eight years with a non-parole of 7 years imprisonment on the Appellant when in similar fact cases sentences had been significantly lesser.

6. That the sentence imposed was harsh and excessive in all the circumstances of the matter leading to an error of law in the consideration of the same.

7. That the learned trial Judge erred in law in disregarding current sentencing practice and the terms of any applicable guideline Judgment as specified in section 4(2) (b) of the Sentencing and Penalties Act 2009.

8. That the learned trial Judge erred in law in failing to verify that the accident report submitted by the prosecution contained accurate and complete information relative to the Appellant.

[7] The evidence led at the trial had been summarized in the sentencing order as follows.

2. The brief facts of the case were as follows: On 28 April 2016 (Thursday), you were drinking grog with two friends at your house at Vuci South Road, Nausori. The three of you drank grog from 8 pm to 12 am on 29 April 2016 (Friday). You had some liquor, and later you and your friends wanted more beer. The three of you then drove to Bob's store at Vuci road after 12 am, in taxi LT 4189 to buy some beer. When you arrived at Bob's store, it was closed and you decided to return home. Three policemen were

doing traffic radar duties opposite Bob's store. They were trying to catch speeding drivers travelling to and from Nausori.

3. Special Constable 4124 Inoke Tagivakatini (PW2) was one of the officers mentioned above. He suspected that you were speeding, and he signalled you to stop. However, you ignored his request. You continued to drive taxi LT 4189 towards your house along Vuci South Road. PW2 said, they got into their police vehicle and chased you. According to PW2, you were speeding along Vuci South road. PW2 said, you turned off your vehicle headlights and continued driving down Vuci South Road. Unbeknown to you, Sairusi Tosonacakacaka Vunakece, aged 35, was walking down Vuci South Road towards his home. It was very dark early that morning. Your taxi suddenly hit Sairusi. Sairusi was hit on the front right side of your taxi, and thrown onto the right front windscreen. He was later thrown into a nearby drain full of muddy water.

4. While severely injured in the muddy drain, he breathed in a lot of mud, which blocked his windpipe, and prevented him from breathing. He suffered a ruptured liver and spleen. He also suffered various traumatic injuries. As a result of the above, Sairusi died at the scene. PW2 later arrested you and took you for a breathalyser test at Nausori Police Station. You failed to give a sufficient sample of breath to the police after three attempts, when requested to do so. You also failed to stop after hitting Sairusi, and failed to give the necessary particulars. According to PW2, you smelt heavily of liquor and your eyes were blood shot. The matter was reported to police, and you were charged with the offences in the information. You were found guilty as charged after a three day trial.

01st ground of appeal

[8] The appellant argues that the trial judge misdirected the assessors in paragraphs 31, 33 and 34 of the summing-up regarding broken pieces of glasses being found near the scene of the accident when there was no evidence to connect them with the appellant's vehicle.

[9] This is essentially a matter of evidence. Upon a perusal of the summing-up and particularly the impugned paragraphs it appears that the photographs marked as 5 and 6 had shown glass pieces on the road which was only one item of circumstantial evidence led by the prosecution. However, no witnesses had apparently spoken of it at the trial. There had been evidence coming from other photographs and PW2 that the front park light on the right and the right front windscreen of the appellant's vehicle had been broken and pieces of glass had been seen in front of the driver's dash board

and on his floor mat. Thus, it is clear that broken pieces of those two glass items had come out as a result of the accident. The trial judge had simply left it to the assessors to decide how they were to treat the photographs and not even suggested that those pieces of glass seen on the road may have come from the front right park light and/or the front right windscreen, which was obviously a real possibility.

[10] I do not think that considering the totality of the circumstantial evidence narrated in paragraphs 15-18, agreed facts in paragraph 29 and 30 and other evidence in paragraphs 31-35 of the summing-up, the trial judge's directions in the impugned paragraphs as complained by the appellant have a serious error so as to have any decisive impact on the outcome of the case.

[11] This ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[12] The appellant contends that the trial judge had misdirected the assessors in that he had not asked them if they were satisfied that an intervening act had caused the death of the deceased in which event the appellant could be guilty of a lesser offence. The appellant has floated the idea of another vehicle having hit the deceased and argued that forensic evidence had not determined the time of death.

[13] The evidence of PW2 had confirmed that when he observed the vehicle driven by the appellant at Bob's store there was no damage to the vehicle but when it came to a halt after being chased by the police down Vuci South Road for about 05 minutes (after he had defied the call to stop and sped away) he saw the damages as described above. Thus, obviously the appellant's vehicle had hit someone or something while he was fleeing from the police. The appellant had admitted in his cautioned interview which was recorded as an admitted fact at the trial that he felt an impact on the right front side of his vehicle on the way and thought that it was an animal or an owl. The deceased was found lying in a drain between Bob's store and where the vehicle was ultimately stopped by the police. The medical evidence had revealed that the force that had caused severe damages to the deceased's organs could have been as a result of a motor vehicle accident. Thus, there was no other lesser offence that possibly

could arise from evidence (see Lord Bingham's remarks in **Coutts** [2007] 1Cr App R 60, HL, para 12).

[14] In the light of the above circumstantial evidence [see remarks of Pollock CB in **R v Excell** (1899) 4 F & F 922, 929; 176 ER 850, 853] and the appellant's own cautioned statement, I do not think that any reasonable assessors or a judge would have failed to conclude that it was none other than the appellant who had knocked the deceased down causing his death. Forensic evidence was not absolutely necessary to determine the time of death in the face of above compelling circumstantial evidence.

[15] In any event, the appellant had not run his case in the High Court on the premise that the deceased could have been hit by another vehicle as he had finally apologized for what he had done but stated that he had not intended to do it in the cautioned interview (which was admitted without any contest).

[16] Therefore, there is no reasonable prospect of success in this appeal ground.

03rd ground of appeal

[17] The appellant joins issue with the trial judge's direction in paragraph 30 of the summing-up where he had referred to some questions and answers in the cautioned interview without asking the assessors to consider it as a whole.

[18] The appellant has not pointed out what other questions and answers favorable to him the trial judge had not quoted in the summing-up. It would appear that the judge had extracted some parts of the appellant's interview relevant to the charges against the appellant as part of summarizing the prosecution evidence. Obviously, the whole of the interview would have been before the assessors like other exhibits and there was nothing to preclude them from perusing it as a whole in their deliberations.

[19] Therefore, this ground of appeal has no reasonable prospect of success.

04th ground of appeal

[20] The appellant complains that the trial judge's summing-up had over stressed the prosecution case while giving no or little consideration to what the appellant had stated in his evidence.

[21] The prosecution had led the evidence of 06 witnesses and several exhibits including 18 photographs, the cautioned interview, post-mortem report and the breath analysis test whereas only the appellant gave evidence at the trial on his behalf. Therefore, it is inevitable that the trial judge had to devote more time and space to the prosecution case.

[22] The trial judge had dealt with the accused's case more than adequately in the summing-up as follows.

> *19. On 22 January 2018, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all counts. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence, and called no witness. That was his right.*
>
> *20. The accused's case was very simple. In his evidence, he admitted he was drinking grog with two friends on 28 April 2016 between 8 pm and 12 am. He admitted, they drank a bottle of stubby beer each after grog. He admitted he drove taxi LT 4189 from his home at Vuci South Road to Bob's Store to get more beer. He admitted, the store was closed and returned home after 1 am on 29 April 2016. He admitted his car head lights went off when it hit the pot holes. He admitted something hit his car windscreen when he was driving home. As he came to his house, his car headlights went on again. He admitted he was confronted by police and later taken to Nausori Police Station for a breathalyser test. He admitted he was later locked in the cell and caution interviewed by police on the afternoon of 29 April 2016.*
>
> *21. He denied the three allegations against him. Because of the above, he is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.*
>
> *38. I have summarized the accused's case to you in paragraphs 19, 20 and 21 hereof. Basically, he denied all the allegations against him. He gave evidence to you on 24 January 2018, and I'm sure the details of his evidence is still fresh in your mind, and I will not bore you with the details. Suffice to say that if you accept his sworn denials, then you must find him not guilty as*

charged on all counts. However, if you reject the same, then you will have to consider the whole of the prosecution's case and decide whether or not they have proven their case beyond a reasonable doubt.'

[23] The appellant has not demonstrated what else the trial judge should have said of his evidence. Neither has he shown any material omissions on the part of the trial judge as far as his case is concerned.

[24] Therefore, this ground of appeal too has no reasonable prospect of success.

[25] The appellant had been represented by two lawyers at the trial and they had not sought any redirections on the alleged non-directions or omissions in the summing-up on any of the matters now raised by the appellant. Therefore, the appellant is not entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[26] The summing-up is objective and balanced and deals with all areas requiring directions by the trial judge. The learned trial judge had adequately addressed himself on all vital areas in his judgment as well in agreeing with the assessors. These grounds of appeal are devoid of any merits.

[27] In **R. v. Brown**, 1993 CanLII 114 (SCC), [1993] 2 SCR 918 L'Heureux-Dubé J's dissenting view is also helpful in this regard.

> *'Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue, including a Charter challenge, for the first time on appeal: first, there must be a sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and third, the court must be satisfied that no miscarriage of justice will result. In this case there has been no change in the substantive offence, the issue was not raised at trial, with the result that the record necessary for appellate review of the issue is unavailable, and there has been no denial of justice to the accused. The Court of Appeal therefore properly concluded that no appeal on this new issue should be entertained.'*

05th, 06th, 07th and 08th grounds of appeal (sentence)

[28] Guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him.*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[29] I think all above appeal grounds could be considered together as they all collectively challenge the quantum of the sentence imposed on the appellant.

[30] Firstly, the appellant argues that the sentences in similar cases have been slightly lesser and his sentence of 08 years on count one is harsh and excessive. His counsel cited **Hill v State** [2018] FJCA 123; AAU109.2015 (10 August 2018) in support of this contention.

[31] The Court of Appeal in **Hill v State** (supra) confirmed that currently the tariff for manslaughter ranges from suspended sentence to 12 years of imprisonment which is one of the widest in the criminal justice system in Fiji. Both counsel had agreed that the sentencing tariff for manslaughter is so wide that it provides little guidance to a sentencing judge, particularly in the case of manslaughter arising from reckless driving. The counsel for the state had in fact invited court to formulate sentencing guidelines on manslaughter arising from reckless driving but the court had declined to do so as proper notice had not been given in terms of section 8 of the Sentencing and Penalties Act and the matter was still at the leave to appeal stage.

[32] Nevertheless, the Court of Appeal had engaged in a useful discussion on this issue and affirming the sentence of 07 years on the count of manslaughter imposed by the High Court judge had observed as follows

> *'[62] Road accidents cause immense human suffering. Every year, a considerable number of people are killed and seriously injured. This represents a serious economic burden. It is understandable that cases of serious driving offences causing death are referred to courts by the DPP in the form of Manslaughter because he considers that the prescribed sentence and tariff for Causing Death by Dangerous Driving is unduly lenient.*
>
> *[63] Motor manslaughter cases cause particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm. Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by reckless driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others. Therefore, the sentencing should strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence.*
>
> *[64] A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence. [**R v Cooksley** (supra)].*

[33] The Court of Appeal had also remarked in ***Hill***

> *'[31] In the absence of availability of the defence of intoxication, the culpability of a driver who kills a person under the influence of alcohol should attract a sentence in the upper region of the tariff.'*

[34] The trial judge had picked the starting point at 07 years on the count of manslaughter and added 03 more years for aggravating factors. After allowing discount for mitigating factors he had ended up with the sentence of 08 years.

[35] Among the aggravating factors considered by the trial judge, I find the substance of the second charge too. I think the trial judge had erred in considering the charged act in the second count as an aggravating factor to enhance the sentence on the first count. Similarly, the factors set out in paragraph 8(iii) and (iv) seem to be common features to many offences against persons and therefore, whether they could be regarded as aggravating features in the charged offences is worth being considered.

[36] On the other hand the trial judge had failed to take into account the fact that the appellant was a taxi driver under the influence of liquor as an aggravating factor, for the state counsel informed this court at the leave to appeal hearing that there is zero tolerance on driving after consuming alcohol or drugs for taxi drivers. However, I am conscious of the fact that the appellant was not on a trip as a taxi driver for a fare when he met with this accident but still he was under the influence of liquor. Whether, his drunkenness as a taxi driver or otherwise should have been taken as an aggravating factor to enhance the sentence considerably is a matter for further deliberations by this court.

[37] Further, when the trial judge had picked the starting point at 07 years he may have already taken into account some aggravating features associated with the incident. Which of the aggravating factors mentioned by him had been so considered cannot be ascertained. Then, if the same factors had been taken into account to enhance the sentence the judge may have unwittingly committed the sentencing error of double counting [see **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)].

[38] On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in

other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[39] **I think it is high time for the DPP to move the Court of Appeal or the Supreme Court to issue a guideline judgment (after complying with the procedural steps under the Sentencing and Penalties Act) regarding applicable tariff on manslaughter arising from reckless or gross negligent driving also known as *'motor manslaughter'* for future guidance. Needless to state that this is obviously a fit case to do so and the full court of the Court of Appeal may then consider the propriety of the sentence imposed on the appellant after having set the applicable sentencing guidelines and the tariff for *'motor manslaughter'*.**

[40] For all the reason mentioned above I allow leave to appeal against sentence.

The Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL