IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 113 OF 2017

BETWEEN	:	**KARUNA GARAN NAIR**
		Appellant
AND	:	**STATE**
		Respondent
Counsel	:	**Mr P. Kumar for the Appellant**
		Mr J. Niudamu for the Respondent
Date of Hearing	:	**25th April, 2018**
Date of Judgment	:	**15th May, 2018**

JUDGMENT

1 The Appellant was charged with Careless Driving contrary to Section 99(1) and 114 of the Land Transport Act 35 of 1998. On 30th August, 2017 he was convicted after a full trial at the Rakiraki Magistrates Court.

2 On 4th October, 2017, the Appellant was sentenced with a fine of $200.00 and default of which, 30 days' imprisonment. Appellant also earned 3 demerit points.

3 Being dissatisfied with the conviction of the Magistrates Court, the Appellant through his Counsel filed his grounds of appeal against conviction within time.

GROUNDS OF APPEAL

4. Following grounds of appeal were filed with the Notice of Appeal.

a. That the Learned Resident Magistrate erred in law when he ordered the Appellant to pay the fine of $200.00 with 3 demerit points. The

Prosecution failed to establish the element "Without due care and attention" of offence.

b. That the Learned Resident Magistrate erred in law when he gave his judgment/order without properly hearing and analyzing the evidences of Appellant.

c. That the Learned Resident Magistrate erred in law when he failed to establish the case of R v Lawrence [1981] RIR 217 by failing to take into consideration that the Appellant had always maintained due care and attention.

d. That the Learned Resident Magistrate erred in fact by failing to take into consideration the evidence of DW1 – Karuna Garan Nair that PW1 was over speeding and could have avoided the accident should the complainant had maintained due care and attention.

e. That the Learned Resident Magistrate erred in fact by failing to take into consideration the evidence of DW2 – Steven Kumar that the accused stopped at the junction at Wairuku for about 60 seconds before entering main road.

f. That the Learned Resident Magistrate erred in fact by failing to take consideration of evidence of DW3 – Satish Kumar that PW1 had overtaken 3 vehicles before causing accident with the Appellant's vehicle.

g. That the Learned Resident Magistrate erred in fact by failing to take consideration of evidence of PW1 – Sarwan Kumar that his vehicle was defective in nature and that the break of his vehicle was not working. The Prosecution failed to establish that PW1 could have avoided the accident at the speed of 60 km/hr if his vehicle was not defective.

h. That the Learned Resident Magistrate erred in fact by failing to take into consideration the evidence of PW2 – Avinesh Lingam that before the collision the PW2 came to know that the steering of the vehicle driven by PW1 was locked and defective in nature and that the collision could have been avoided if the vehicle of PW1 was not defective.

i. That the Learned Resident Magistrate erred in fact and law by failing to taking into consideration of evidence of PW3 – Ashwin A. Lal who stated

in his evidence that PW1 was over speeding and was careless. The Prosecution failed to establish that the PW1 could have avoided the accident should he was not over speeding.

j. That the Learned Resident Magistrate erred in fact by failing to taking into consideration of evidence of PW4 – Maciu Ratabacaca who stated in his evidence that PW1 could have avoided the accident should he was cautious enough before overtaking at a long broken line.

k. That the manner in which the Learned Magistrate conducted the proceedings was conducted in an unfair manner since the Learned Magistrate failed to take into consideration the Appellant's and his witnesses evidences before the Court and as a result the manner in which the Learned Magistrate conducted the proceedings was in all circumstances unfair to the Appellant and prejudicially affected the result of the proceedings.

5. To support these grounds the Appellant's Counsel had filed submissions. The Counsel for Respondent also filed submissions and seeks a dismissal of the Appeal.

6. In summary, the grounds raised by the Appellant are based on the premise that the learned Magistrate erred in law and in fact in his assessment of the facts and he found the Appellant guilty of Careless Driving without a full assessment of all the evidence adduced and specially as to whether the evidence supported the facts as alleged by the Prosecution. Therefore, all the grounds can be dealt with together.

7. In order for the Appellant to succeed in this appeal he has to show that there was no evidence on which the trial Magistrate could reach the conclusion which he did if he properly directed himself.

8. The Prosecution case was that, on the 26th of June 2014, PW1 was driving a heavy vehicle (container truck) and was returning to Ba from Rakiraki. PW.2 was seated in the front passenger seat. On their way back to Ba, just outside of Rakiraki, they were involved in an accident at Wairuku, Rakiraki. When there was an overtaking lane at a straight stretch, PW1 overtook two vehicles in front of him. Whilst he was still overtaking, the Appellant emerged from a feeder road and turned towards Rakiraki. PW1 could not see the Appellant's vehicle (Toyota Hilux) being driven to the King's Road because of the grown sugarcane field

beside the road. PW1 saw the Appellant's vehicle only when it was about 2 to 3 meters away. When he applied breaks, the engine went off. PW1's vehicle then bumped the FEA post and went into the nearby drain.

9. To prove the charge of Careless Driving, the Prosecution must prove following elements.
   i. The Accused,
   ii. Drove a motor vehicle,
   iii. On a public road,
   iv. Without due care and attention

10. It was not disputed that, at the material time and place, the Appellant was driving a Toyota Hilux vehicle BV-297. It was also not in dispute that the Appellant was driving his vehicle from a feeder road into a public road (King's Road) at Wairuku and turned towards Rakiraki.

11. The only dispute was whether the Appellant drove the vehicle without due care and attention. The Prosecution had called five witnesses. The Appellant was put to his defence, He called 4 witnesses.

12. The learned Counsel for the Appellant argues strongly that the learned Magistrate has come to a wrong conclusion on the facts. He outlines in his submission the evidence which shows that the PW1 (Sarwan Kumar) was actually careless and not the Appellant.

13. PW.1 admitted that he was driving a heavy vehicle and, at the time of collision, he was overtaking two vehicles moving slowly in front of him. His vehicle was overtaking one Fielder car and he could not complete overtaking and also he could not fit into the gap when the Appellant drove his vehicle from the feeder road into the main road. He was driving at a speed of 60 km/hr. He saw the Appellant's vehicle only when it was about 2 to 3 meters away as the cane field beside the feeder road was obstructing the view. When he applied brake, it was too late to avoid the accident.

14. PW.2 confirmed the evidence of PW.1. He could not recall whether there were two vehicles in front of the Fielder. It was an overtaking lane. He denied that PW.1 was over speeding and that the vehicle had a mechanical defect. The steering wheel was locked because of the accident.

15. PW. 3 is an independent witness. He was a taxi driver for five years. As he was heading towards Rakiraki he saw clearly from a distance of 300 m. Appellant's vehicle entering the main road from a feeder road and bumping the heavy vehicle as it was overtaking in the main road. Appellant's vehicle never stopped at the junction, it just came slowly and entered the main road. Within seconds, the accident occurred.

16. LTA officer (PW.4) confirmed that there were no defects in both vehicles. The accident occurred at a stretch where there was a long broken line. Overtaking is permitted in this area but he stressed that the driver must take precautions.

17. Having referred to ***Pluckwell v Wilson*** (1832, 5C & P375, 172 ER. 1016 and ***Khan v. The State*** Criminal Appeal No. 1 of 1994 where Alderson J 's observation in Pluckwell was cited by Pathik J, the Counsel for Appellant argues that it was PW.1 who drove his vehicle without due care and attention and therefore PW1 should be held responsible not the Appellant.

18. In Pluckwell (supra) Alderson J observed:

> *" ...that the person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better lookout, that he might avoid any concussion, then would be requisite if he were to confine himself to his proper side of the road.*

19. The Counsel for Respondent concedes that, PW1 might also be at fault since he was driving a container truck and he overtook two vehicles in front of him and he should have taken precautions whilst overtaking. However he quite rightly submits that the focus of this appeal should be whether the Appellant was careless when he entered into the main road from the feeder road. It is the Appellant's driving which is on trial. It was PW1 who was on the main road and had the right of way. As stated by the learned Magistrate at paragraph 21 of his judgment: ***"The only disputed issue is whether the accused's manner of driving was without care and attention?"***

20. The Counsel for Appellant argues that the learned Magistrate erred in law when he failed to establish the case of ***R v Lawrence*** [1981] RIR 217 by failing to take into consideration that the Appellant had always maintained due care and attention.

21. In ***Lawrence*** (supra), Lord Diplock formulated a standard direction to the jury based on reckless manslaughter in following terms;

> *"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:*
>
> *First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and*
>
> *Second, that in driving in that manner the defendant did so without having given any thought to be possibility of there being any such risk or, having recognized that there was some risk involved, had nonetheless gone on to take it."*

22. The learned Magistrate adhered to the principle enunciated in ***Lawrence*** (supra) to conclude that the Appellant had not always maintained due care and attention. The learned Magistrate summarized the evidence of each witness, and having properly analyzed the same, he has given a well-considered judgment setting out the facts, and drawing reasonable conclusions from the facts proved before finding the Appellant guilty of careless driving. His Worship found that (at page 51 of Record – paragraph 24):

> *"When considering all these evidence together I find the evidence that accused vehicle came onto the main road without stopping credible and believable. The said road where the accident occurred is a long and straight stretch. I doubt PW1 would have overtaken the vehicles in front of him had he seen accused vehicle coming from the opposite direction. I find on the evidence that accused failed to stop at the junction. I refuse to accept DW2's evidence that he saw accused brake lights for 60 seconds before turning onto the main road. If accused had stopped at the junction for 60 seconds then certainly he would have seen the oncoming traffic including the truck driven by PW1 overtaking the other vehicles. As earlier mentioned it is a long straight road hence his vision of oncoming traffic would have been unhindered. I doubt accused evidence that he was driving for 10–15 seconds on the main road before accident occurred.....It appears from the evidence that accused only slowed down at the junction and turned onto the main road. He didn't stop. Had accused stopped at the junction, he would have clearly seen PW1's vehicle already in the process of overtaking and*

would have then exercised due care and attention and waited until the truck had passed."

23. The learned Magistrate accepted the evidence of the Prosecution and rejected that of the Defence. His Worship's finding is available on evidence and hence justified.

24. The Appellant (DW.1) in his evidence completely denied driving the vehicle without due care and attention. He stated that he stopped his vehicle for 60 second at the junction of Wairuku and singled to turn towards Rakiraki before turning into the main road. He also stated that he watched towards his left and right and only moved his vehicle after the road was clear. He also said that he was driving for 10–15 seconds on the main road before accident occurred.

25. The Appellant's evidence is not plausible and also not supported by other evidence led in trial. If he had stopped at the junction for 60 seconds and watched the road carefully, then certainly he would have seen the oncoming traffic including the truck driven by PW1 overtaking the other vehicles. According to the sketch plan and other witness accounts, it is a long straight stretch hence his vision of oncoming traffic would have been unhindered if he watched the road carefully. Since there was a grown up sugar cane field beside the feeder road towards the side he was turning into, he was expected to take extra precaution to watch the road before entering the main road. PW1 cannot be blamed for his failure to notice Appellant's vehicle because he was already driving in the main road.

26. The Appellant's evidence that he was driving for 10–15 seconds on the main road before accident occurred is not supported by the sketch plan prepared by police. According to this plan, the point of impact is located right in front of the feeder road from where the Appellant emerged.

27. The Defence had called DW.2 to support the version of the Appellant that, before entering the main road, he had stopped his vehicle for 60 seconds at the junction. DW2 said that he went inside the house soon after the Appellant had left and come out again only when he heard the bang. It is implausible that this witness could have seen from the distance he was in and recollected insignificant things like the ones he testified about such as if brake lights were on and single lights were blinking in the vehicle driven by the Appellant. DW2 admitted that he is the brother-in- law of the Appellant. He was home when the police team arrived at the scene. There is no evidence that he had come forward to give a statement

to police to say what he said in court. The Appellant had never told that his son was also in the Hilux when the incident occurred. DW2's evidence is inconsistent and implausible. He is an inevitably an interested witness for Defence.

28. DW3 had seen PW1's vehicle over speeding from his side mirror. According to him, PW1 had crossed a double line in the process of overtaking and had tried to overtake not two but six vehicles. DW3 had also told that the overtaking took place at a bend. DW3 's evidence is not consistent with other evidence led in trial. DW3 is a friend of the Appellant and had come forward to support his friend.

29. DW4 is a sister-in-law of the Appellant and not an independent witness. She was called to show that PW1 was in a hurry to go to Ba. Her version was never put to the PW1 when he was under cross examination. Her evidence did not shake the Prosecution's version of events.

30. For these reasons, I find that the rejection of Defence evidence by the learned Magistrate is rational and justified.

31. The learned Counsel for Appellant has referred the Court to the case of ***Prasad v The State*** [1995] FJHC 65; Haa0026j.94b (30 March 1995). In that case Pathik J had cited cases where a similar factual situation arose. In ***Walker v Tolhurst*** (1976 Q.B.D. RTR. p. 513) the vehicle at fault was to turn to left from a side road bumped a cyclist on the main road. The Court held that "whether or not due care had been exercised was a subjective matter and the question for decision was whether the driver did or did not exercise due care". Lord Widgery C.J. there said at p.515 that:

> *"..... I think that we must recognize that, in general, if a car is seeking to emerge from a side turning into a main road and the driver fails to see a cyclist who is approaching him on his own side of the road, that must more often than not amount to a failure to show due care and attention, but not always."*

32. After giving a careful consideration to the evidence led in trial, I have come to the conclusion that this is not one of those cases in which the appellate court could or should interfere. In this regard I also refer to what Lord Thankerton said in ***Watt (or Thomas) v Thomas*** 1947 1 AER 582 at 587 which reads:

> *"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is*

disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

33. From the learned Magistrate's judgment it is quite clear that His Warship had taken into account all the facts and circumstances that should have exercised his mind before arriving at his conclusion. All the evidence taken as a whole clearly and unmistakably shows that the Appellant coming from the feeder road had put on to the main road without proper lookout or with insufficient lookout or with the misjudgment and as a result collided with a vehicle going on the main road.

34. The evidence on which the trial Magistrate relied was sufficient to justify the conclusion which he reached. I affirm the Judgment of the learned Magistrate at Rakiraki

35. The appeal is accordingly dismissed.

HIGH COURT OF FIJI
LAUTOKA

Aruna Aluthge
Judge

At Lautoka
15th May, 2018

Solicitors: MIQ Lawyers for Appellant
Office of the Director of Public Prosecution for Respondent