IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 69 OF 2017

BETWEEN : **MALONI NAISOGOVESI**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. K. Vulimainadave [LAC] for the Appellant.
: Mr. A. Datt for the Respondent.

Date of Hearing : 15 March, 2018
Date of Judgment : 19 March, 2018

JUDGMENT

Background Information

1. The Appellant was charged in the Magistrate's Court at Tavua with one count of Dangerous Driving Occasioning Death contrary to section 97 (2) (c), 5 (a) and 114 of Land Transport Act No. 35 of 1998.

2. It was alleged that the Appellant on the 5th day of September, 2015 at Tavua drove a motor vehicle registration number CW175 on

Kings Roads, Natawa, Tavua in a manner dangerous to another person, involved in an impact with another person and occasioning the death of Vaithi Lingam Chetty.

3. On 20 March, 2017 the Appellant in the presence of his counsel pleaded guilty to the charge after it was read to him and understood by him in the Magistrate's Court.

4. The Appellant also admitted the summary of facts after it was read to him. The learned Magistrate being satisfied that the guilty plea was unequivocal convicted the Appellant as charged.

SUMMARY OF FACTS

5. The following summary of facts was admitted by the Appellant:

" On the 5th day of September, 2015 at about 0850hours at Kings Road Natawa, Tavua Maloni Naisogovesi [Accused] aged 44 years, Driver (Feroz Transport Limited) of Vatukacevaceva, Rakiraki drove a motor vehicle registration number CW 175 in a dangerous manner causing the death of Vaithi Lingam Chetty, [Deceased] aged 65 yrs Farmer of Natawa, Tavua.

On the above mentioned date, time and place the Accused was returning from Lautoka Mill and headed to Rakiraki town. Accused stopped at Bilolo Primary school to remove his safety boot and also his T-Shirt as he was feeling sleepy. The accused then drove towards Tavua, at Natawa he fell off to sleep and bumped the Sunbeam Bus registration number FZ 4Q4 on the rear and the impact caused the death of the deceased who was the pedestrian.

The matter was reported at Tavua police station whereby PC 5003 Tora was appointed the I.O. The rough sketch plan was drawn and the

necessary measurements was taken. The accused was caution interviewed on 27/10/15 whereby he admitted that he slept whilst driving. The accused was formally charged for the offence of Dangerous Driving Occasioning Death under section 97(2) (c), (5) (a) and 114 of Land Transport Act 35 of 1998.

6. After considering mitigation, on 25 April, 2017 the Appellant was sentenced as follows:

"(i) Fine of $1,000.00 to be paid within 30 days in default 3 months 10 days in prison. If fine is not paid, default prison term to be made consecutive to imprisonment term.

(ii) Imprisonment term of 2 years 6 months to be served forthwith.

(iii) Disqualification from driving for period of 1 year. Disqualification to take effect upon offenders release from prison."

7. The Appellant being dissatisfied with the sentence filed a timely appeal against sentence which was later amended as follows:

"1. That the Learned Magistrate erred in Law and in Fact when he convicted the Appellant on sections 97(2) (c), 5 (a) and 114 of the Land Transport Act No. 35 of 1998 but sentenced the Appellant on sections 97(2) (c), 5 (b) (8) and 114 of the Land Transport Act No. 35 of 1998 in his written sentence dated 25th April, 2017.

2. That the Learned Magistrate erred in Law and in Fact when he convicted the Appellant based on the particulars that the Appellant drove a motor vehicle in a manner dangerous to another person involved in an impact with another person occasioning the death of Vaithi Lingam Chetty but sentenced the Appellant based on the particulars that the Appellant drove a

motor vehicle in a manner dangerous to another person involved in an impact with another person occasioning the death of Virisila Sukaleca.

3. *That the Learned Magistrate erred in Law and in Fact in failing to properly consider the Appellant's plea in mitigation submission holistically on sentencing.*

4. *That the Learned Magistrate erred in Law and in Fact in failing to consider that there is no evidence that the Appellant did cause the fatal accident due to any selfish disregard for the safety of other road users and other aggravating factors raised in the Guilfoyle and Boswell principles.*

5. *That the Learned Magistrate erred in Law and in Fact in failing to consider that the maximum sentence that could be imposed in such matters is $10,000 fine or 10 years imprisonment and imposed immediate custodial sentence and also fined the accused.*

6. *That the Appellant appeals against the sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.*

8. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful. During the hearing the counsel for the Appellant withdrew four grounds of appeal namely grounds one, two, four and five. The hearing proceeded on two grounds of appeal namely existing ground three and six as per the amended Petition of Appeal. For ease of reference the above grounds three and six will be treated as grounds one and two.

LAW

9. In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the Appellate Court that the Sentencing Court fell in error whilst exercising its sentence discretion.

10. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

> *"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."*

GROUNDS OF APPEAL

GROUND ONE

That the Learned Magistrate erred in Law and in Fact in failing to properly consider the Appellant's plea in mitigation submission holistically on sentencing.

11. Counsel for the Appellant submits that the learned Magistrate did not consider other mitigating factors such as the personal background of the accused, his financial status being sole breadwinner of the family, he got injured, he is remorseful and truly apologises, traumatised by his action, clean driving record, cooperated with police that were submitted by defence counsel as part of mitigation submissions.

12. Counsel further submitted that the learned Magistrate did not specify the mitigating factors and it was not clear from the sentence which mitigating factors apart from being a first offender was considered.

13. At paragraph 4 of the sentence the learned Magistrate stated the following:

"You mitigated and the following considered in your favour:

- *This is your first offence.*
- *Your guilty plea and remorse.*
- *Your personal and family background.*
- *Cooperation with police.*
- *The accident had affected you physically and also psychologically "*

14. The submission of counsel is misconceived considering the fact that the learned Magistrate had taken into account all the relevant mitigating factors under broad headings. The Appellant got injured as a result of his conduct which was not a mitigating factor.

15. It is not for an Appellate Court to revisit mitigation which were all before the Magistrate at the time of sentencing unless manifest injustice will be caused to the Appellant (see *Josaia Leone & Sakiusa Naulumatua vs. State [2011] HAA 11 of 2011 (8 July, 2011).*

16. The learned Magistrate had complied with the purposes of the sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2) (j).

17. It is not incumbent upon a court to list and consider every point made by counsel. The court will of course consider and adopt all points that are relevant.

18. Furthermore, there is no requirement of the law that where there are several mitigating factors each one of them should be dealt with separately. The Supreme Court in *Solomone Qurai vs. The State, Criminal Petition No. CAV 24 of 2014 (20th August, 2015)* stated this very clearly at paragraph 53 in the following words:-

"Although section 4 (2) (j) of the Sentencing and Penalties [Act] requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately..."

19. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

"That the Appellant appeals against the sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case."

20. In respect of this ground of appeal that the sentence was harsh and excessive it is important to look at the tariff which exists for the offence of dangerous driving occasioning death.

21. In *Iowane Waqairatavo vs. The State, Criminal Appeal No. HAA 127 of 2004S*, Shameem J. established the tariff for the offence of dangerous driving occasioning death to be between 2 to 4 years imprisonment.

Her ladyship also made a very pertinent observation which is applicable today in the following words:

"...Deaths on our roads have led to untold suffering for the families of the deceased. Children have lost parents, siblings and relatives in road deaths which could have been avoided had the driver exercised little care. It is time the courts took a principled and determined approach to causing death by driving cases, especially when Parliament has, in unequivocal terms, indicated to the judiciary that sentences should increase."

22. The sentence of imprisonment is within the tariff and appropriate for a shocking failure to maintain a prudent driving standard leading to a loss of life. However, there is a need to revisit the existing sentence since it is this court's view that the sentence is excessive in view of the monetary fine imposed with a consecutive sentence of 3 months and 10 days imprisonment in default of payment.

23. From the copy record it is obvious that the learned Magistrate had not conducted a means test to ascertain the fine of $1,000.00. The Appellant was further burden with a consecutive sentence in case of a default in the payment of fine. This in my view resulted in an excessive sentence. The State Counsel fairly concedes this aspect as well.

24. Furthermore, it is noted from the mitigation submission of the Appellant filed in the Magistrate's Court that the Appellant was the sole breadwinner of the family. He has two children and two nieces to look after apart from his wife. The four children are also going to school.

25. Section 32 of the Sentencing and Penalties Act states if a court decides to fine an offender it must determine the amount of fine and

the method of payment by taking into account the financial circumstances of the offender and the extent of the burden its payment will impose.

26. The learned Magistrate fell in error when he did not comply with section 32 (1) of the Sentencing and Penalties Act, it was important for the learned Magistrate to determine the financial circumstances of the Appellant before imposing the fine and the default orders. The appeal is allowed to the extent that the fine imposed (with consecutive sentencing by a term of imprisonment in default of payment) without a means test has a crushing effect on the Appellant.

CONCLUSION

27. In the interest of justice and in accordance with section 256 (2) (a) of the Criminal Procedure Act it is only proper that the sentence of the Appellant be varied to the extent that the fine imposed on the Appellant be set aside.

ORDERS

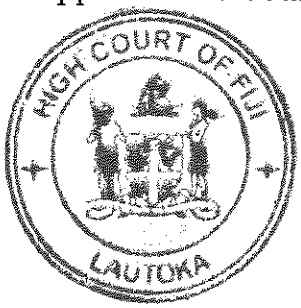
1. The appeal against sentence is partly allowed that is the fine imposed on the Appellant is wholly set aside with immediate effect.

2. The sentence of the Magistrate's Court is affirmed to the extent that:

   (a) the Appellant is sentenced to 2 years and 6 months imprisonment with effect from 25th April, 2017 without a non-parole period.

(b) the Appellant is disqualified from driving for a period of 1 year upon his release from the Corrections Centre.

3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
19 March, 2018

Solicitors

Office of the Legal Aid Commission, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.