

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA 29 OF 2018

(Magistrates' Court Case No. 438 of 2012)

BETWEEN: **ROHIT VIMAL PRASAD**

APPELLANT

AND: **THE STATE**

RESPONDENT

Counsel: **Mr J Reddy for the Appellant**
 Ms A Vavadakua for the Respondent

Date of Hearing: **12 July 2019**

Date of Judgment: **2 September 2019**

JUDGMENT

Background

[1] Following a trial in the Magistrates' Court at Labasa, the appellant was convicted of dangerous driving occasioning death and sentenced to 2 years' imprisonment with a non-parole period of 18 months. This is a timely appeal against conviction and sentence.

Grounds of Appeal

[2] The Petition contains eleven grounds of appeal. However, at the hearing, counsel for the appellant abandoned two grounds. The remaining grounds are:

- (1) That the learned trial magistrate erred in law and in fact in convicting the Appellant on the charge of Causing Death by Dangerous Driving.
- (2) That the learned trial magistrate erred in law and in fact in convicting the Appellant when no evidence was adduced by the Prosecution that the Appellant was driving in a manner dangerous to the public at the time of accident.
- (3) That the learned trial magistrate erred in law and in fact in upholding that the act of the accused in closing his eyes and sleeping for 2 seconds whilst driving is dangerous when in fact the accused's version is "*his eyes suddenly closed for 2 to 3 seconds and when he opens his eyes, the vehicle had bumped the culvert as he was unable to control the vehicle*". Therefore, the learned trial magistrate erred in coming to a different conclusion than what was meant by the appellant. The appellant has not used the words "*sleeping*" in his testimony but the learned trial magistrate has used the said word in paragraph 14 of his judgment which word has created a different meaning of the version given by the appellant.
- (4) That the learned trial magistrate erred in law and in fact when he failed to uphold the defence's submission that the Appellant was driving in a dangerous manner.
- (5) That the learned trial magistrate erred in law and in fact in not considering the fact that the appellant was only travelling between 40 to 50 km/per hour immediately before his eyes suddenly closed for 2 to 3 seconds.
- (6) That the learned trial magistrate erred in law and in fact when he did not consider the post mortem report which does not suggest that the deceased dies as a result of motor vehicle accident but because of extensive infection and ulcers that spread through his blood. The learned magistrate's finding that the injuries received by the deceased from the vehicle accident caused the infection of the blood lead to his death was not substantiated from the Doctor James Kalougivaki's testimony as contained in the judgment.
- (7) That the learned trial magistrate erred in law and in fact when he stated in his judgment by making inference that "*if the accused is tired or fatigue as appears in his defence, than he should informed Sgt Isireli for him to rest for a while as suggested by Fredrick Bull*" when in fact no evidence of tiredness or fatigue was tendered in court as evidence.

- (8) That the learned magistrate erred in law and in fact when he failed to consider the following material facts when he convicted the Appellant for Causing Death by Dangerous Driving.
- (a) That there was no consumption of alcohol nor was he driving under the influence of intoxicating liquor or drugs.
 - (b) That the Appellant was not racing or competing with other drivers;
 - (c) That there was no persistent and deliberate course of very bad driving;
 - (d) That there was no bad behaviour on the part of the Appellant like failing to stop or escaping from the scene of the accident;
 - (e) That the Appellant did not drive recklessly;
 - (f) That the Appellant did not drive in a manner dangerous to another person or persons.
 - (g) That the appellant did not drive at a speed dangerous to another person.
- (9) That the sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case in view of the foregoing grounds:
- (a) That the Appellant was a 1st offender.
 - (b) That the Appellant had a good driving record up to the date of accident.
 - (c) That the Appellant had a good character generally.
 - (d) That the Appellant was remorseful for his actions.
 - (e) That there was no consumption of alcohol nor was he driving under the influence of intoxicating liquor or drugs.
 - (f) That the Appellant was not racing or competing with other drivers.
 - (g) That there was no persistent and deliberate course of very bad driving.
 - (h) That there was no bad behaviour on the part of the Appellant like failing to stop or escaping from the scene of the accident.
 - (i) That the Appellant did not drive recklessly.
 - (j) That the Appellant did not drive in a manner dangerous to another person or persons.
 - (k) That the Appellant did not drive at a speed dangerous to another person.
 - (l) That the Appellant was himself badly injured in the said accident.

- (m) That the learned trial magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances.

Evidence

- [3] At trial, the prosecution led evidence from six witnesses. The appellant gave evidence in his defence. He was represented by private counsel of his choice.
- [4] The incident occurred on the evening of 26 January 2012 at Vulovi, Labasa. Both the appellant and the deceased were police officers. They were on their evening shift attending to official runs when the vehicle driven by the appellant was involved in a collision. The deceased was a passenger sitting on the front seat. The vehicle was a van - Toyota Hilux.
- [5] The first prosecution witness was a Land Transport Authority Officer, Isikeli Kini. Mr Kini examined the accident vehicle and prepared a report. Mr Kini did not find any mechanical defects in the vehicle that may have caused the collision.
- [6] The next witness was Cpl Meo. He interviewed the appellant under caution. The record of interview was tendered by consent. In the record of interview, the appellant gave the following explanation for the collision:

Q48: How did the accident happened?

Ans: I was driving returning from Soaso when my eyes closed for a second or so I only woke up when I felt the vehicle bump into something, by this time I also felt pain on my right leg and I realized that the vehicle had become stationary.

...

Q53: Were you feeling tired before driving or during your driving?

Ans: No

Q54: Were you feeling sleepy at all?

Ans: No

Q55: If you weren't feeling sleepy, then can you tell me what do you mean when you said that your eyes had closed for a few seconds?

Ans: Suddenly my eyes had closed.

Q56: When you say that your eyes suddenly closed, do you mean to say that you had sleepy whilst driving?

Ans: Yes but not on purpose.

...

Q58: Do you wish to add, alter, correct anything in your interview?

Ans: Yes I want to add something. I had requested A/Cpl Bull to find a replacement for me but didn't. This in spite of his assurance that he would get someone to replace me. I didn't get enough rest before resuming duties again. If something could be done to the said NCO since due to his poor decision I am now suffering. I have been doing this 12 hours shift since 01/12/11. My body was fatigued that's why I believe I fell asleep.

[7] The third witness was PC Naiker. He attended to the accident scene after a report was lodged. When he arrived at the scene, he saw the deceased unconscious on the front passenger seat. His head was leaning towards the driver's seat. The vehicle had gone from the left to the right lane before the impact. The point of impact was at a concrete culvert on the right side of the road. The vehicle was facing towards Labasa town. There was no break or tyre marks on the road. The witness drew a sketch plan of the collision scene, which was tendered in court. In cross-examination, the witness said that the deceased did not have the seat belt on when he arrived at the scene.

[8] The fourth witness was a civilian, Pravin Chand. Mr Chand was the first person to arrive at the scene after the collision. He stopped his vehicle. He saw the accident vehicle was a police vehicle. He saw a policeman sitting on the roadside while the other person was on the passenger seat. He called Labasa Police Station and reported the accident.

[9] The fifth witness was DC Bull. He said on 26 January 2012 the appellant was rostered for the evening shift driving duties. When the appellant reported to the station, he handed the vehicle key to him. He said that he also have driven official police vehicle in the past. He said that if the driver is feeling tired or fatigue, there is no harm to park the vehicle and rest for a while before continuing to drive. He said that although the drivers are not required to drive for more than 12 hours, they are supposed to follow instructions of their seniors. He said that he knew that the appellant had done the day shift on the day of the accident but was told to return for night duties.

[10] The final witness for the prosecution was a forensic pathologist, Dr Kalougivaki. He tendered the post mortem report made by the pathologist, Dr Gounder. Dr Gounder was no longer available to give evidence. According to the report, the deceased died of Peasemia associated with infected ulcer. Paesemia is a condition caused by bacterial infection in the blood.

[11] The appellant gave evidence that on 26 January 2012, he was on day shift duties. He commenced work at 6.30am. Cpl Bull was his supervising officer. At around 1.30pm he was directed to go home and return to work at 6pm. On the previous day, he was on a 12-hour shift. When he reported for his night shift duties he was directed to drive and check a flood prone area. The direction was given by Sgt Isimeli. The appellant was a junior officer. His rank was a constable. He could not disobey the directive of his senior. He would be disciplined. The appellant drove the vehicle. There was heavy rain. After attending to the scene, he was returning to the station. The deceased was with him on the passenger seat. His speed before the impact was 40 – 55km per hour. He drove the vehicle on the left side of the road. The appellant described his conduct immediately before the impact as follows:

Suddenly my eyes closed for a few seconds. It suddenly closed. The vehicle bumped the culvert.

[12] In cross-examination, the appellant said:

My eyes suddenly closed – just blink my eyes for few seconds. Suddenly closed for 2 – 3 seconds. When open my eyes realised vehicle bumped the culvert.

[13] He also said:

I was not sleeping when driving the vehicle. Before blink I never felt sleep as everything was alright. I was not feeling sleeping, it was a blink of eye.

[14] The appellant also said that he was tired but not to an extent that he was unable to drive the vehicle.

The issues

[15] Section 97(2) (c) of the Land Transport Act defines the offence of dangerous driving occasioning death as follows:

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 – in a manner dangerous to another person or persons.

[16] The appellant challenges his conviction on two grounds. His first contention is that he did not drive in a manner dangerous to another person. His second contention is that the victim's death was not caused by the impact.

[17] At trial, the appellant did not dispute that he was the driver of the vehicle that was involved in the collision. He disputed driving the vehicle in a manner dangerous to another person and causing that person's death. The prosecution case was that the appellant knew he was feeling fatigue and sleepy before the collision and with that realization he continued driving, risking his passenger's safety. The prosecution submitted that the passenger sustained injuries as a result of the impact. The passenger succumbed to the injuries after he developed other medical conditions while hospitalized. The prosecution submitted that the appellant was criminally liable for the death of the victim by driving a vehicle in a dangerous manner.

[18] The learned trial magistrate accepted the prosecution case and convicted the appellant. The learned trial magistrate came to that conclusion by giving the following reasons in paragraphs 22-25 of his judgment:

The sixth witness for the prosecution is *Fredrick Bull*. On 25 January 2012, the accused was listed for night shift. At 11am the accused was released to go home and come back for the night shift. He met the accused at 7pm when he reported in for the night shift. He handed over the key for fleet 268 to the accused. There was nothing wrong with the vehicle. If fatigue or tired there is no harm to park the vehicle and rest for a while once fit he can commence driving. He knew Sgt Isireli and he passed away 3 months after the accident in 2012 and he attended the funeral.

If the accused is tired or fatigue as it appears to be his defence, than he should informed Sgt Isireli for him to rest for a while as suggested by Fredrick Bull. That would be the best approach the accident would be avoided and Isireli Moce would be still alive.

Is assessing the evidence, and the closing submission of the prosecution and the defence, I am satisfied that the Prosecution has established all the elements of the offence. I find that the Prosecution has proven his case beyond reasonable doubt.

In my judgment, I find the Accused guilty as charged and accordingly, I convicted the Accused as charged.

Cause of death

[19] I first consider the issue whether the impact caused the death of the victim. Section 97 (5) of the Land Transport Act states:

For the purposes of this section, the circumstances in which a vehicle is involved in an impact occasioning the death of, or grievous bodily harm to, a person include if the death or harm is occasioned through any of the following –

(a) the vehicle overturning or leaving a public street while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);

(b) an impact between any object and the vehicle while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);

(c) an impact between the person and the vehicle;

(d) the impact of the vehicle with another vehicle or an object in, on or near which the person is at the time of the impact;

(e) an impact with anything on, or attached to, the vehicle;

(f) an impact with anything that is in motion through falling from the vehicle.

[20] In the present case, it was not in dispute that the point of impact was a concrete culvert after the vehicle went out of the road. The impact was between the vehicle driven by the appellant and an object, that is, a concrete culvert on the side of the road. As a result of that impact the victim did not die at the scene but lost conscious. The bone connecting the victim's neck and spine was disconnected. He was paralyzed and immobile. Due to the immobilization the victim developed bed sores and bacterial infection in his blood. He died within 3 months after the impact.

[21] There was medical evidence that the injuries caused by the impact were serious. As a result of those injuries the victim developed other complicated medical conditions, which eventually led to his death. While the injuries caused by the impact were not the direct cause of death, they substantially contributed to the victim's death. The nexus between the injuries caused by the impact and the cause of the victim's death was proven by the prosecution and the learned trial magistrate did not make an error in finding that the impact caused the death of the victim.

Dangerous manner of driving

[22] The remaining issue is whether the appellant drove his vehicle in a dangerous manner. To prove this element, the prosecution was required to prove that the appellant created a dangerous situation and that that there was some fault on the part of the appellant causing the situation (*Sambhu Lal v. Regina* Fiji Court of Appeal Criminal Appeal

No. 49 of 1986; *Kumar v State* [2002] FJCA 12; AAU0014U.2002S (30 August 2002)). There is no requirement for the prosecution to prove that the appellant realized the dangerous nature of his driving. Whether or not the situation created by the appellant was dangerous must be determined objectively. The fault involved may be no more than slight. It matters not whether the driving was careless, dangerous or reckless.

[23] It was an undisputed fact that immediately before the collision with the concrete culvert on the right side of the road, the vehicle went from the left to the right lane. The appellant was in control of the vehicle when it went on the wrong side and then off the road. Under such a situation the safety of the passenger was put at risk. The situation, when viewed objectively, was dangerous.

[24] The question is whether the appellant was at fault for creating that situation. The prosecution case was that the appellant drove the vehicle off the road because he slept on the wheels and that he was at fault because he continued driving after realizing that he was feeling fatigue and sleepy.

[25] The defence case was that the appellant was not feeling fatigue or sleepy immediately before the collision as to realize that he was creating a dangerous situation for others if he continued driving the vehicle. The learned trial magistrate in his judgment misconstrued the appellant's case when he said that the case for the defence appears to be that the appellant was feeling tired and fatigue before the collision occurred. The appellant relied upon his caution interview and his sworn evidence to point out to his belief that it was safe for him to drive or continue driving on the day in question.

[26] When an accused raises an issue of an honest and reasonable belief on his part that it was safe to drive or to continue driving, the burden is on the prosecution to disprove that the accused had such a belief (*Jiminez v The Queen* (1992) 173 CLR 572).

[27] There was evidence that the appellant may not have had enough rest or sleep from his previous shift before he was given an official directive to drive a vehicle when he reported to work for the night shift duties on the same day. The appellant's evidence was that he obeyed the directive and drove the vehicle. His evidence was that he was

not feeling tired or sleepy immediately before the collision. He said that he was driving at 40-55 km per hour and concentrating on his driving before the collision occurred. He said that the collision occurred because his eyes momentarily closed for a few seconds. In these circumstances, the onus was on the prosecution to disprove that the appellant's belief that it was safe to continue driving was reasonable and honest. The evidence to rebut that belief was lacking and the learned trial magistrate erred in finding that the appellant was at fault in creating a dangerous situation for the passenger in his vehicle. The appellant did not consciously drive his vehicle to the other side of the road to be at fault for creating a dangerous situation. The conviction is not reasonably supported by evidence.

Orders

[28] The appellant's conviction and sentence are set aside. He is acquitted.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Jitend Reddy Lawyers, Barristers & Solicitors for the Appellant
Office of the Director of Public Prosecutions for the Respondent

