IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 21 OF 2016

BETWEEN: **PRANIL RAVINDRA SAMI**

Appellant

AND: **STATE**

Respondent

Counsel : **Mr. A. Singh for the Applicant**

Ms. S. Kiran for the Respondent

Date of Hearing : 28th November, 2016

Date of Ruling : 13th December, 2016

JUDGMENT

1. The Appellant in this case had been convicted after fully defended trial of one count of Dangerous Driving Occasioning Death contrary to section 97(2) C and 5(D),(8) and 114 of the Land Transport Act No. 35 of 1998.

2. Upon conviction, the Appellant was sentenced on the 12th February, 2016 to two years' imprisonment and was disqualified from driving for a period of one year.

3. The Appellant through his Counsel filed a Notice of Appeal against conviction and sentence within time. He had originally raised seventeen grounds of Appeal against conviction. However, at the hearing stage, he abandoned some of the grounds and is now confined to following three grounds.

(i) That the Learned Trial Magistrate erred in law and in fact when he failed to consider the fact that when the accident and impact occurred, the vehicle driven by the accused had stopped and was not moving and thereby not satisfying an essential element of the offence of DANGEROUS DRIVING OCCASSIONING DEATH which requires the driver of the vehicle involved in the impact to be driving the vehicle at the time of the impact.

(ii) That the Learned Trial Magistrate erred in law and in fact when he failed to consider the fact that it was the driver of the opposing vehicle who while driving at a high speed bumped into the Appellant's vehicle which had stopped on the side of the road from the rear.

(iii) That the Learned Trial Magistrate erred in law and in fact when the actual cause of death for the deceased was due to the opposing vehicle bumping the Appellant's vehicle from the rear which upon impact flung a tyre from the back tray and struck the deceased.

4. Ground of appeal against his sentence is that it is manifestly harsh, excessive and wrong in principle.

Facts

5. The Appellant was 22 years old at the time of the incident. He was working for a company as a painter. On the day of the incident, he was assigned the task of transporting his fellow workmen who had finished overtime work. He reluctantly accepted the driving job. The car was a four seater Caldina. He had to transport five passengers in a rainy night. As he was driving towards Ba, he was overtaking another vehicle. In the process he speeded up. Upon completion of overtaking, he suddenly applied breaks, and as soon as he applied breaks, he lost control of the vehicle making it

to spin and it went to the other side of the road (the other lane going towards Lautoka) and stopped. After a while (in two seconds) the other vehicle (driven by PW1) came and bumped into his vehicle from rear. One of four persons seated at the back seat got severely injured as a result of the impact and later he succumbed to injuries at the hospital.

Analysis

Ground (1)

6. In relation to his ground of appeal against conviction referred to at paragraph 3 (i) above Counsel for the Appellant contends that when the accident and impact occurred, the vehicle driven by the Appellant had stopped and was not moving and thereby not satisfying an essential element of the offence of Dangerous Driving Occasioning Death.

7. Section 97(2) (c) of the Land Transport Act with which the Appellant was charged states that:

> *"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 -* .....(c) in a manner dangerous to another person or persons".

8. According to this Section it is essential for the Prosecution to prove that, at the time of the impact, the Appellant was driving the vehicle.

9. There is no dispute that the accused drove the vehicle bearing registration No. EL 872. The contention of the Appellant is that at the time of the impact, vehicle driven by the Appellant had stopped and was not moving. In his assertion, the Appellant is relying on

what he had said in his examination-in-chief. The relevant portion of which I reproduce below:

At page 36 of the Copy record:

Q: What happened when you heard the sound and you applied the brakes?

A: As soon as I applied brakes sir the vehicle swung and it faced towards Lautoka.

Q: You mean to say it parked towards Lautoka in the middle of the road?

A: It was on the side of the road, sir.

Q: How far was the other vehicle once your car was parked facing Lautoka?

A: The difference was between 20 car gap, sir.

Q: Would you be in a position to explain the timing of when your car was parked to face towards Lautoka and then other car bumping your car from behind as in seconds. What was like the time? After how long?

A: It was after a while when the vehicle came and bumped into our car, sir.

At page 38 of the Copy Record:

Q: And then you said your vehicle was parked on the other lane is that true?

A: Yes, sir.

Q: You were asked as to how far was the other vehicle which bumped your vehicle then you said 20 car distance?

A: Yes, sir.

10. The trial Magistrate accepted the evidence of the Prosecution and rejected that of the Defence. He had given reasons for doing so. The evidence on this particular point given by the Appellant was completely contradictory to un-impeached evidence of Prosecution witnesses. Prosecution witnesses PW.2 and PW.3 were not mere bystanders. They were colleagues of Appellant's same workplace who, at the time of the incident, were being driven home by the Appellant. There was no apparent reason why they should lie to put the Appellant in trouble. PW.1 was the driver of the other vehicle involved in the collision. His evidence was corroborated by other two Prosecution witnesses and to a greater degree by the Appellant himself.

11. PW.1 said that he was driving somewhere near Lovu when the vehicle in the opposite lane suddenly made a spin and came into his lane. He could not save because the other vehicle was too close. He denied of over speeding.

12. PW.2 stated that he was in the vehicle driven by the accused. Vehicle was travelling at a high speed. Accused overtook another vehicle when there was an oncoming vehicle. However, he managed to overtake and come to his lane but in the process he lost control of the vehicle and it went zig zag. He in fact stated that they told the accused to reduce the speed.

13. PW3 stated that he was also in the vehicle driven by the accused heading towards Ba. The accused overtook a vehicle and then applied breaks but the car swung and came to the other lane going to Lautoka. He applied breaks whilst overtaking. He personally told the driver to slow down because he saw the oncoming vehicle and knew it was dangerous.

14. In his own evidence, the Appellant had admitted that he was driving at a speed of 60 km/hr., attempted to overtake another vehicle, upon completion of overtaking applied

breaks and as soon as he applied breaks, the vehicle swung and parked on the other side of the road (the other lane facing Lautoka) and after a while (in two seconds) the other vehicle came and bumped into his vehicle from rear.

15. Although the vehicle driven by the Appellant had come to a standstill at the time of impact, it had come to the other lane as a direct result of Appellant's driving. In my view, even if what the Appellant said was believed by the trial Magistrate, the admission that his vehicle had come to a standstill on the other side of the road as a result of his driving /sudden application of breaks was sufficient to find that 'the driver was, at the time of the impact, driving the vehicle'.

16. There was clear evidence before the trial Magistrate, having regard to the circumstances of the case, to find that the Appellant was driving dangerously prior to the accident. His four seater car was transporting six people. He overtook another vehicle during night under heavy rainy condition. In the process, he speeded up the vehicle when he saw an oncoming vehicle from the opposite direction. When he suddenly applied breaks he lost control of his vehicle and it spun, went to the other side of the road and stopped before collision occurred.

17. A vehicle travelling at a low speed would not really slip or spin on a flat road. Although there is no credible evidence of speed, the results are indicative of fast driving. The fact that Appellant lost control causing the vehicle to spin when he applied breaks indicates that he had been driving at an excessive speed. The facts speak of themselves. The Appellant failed to explain why he parked his vehicle in the middle of the opposite lane if he managed to control the vehicle when he applied breaks.

18. In ***R. v. Evans*** (1963) 1 Q.B. 413 where a defendant had been convicted of causing death by dangerous driving it was held:

"that the test being objective the degree of negligence was irrelevant and if in fact the driver adopted a manner of driving which the jury thought dangeraus to other road users in all the circumstances he was guilty, and it mattered not (although it was relevant to sentence) whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best".

19. This legal principle was adopted in Fiji by Justice Kermode, in ***Director of Public Prosecutions v Ali*** [1978] FJSC 23; Criminal Appeal 008 of 1978 (22 March 1978) when he convicted the appellant of the offence of Causing Death by Dangerous Driving contrary to section 269(1) of the Penal Code.

20. The distinction between the offences of dangerous driving causing death and careless driving causing death has been the subject of many decisions in various jurisdictions. In Fiji the decision in ***Sambhu Lal v. Regina*** Fiji Court of Appeal Criminal Appeal No. 49 of 1986 having analysed the law followed the English decision in ***R.v. Gosney*** [1971]3 All ER 220 (the law in England then being the same as in Fiji). At p.224 of 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****." (emphasis added)*

21. The Court in ***Gosney*** went on to note that the fault involved may be no more then 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." (vide ***Kumar v State*** *{2002] FJCA 12AAC0014U.2002S (30 August 2002)*

22. The Appellant admitted that the vehicle made a spin after overtaking and went to the other lane. The positing he is taking in his appeal that he swung and was able to apply the break and safely park on the side of the road is not consistent with his own evidence.

23. The sketch plane tendered in evidence which was agreed by the Appellant shows that the car driven by Appellant was parked in the middle of the lane (going to Lautoka) just in front of the vehicle driven by P.W.1 in a straight line and approximately the same distance from the edge of the road. There was no evidence that Appellant's vehicle was pulled to the middle by PW.1's vehicle as a result of the collision. Broken glasses were seen in between the two vehicles. The reasonable inference that the trial Magistrate could have drawn from these facts was that the Appellant's vehicle was bumped from behind when Appellant's vehicle had suddenly stopped after it swung to the middle of the lane.

24. It is highly improbable that the Appellant managed to park safely on the side of the road in a situation where he had already lost control of his vehicle.

25. It may be true, that the Appellant's vehicle had come to a standstill at the time of impact. It may also be true that the impact occurred when the vehicle driven by PW.1 drove his vehicle into the Appellant's vehicle which had already stopped. But there had been some fault on the part of the Appellant causing the situation. Therefore, the learned Magistrate's finding that *'Appellant's dangerous driving had resulted in an impact with another vehicle which led to the death of a person'* was not erroneous.

26. According to PW.1's evidence, all of a sudden the vehicle driven by the Appellant had spun and come in front of his vehicle. He had tried to apply breaks. However, he could not avoid the accident because the other vehicle was too close to his vehicle. The Appellant also admitted that the impact occurred only two seconds after he had

stopped the vehicle. In this context, the learned Magistrate's finding that PW.1 could not have avoided the collision due to the sudden turn of events was not erroneous.

27. Therefore, I have no hesitation in dismissing the first ground of appeal against conviction.

Ground (ii)

28. The Appellant's second ground of appeal against conviction is that the learned trial Magistrate erred when he failed to consider the fact that it was the driver of the opposing vehicle (PW.1) who while driving at a high speed bumped into the Appellant's vehicle which had stopped on the side of the road from rear.

29. PW.1 maintained throughout his evidence that he was driving below 60 km/hr. and it was raining heavily and visibility was poor. However, the road was clear. He was two car distance away when the Appellant's vehicle spun and stopped in his lane. He could have stopped his vehicle if he were a bit further than two car distance. He tried to save and prevent this accident but there was another vehicle coming from the other side.

30. PW.1 vehemently denied that he was over speeding. Merely putting propositions to a witness is not evidence of fact. No proposition was put to PW.1 that Ashneel Ratnam (DW2) had warned him of over speeding and, despite that warning; he kept on driving at the same speed.

31. There was no credible evidence that PW.1 was over speeding. It was only the witness Ashneel Ratnam (DW2) called by the Defence who told that PW.1 was over speeding despite his warnings. However, the trial Magistrate decided to totally disregard his evidence and no weight whatsoever was attached to it in light of serious doubts cast on

his impartiality. The trial Magistrate had given acceptable reasons for rejecting DW2's evidence.

32. In any event, the Appellant was not able to control his vehicle thereby causing it to make a spin towards the other lane and therefore, speed of PW.1's vehicle would not have made any difference.

33. The trial Magistrate in his sentencing ruling had stated: *"After taking over?? (over taking) the other vehicle you lost control of your vehicle and it collided with an oncoming vehicle".*

34. The Appellant argues that this finding by the trial Magistrate was entirely wrong in fact since the impact was caused from rear. There was no dispute at the trial that the vehicle driven by PW.1 bumped into rear of the Appellant's vehicle. In his judgment the trial Magistrate rightly found that the Appellant was driving dangerously causing his vehicle to spin towards the other lane of the road. Therefore, the trial Magistrate's statement in his sentencing ruling does not vitiate the judgment which found the Appellant guilty on correct analysis of evidence.

Ground (iii)

35. The Appellant argues that the learned Magistrate failed to appreciate that the actual cause of death was due to the opposing vehicle bumping the Appellant's from rear which upon impact flung a tyre from the back tray and struck the deceased.

36. None of the eye witnesses had stated that the deceased got injured when a tyre from the back tray of Appellant's vehicle struck him. Therefore, this ground is based on a misconceived notion and should necessarily fail.

Ground (iv) - Sentence was Harsh and Excessive

37. This Court will approach an appeal against sentence using principles set out in ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499 and adopted in ***Kim Nam Bae v The State*** Criminal Appeal No.AAU0015 at [2].

38. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Fiji Appeal Court observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

39. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** (supra):

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(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.

40. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed the approach to be taken when exercising appellate jurisdiction in reviewing a sentencing discretion of a lower court. The Court observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".*

41. The present offence of Dangerous Driving Occasioning Death is enacted by the Land Transport Act of 1998. It was previously an offence under the Penal Code, Cap 17 (now repealed). Section 238 of the Penal Code provided for the offence of Causing Death by Reckless or Dangerous Driving of Motor Vehicle and the maximum penalty was a penalty of five years' imprisonment.

42. The Land Transport Act ("the Act") in 1998 provided for the enforcement of traffic laws and in doing so repealed the provisions of section 238 of the Penal Code. Section 97 of

the Land Transport Act provides for this offence which the Appellant had been charged with, and by Section 114 of the Act increased the maximum penalty to 10 years imprisonment, with a maximum fine of $10,000 and disqualification of license for any period of up to whole of life.

43. In the case of ***Sharma*** HAA 97 of 2005S, Shameem J in assessing the impact of this doubling of the maximum term of imprisonment stated:

> *"In 1998 Parliament passed the Land Transport Authority Act and increased penalty for causing death by dangerous driving to 10 years imprisonment. There can be no clearer Parliamentary intention as to sufficiency of penalty. To reflect such ....intention, I held in Waqaraitavo that the tariff for such offences must increase to 2 to 4 years' imprisonment".*

44. This new tariff imposed by Shameem J, has subsequently been followed by the High Court in ***Kumar*** CA 172 of 2014, and ***Bulivorovoro*** HAA 11 of 2014. Madigan J in ***Kumar*** CA 172 of 2014 (Ltk):

> *"there is no doubt that the tariff is still now 2-4 years and the "momentary inattention" mitigating factor is not available under the harsher penalty on the LTA Act. Irresponsible and dangerous driving that causes loss of life should no longer receive lenient sentences no matter who the accused is or what his status in the community might be. There is no room for suspended sentences for this offence."*

45. It has been decided by Shameem J and by this Court that the earlier defence of "momentary inattention" which was available under the old Penal Code offence is no longer applicable to this Land Transport Act offence and in addition that **suspended**

sentences will only be passed in truly exceptional circumstances. As Shameem J said in ***Waqairatavo*** HAA 127 of 2004S.

> *"a non-custodial sentence for this offence must be the exception rather than the rule. Indeed, a starting point should be picked from between 2 years and 4 years imprisonment depending on the gravity of the offending. The gravity of the offending is to be assessed on circumstances such as the numbers of death, and the seriousness of the fault, which led to the offending".*

46. In ***State v Bulivorovoro*** [2014] FJHC 930; HAA11.2014 (18 December 2014) the accused was sentenced to 12 months' imprisonment suspended for two years on his own plea of guilty on one count of Dangerous Driving Causing Death and one count of Dangerous Driving Causing Grievous Bodily Harm. On appeal by the State, the High Court, stating that the sentence was extremely lenient, sentenced the appellant afresh to two years' imprisonment.

47. Considering the tariff for Dangerous Driving Causing Death, the Appellant in this case has received quite a lenient sentence at the bottom end of the tariff.

48. At the oral hearing, the Counsel for Appellant having cited ***State v Apted*** [2015] FJHC 653; HAR002.2015 (11 September 2015) applied for a suspended sentence. I have carefully considered the judgment the relevant part reads as follows:

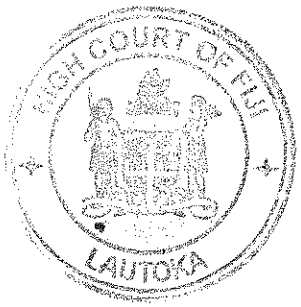
> *"The respondent comes before the Court with strong mitigation. He is 85 years old and has been driving for 60-65 years without any traffic infringement. He is of undoubted good character and entered a plea of guilty as soon as the charges were settled. His remorse is undeniably and painfully evident. He has made abject apologies to the family and I am told has offered whatever assistance they might need in their grief. (para 45).*

As if the respondent needs no more tragedy in his life, I am told that his eldest daughter recently succumbed to cancer, his eldest son is in the final stages of a battle with cancer and a younger daughter has too recently been diagnosed with cancer. (para 46).

In the premises, whilst I do not think the offending did bring with it "special circumstances" as argued by defence counsel, the mitigation does indeed bring before the Court special circumstances enough to allow me to suspend the sentences passed for a period of three years" (para 47).

49. There is no evidence/ facts before me that constitute exceptional circumstances either in Appellant's offending or mitigation. Therefore, this Court has no option but to affirm the immediate custodial sentence imposed by the trial Magistrate.

50. Accordingly, the appeal against conviction and sentence is dismissed. Conviction recorded and sentence imposed by the trial Magistrate are affirmed.



Aruna Aluthge
Judge

At Lautoka
13th December, 2016

Solicitors: **Aman Ravindra Sing Lawyers for the Appellant**
Office of the Director of Public Prosecution for the Respondent