

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 218 OF 2019

STATE

V

KUSHAL DUTT

Counsel : Ms. W. Elo for State
: Mr. A.K. Singh for Defence

Dates of Trial : 17, 18, 19, 20 November 2020

Date of Summing-Up : 23 November 2020

SUMMING-UP

Ladies and Gentleman Assessors:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial, to sum-up the case to you. Each one of you will then be called

upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my Summing-Up of the case very carefully and attentively. This will enable you to form your individual opinions as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
3. In other words, you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
4. The counsel for the Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
5. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt on each count rests on the prosecution and never shifts.

7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.

8. Your opinions must solely and exclusively be based upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity. Do not get carried away by emotion. You are expected and indeed required to use your common sense and experience in your deliberations and in deciding

9. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances.

10. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of a witness, you should take into account not only what you heard but what you saw. You must take into account the demeanour or the manner in which the witness gives evidence.

11. Documentary evidence is evidence presented in the form of a document. In this case, the post mortem report is an example if you believe that such a record was made. You can al-

so use real evidence which is exhibited from the witness box for example scars of injuries on a witnesses' body.

12. In this case, two doctors gave evidence as expert witnesses. Expert evidence should not be accepted blindly. You will have to decide the issues before you by yourself and you can make use of doctor's opinion if their reasons are convincing and acceptable to you; and, if their opinions had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case.

13. The Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. Agreed facts in this case are:
 1. THAT KUSHAL DUTT is the accused in this matter.
 2. THAT the complainants in this matter are AKASH SHARMA and BAADAL SHARMA.
 3. THAT on the 14th day of April 2018 till midnight the accused and the complainants were drinking grog.
 4. THAT KUSHAL DUTT on the 15th day of April, 2018 was driving a vehicle registration number IM 115 which was owned by Coca Cola Company limited.
 5. THAT whilst the accused was driving the said vehicle on the date and time of the alleged incident, AKASH SHARMA was seated at the front passenger seat while BAADAL SHARMA was seated at the back passenger seat.
 6. THAT the alleged incident occurred on the 15th day of April, 2018 at Koronivia Road, Nausori.

7. THAT the accused together with the two complainants were taken to the hospital after the accident on the date of the alleged incident.
 8. THAT BAADAL SHARMA was hospitalized at the CWM Hospital after the alleged incident.
 9. THAT the deceased in this case is AKASH SHARMA.
 10. THAT AKASH SHARMA died on the 17th day of April 2018.
 11. THAT a post mortem was conducted on the 18th of April 2018 by Dr. Avikali Mate.
 12. THAT the accused was caution interviewed at Nausori Police Station on the 14th of May, 2018.
14. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT ONE

Statement of Offence

MANSLAUGHTER: Contrary to Section 239 of the Crimes Act 2009.

Particulars of Offence

KUSHAL DUTT on the 15th day of April 2018 at Nausori, in the Eastern Division, drove a vehicle with registration number IM: 115 along Koronivia Road in a manner that caused the death of AKASH SHARMA, and at the time of driving, the said KUSHAL DUTT was reckless as to the risk that his conduct would cause serious harm to another.

COUNT TWO

Statement of Offence

DANGEROUS DRIVING OCCASSIONING GRIEVIIOUS BODILY

HARM: Contrary to Section 97 (4)(b) and section 114 of the Land Transport Act 1998.

Particulars of Offence

KUSHAL DATT on the 15th day of April 2018 at Nausori, in the Eastern Division, drove a motor vehicle with registration number IM: 115 along Koronivia Road, which was involved in an impact occasioning grievous bodily harm to BAADAL SHARMA, and at the time of the impact KUSHAL DATT was driving at a speed dangerous to another person.

15. You should consider the evidence against each count separately. In the event you find the accused guilty of one count you should not simply assume that he must be guilty of other count as well. It is necessary that you consider whether the prosecution has proved each charge beyond reasonable doubt.

16. On the first counts the accused is charged with the offence of Manslaughter. To prove the offence of manslaughter, the Prosecution should prove the following elements beyond reasonable doubt.
 - a. the accused
 - a. engaged in a conduct
 - b. that conduct caused the death of a person
 - c. accused intended to cause serious harm to that person,

 - or

 - accused was reckless as to a risk that the conduct will cause serious harm to the other person.

17. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
18. The element touching causation is very important in this case. The Prosecution must establish that conduct of the accused caused the death of the deceased. You should remember that the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct substantially contributed to the death of the deceased, that is sufficient to satisfy the third element above.
19. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause serious harm to the deceased or that the accused was reckless as to a risk that his conduct will cause serious harm to the deceased. The prosecution should prove only one of the two limbs of this fourth element.
20. In this case, the prosecution is relying only on the second limb of the fourth element that is based on recklessness. An accused will be reckless with respect of a risk of causing serious harm to the deceased, if;
 - a. He was aware of a substantial risk that serious harm will occur due to his conduct;
and
 - b. Having regard to the circumstances known to him, it was unjustifiable for him to take the risk.
21. It is not possible to have direct evidence regarding a person's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.

22. However, if you find that the prosecution has failed to establish any of these elements in relation to the offence of Manslaughter beyond any reasonable doubt; as an alternative, you are then allowed to look at the lesser offence of 'Dangerous Driving Occasioning Death ', though the accused is not formally charged in the Information for that offence.
23. 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.
24. On count 2, the accused is charged with Dangerous Driving Occasioning Grievous Bodily Harm. "A person commits the offence of Dangerous Driving Occasioning Grievous Bodily Harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle in a manner dangerous to another person or persons.
25. In order to justify a conviction on a count of dangerous driving 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 that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation.

26. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case

PW-1 Baadal Sharma

27. Baadal said that on 14 April 2018 he was staying at his brother Sagar's' place in Makoi. He was planning to go to Koronivia, his parent's home, to watch rugby sevens during weekend and spend time with his parents. His deceased elder brother Akash Sharma called him in that afternoon and came to pick him up in his neighbour, Kushal Dutt's, Co-ca-Cola vehicle, bearing Reg. No. IM. 115. When Akash came in, his younger brother Sagar was drinking beer. He sat there for around 5 minutes and then he and Akash left for Koronivia in the same vehicle which was driven by Kushal.
28. When they reached Koronivia it was a bit dark. He met his parents and watched rugby for a while when they were invited by Kushal to have some grog at his residence, which was on the ground floor.
29. He and Akash drank grog with Kushal Dutt at his residence and watched rugby while drinking grog for approximately 2 hours. Afterwards they came to the idea that they go and buy some beer from Nakasi.

30. They left the house at around midnight in the same Coca-Cola vehicle driven by Kushal. Kushal Dutt was driving the vehicle. His elder brother Akash was sitting in the front passenger seat, and he was sitting at the back seat in the middle.

31. They all went to Nakasi Dairy Shop and bought 6 bottles of Fiji gold long neck. He placed it at the back seat where he was sitting. Akash was still seated at the front passenger seat. Kushal Dutt drove the vehicle back at a normal speed- 50 kmh up till Koronivia junction. When he turned into Koronivia road, Kushal suddenly started to drive the vehicle very fast. The speedometer read 163 kph. He could see the speedometer because he was sitting in the middle in the back seat.

32. It was an unmarked road where only 2 vehicles could fit into at a time. As soon as they got into Koronivia Road, Akash told Kushal to slow down as he was travelling at 163 kmh. He himself told Akash to slow down. Kushal literally did not respond. Whilst they were approaching the bridge, they met with an accident. About 3 to 4 minutes into the road, there is a small one way bridge, approximately 10 meters long or less. Only one vehicle can fit into that bridge. He and his brother Akash told number of times to slow down, but Kushal did not respond. Kushal was still driving very fast. It was night time and from a distance, he could see another vehicle, approximately 50 -100 meters away on or near the bridge, coming towards them with its lights on. Even after getting so close, he did not feel anyway that Kushal was slowing down or there was a press on the breaks although they were continuously telling him to slow down.

33. His vision was mainly from the light of the vehicle that they were travelling in and from the oncoming vehicle. He could even recognise the oncoming vehicle and the driver. It was Nishant. He could recognise this person and the vehicle because he was from that area. Then Baadal said that he recognised the vehicle and that he believed that Nishant was driving the vehicle. There were some passengers in that vehicle as well.

34. Kushal did not apply break and he reached the one way bridge but did not go on the bridge. Instead, the vehicle went off road and it flew down and hit the side of the bridge. That is all that he could remember.
35. When he woke up, he found himself at CWM Hospital where he was admitted for approximately 2 to 3 weeks.
36. He had a problem in his diaphragm which caused him to have difficulty in breathing and had to undergo an operation for that. He sustained multiple injuries all over body. The scars of the injuries were shown to you so that you can form an idea as to the extent of injuries he had sustained.
37. When he was discharged from hospital he had missed approximately 2 to 3 weeks of his classes at the university. Kushal wanted to meet him and, on the request of his parents, he met Kushal at Kushal's residence. He was told to suggest in his evidence that instead of him driving the vehicle, his deceased brother Akash was driving the vehicle.
38. He said 'No' to Kushal's suggestion. Kushal said 'it is okay, your brother has passed away'. He further suggested for him to say that, when the vehicle reached the bridge, his brother grabbed the steering wheel and turned it that is how the vehicle went off-road. He got angry, but he could not do much, because he was under a lot of injuries. Kushal said not to worry about the evidence of the police because he had that under control.

39. Under cross-examination, Baadal admitted that he made a statement to police on 5 May 2018, approximately 20 days after the accident. He admitted that in his statement to police he had said that “My brother Akash Shanil Sharma came inside the house and had drinks with me, later we decided to leave for Koronivia.” But he denied that he had said that Akash had drunk beer with him. He said that he was in a crucial state at the time of the statement and didn’t go for picky words and it could mean something else.
40. He denied that he was discharged from hospital after a couple of days after his operation. He said that he wanted to attend his brother’s funeral and that his parents sought permission for him to be released so that he could attend the funeral. After attending the funeral he returned to hospital and was under normal medication.
41. He admitted that he was not wearing seat belt but his brother who was seated at the front passenger seat did. He said that the speedometer was a digital one. Then he said he believe it was digital. He admitted that, in his statement to police, he had not stated that the vehicle was being driven at 163 kmh. He said that he had only told the police that vehicle was travelling at a very high speed.
42. By looking at the photograph tendered by the accused, the witness admitted that there is a bend before the bridge from Lokia side. He said that in night time, literally no lights in road, if vehicles were approaching the bridge from Lokia side, with their lights on, a passenger in a vehicle coming from Koronivia junction side can tell from a distance of about 50 m whether or not a vehicle is coming from the opposite (Lokia) side.
43. He said that when he first saw the oncoming vehicle on the bridge, their vehicle was approximately 20 m away from the bridge. From that distance, and at that speed, he could

recognise the oncoming vehicle and that there were passengers in it. But he did not see who was driving.

44. He denied that the oncoming vehicle came in front of their vehicle towards its left and that Kushal had singled with his headlight to warn the oncoming vehicle that he was coming in front. He denied the proposition that the reason why the accused did not stop the vehicle or apply the break was because he wanted to avoid a head on collision. He said that there could have been a head-on collision if Kushal had driven onto the bridge because the other vehicle was already on the bridge.

PW-2 Avikali Mate

45. Dr. Mate is a forensic pathologist, based at the Forensic Pathology Unit of the Fiji Police Force. Her qualifications were not disputed and her *curriculum vitae* was entered by consent (PE3).
46. She tendered the post mortem report (PMR) (PE4) of the post mortem conducted on the 19 April 2018 at the CWM hospital mortuary for the deceased Akash Sharma.
47. Upon the external examination of the deceased, she noted multiple minor injuries like lacerations, bruising or abrasions on the head, lower lip, upper left hand, and upper chest. She said that those injuries could have been caused by a blunt force trauma.
48. The abdomen showed, bruising in the left lower part. They could have been caused by a blunt force trauma. The next notable findings was the circular opening in the lower ab-

domen exposing underlying the sutured margins or stitches of the colonic tissue, which is part of the large intestine, representing the size of a colostomy. The colostomy is a surgical procedure to divert part of the colon or the large intestine, out of the body so that the stool or the waste products in the intestine is brought out from the body. A colostomy is usually done if there are some obstructions or injuries to the intestines or digestive track in order to divert a part of the intestine outside of the body.

49. Unnatural causes of this type of injury can be from penetrating injuries to the abdomen or blunt trauma to the abdomen as a result of an accident, assault or fall from a height. Linear vertically placed sutured incised wound was also noted representing a laparotomy which is a surgical opening and another small incised wound with latex drainage tube.

50. In the Lumina, which are part of the passage of air way, a mixture of mucus and light brown fluid were seen. The trachea and the bronchi, the main wind pipes or air passages that form the upper air way, were normal in structure. The abnormality was that it contained large amounts of this mixture of mucus and light brown fluids and this was seen to be extending into the smaller air ways that are entering the lung. It can be caused by inhaling substance when it travels into airway or it could get into the airway from the esophagus of the food passage. Usually if a person who is in an unconscious state, still breathing, that could end up in the airway. It can also be caused when a person is at sleep and he had food or fluid in his stomach. They can travel back upwards into the food pipe and then it comes out of the food pipe and can enter the air way. This can usually happen if the person is in an unconscious state.

51. Lungs were more expanded or bigger in size. There were fluids in the lungs and they also contained mucoid or mixture of mucus and light brown fluid which can cause pneumonic changes in the lungs.

52. In thoracic cage made up of the ribs, there were multiple fractures seen with a hemorrhage that could have been caused by a blunt force trauma.
53. In the abdominal cavities, at digestive track or the intestine showed contusions, probably caused by any blunt trauma. Within the abdominal cavity there was excessive amount of a light brown fluid.
54. As per pathologist's medical opinion as to the cause of death, the primary cause of death was "Asphyxiation" which is caused by lack of oxygen in the blood. This is due to aspiration of the gastric content that was seen within the stomach was also seen in the airways and the lungs. The other significant condition that contributed to the death is peritonitis. She agreed that Akash's death could have been caused by the accident referred to in the history.
55. Under cross-examination, the pathologist agreed that if the patient is given pain tablets prior to a surgery to make the patient drowsy and relieve his pain. She agreed that the surgery was successful, because the deceased survived 2 days. She agreed that there were no fatal injuries to the lungs, heart or the brain. She agreed that if those foreign objects would not have entered the airway, this person would not have died. She agreed that if somebody is unconscious, he or she will not be able to cough to remove what is within the airway. She agreed that brown liquid mixed-up with blood found in the airway could be those in the abdomen produced at the surgery. She agreed that the contusions in the intestines and the bruising of the organs are not fatal and could have been fixed in the surgery.
56. She agreed that if the air way where the foreign objects were present was properly looked after, the deceased would have still been alive.

57. That, is the case for the Prosecution.
58. At the close of the Prosecution's case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
59. The accused elected to give evidence under oath and called two witnesses. By electing to give evidence, accused has not assumed any burden to prove his innocence. He has nothing to prove in this case. You must take into consideration the evidence presented by the defence and its version when evaluating evidence.

The Case for Defence

DW-1 Kushal Dutt (Accused)

60. Kushal said that on 14 -04-2018, he invited Akash and his brother Badaal to have "kava" at his place and to watch rugby. Once they had finished the grog at around 11 pm, Akash and Badal insisted for them to drink beer. They went to Nakasi in his company vehicle, Nissan Xtraí IM 115 and bought beer.
61. Akash was sitting in front and Badaal sat at the side of the back seat because the baby car seat was fixed in the middle. He drove the vehicle back along the Kings Street and turned at Koronivia junction. Because both Kings Road and Koronivia Roads were under

construction plus everyone is looking at the company vehicle, he did not drive fast and maintained a speed of 50-60 kmh. His vehicle had only a analog speedometer. (He tendered a manual and a photograph of the dashboard of a Nissan Xtrail 2016 model)

62. Some places of the road were tar sealed, some places loose gravelled, pot holes were there all along. The first wooden bridge is located 1.5 km from Koronivia junction.
63. He tendered some photographs recently taken by him and described the road and its condition. He said that, towards the Koronivia side, there is a bend approximately 50 meters away from the bridge and thereafter the road is straight up to the bridge.
64. He never spotted the oncoming vehicle when he was approaching the bend. It was only from its light he could see it. He could feel that something is coming. He was driving at a normal speed, 50 to 60kmh. He assumed that this oncoming vehicle would go on its left, to be on its side. Instead of that vehicle going towards on its left, it came very fast and came right in front of him. By that time, he had reached the bend. He blinked the headlamp once to warn. At the same time the oncoming vehicle put full beam on and came right in front him. He went blank, and was blinded. He pulled his vehicle towards right because there was ample space on the right. If he had pulled his vehicle towards left, it would have landed in the drain. If he had applied the break and stopped the vehicle, it would have stopped there, but that car would have come on top of him. He finally applied break but didn't, work as the vehicle was already on the loose gravel. His vehicle went on top of the pipe which was situated just beside that bridge. He could not remember what happened after the impact.
65. He said that, at that time, the humps and the sign boards were not there and some parts of the road had only loose gravel and were not tar sealed.

66. He denied having approached Badaal to discuss tampering with evidence. He denied that Akash and Badaal had called out to slow down the vehicle.
67. Under cross- examination, Kushal admitted that back in 2018, he had 10 years' of experience as a driver and was aware of the speed limit in this area to be 60 to 50 kmh.
68. Kushal denied that he was driving at a speed of more than 100kmh and that he was reckless. He agreed that Badaal had sustained serious injuries from the accident. He denied the proposition that he could have stopped the vehicle and, if he did, he would not have headed straight to the other edge of the stream and that if he had not been driving at an excessive speed, he would not have detracted 10m prior to reaching the bridge. He denied that the red mark of the vehicle wouldn't have been on the side of the pipe if it went on top of it.
69. He agreed that the fact that baby car seat had been fixed in the middle of the back seat was never put to Badaal by his Counsel when he gave evidence. He agreed that, at night, he will be able to see the light from the oncoming car from the bend where he took the photograph for a reasonable person to take precautions. He agreed that according to the photographs taken at the time of the accident, there had been sign boards to warn the drivers.
70. Under re-examination, Kushal said that his company vehicle had a black chassis and the extensive damage to the front part was caused due to the fall on the ground.

DW -2 Ritesh Goundar

71. Ritesh from Carpenters said that the Nisan Xtrail T32 vehicles that were supplied to Co-co- Cola Company had analog speedometers. He tendered the manual of the vehicle in evidence.

DW-3 Dr. Sanjivan Padarath

72. Dr. Sanjivan Padarath is a medical officer and a Lecturer at the Fiji National University teaching for fifth and final year medical students. He obtained his degree in Bachelor of Medicine, Bachelor of Surgery in 2013, Post Graduate Diploma Certificate in NCD in 2017 and a Masters degree in Public Health in 2019 form University of Auckland and had 7 years of clinical experience.
73. Referring to the Post Mortem Report, Dr Padarath said that the subcutaneous scalp haemorrhage is not fatal and, in brain, anything fatal was found.
74. Pathologist's finding that trachea and bronchi had large amount of light brown fluid is consistent with aspiration of gastric contents. This would happen if the airway was not protected. If something goes into airway, a conscious person is able to cough and remove that object. However, in this case, it seems that the patient was quite unwell and was not able to protect his airway himself.
75. Site of colostomy and laparotomy in abdomen suggest that there had been a corrective surgery on intestine and if there had been an issue, the surgery would have fixed it.

76. Pain killers are given to the patients after a surgery to make them drowsy and less conscious to take their pain away. If a patient is given those kinds of medicine, he is not able to cough and thereby stop foreign objects like liquid or food going into his airway. If something foreign like food goes to his airways of a patient under such medication, the airways can be blocked. To prevent this incident, before an operation is done, the patient is given a kind of a tube to help the patient breath, and raise the head of the bed.
77. He said that mucoid light brown fluid found in the airway and lungs, is most likely to be gastric content that had come from the stomach, and it had gone there because the airway was not protected.
78. 400ml of light brown fluid and small food particles in the stomach means that the deceased must have eaten at least 3 hours before passing away, because after 3 hours, the stomach empties and goes to the intestine. The stomach needs to be clear before an operation and if it is not possible in an urgent operation, the said two precautionary measures must necessarily be taken to protect the airway.
79. Elaborating on the cause of death directly leading to death as per the PMR, the doctor said that asphyxiation means that the person is unable to breathe and the aspiration is the antecedent cause. There was aspiration of gastric contents, which means that the gastric contents had gone from the stomach to the lungs, and as a result, the person was not able to breathe and that has caused the death.
80. He opined that this is a clear case of medical negligence. Explaining his reasoning, the doctor said that the corrective surgery had been done in the abdominal cavity and the vital organs like the lungs, the brain and heart and the cardiovascular system had been fine

and therefore the patient would have survived if his airway was protected. Even after the operation, the airway should be protected by raising the patient's head.

81. As per the death certificate, aspiration pneumonia is the cause of death which is the result of the asphyxiation and the aspiration of the gastric content. When the gastric contents enter into the lungs the lungs get inflamed causing pneumonia.
82. Under re-examination, the doctor said that, based on the brief history, there was an issue with the intestine which could have been caused by a motor vehicle accident. If the surgery was not conducted, it would have been fatal, if there was no other way. Most of the cases of asphyxiation, if it happens in the hospital setting, is due to medical negligence.
83. He said that after the operation, the deceased had swallowed and that had led to asphyxiation which led to death.

Analysis

84. There are two counts in the information. You are supposed to consider evidence against each count separately.
85. The Prosecution says that the accused drove the vehicle reckless and dangerous manner and this conduct caused the death of Akash Sharma and caused serious injuries to Baadal Sharma.

86. There is no dispute that the accused was the driver of the vehicle at the time of the accident. The third and the fourth elements of Manslaughter are the matters in contention at the trial. First, I would like to deal with the fourth element of Manslaughter which concerns the state of mind of the accused, namely that the accused was reckless as to a risk that his conduct will cause serious harm to the deceased. You have to ask yourselves two questions in this regard.
- (a) Was the accused aware of a substantial risk that serious harm will occur due to his conduct?
 - (b) Having regard to the circumstances known to him, was it justifiable for him to take that risk.
87. On this particular element, the court received two diametrically opposed versions of the events, one from Badaal Sharma, called to give evidence on behalf of the Prosecution, and the other from the accused. The Prosecution relies on the evidence of Baadal Sharma who was seated at the back seat of the vehicle. The accused was the driver at the time of the accident. The factual issue accordingly was one of credibility, that is to say, which account you would accept as correct.
88. The Prosecution says that the accused drove the vehicle excessively fast and when he was engaged in that conduct, he was aware of a substantial risk that serious harm will occur; and having regard to the circumstances known to him, he was not justified in taking the risk.
89. Badaal's evidence is that the accused was driving very fast. When he looked at the speedometer, which he believed to be one of digital, it read 163 kmh. The Prosecution says that the extensive damage to the frontage of the vehicle, and the 10 m long tyre mark as depicted in the undisputed sketch plan support the evidence of Badaal that the accused was driving the vehicle at an excessive speed. The State Counsel argues that the accused,

if he was driving at a normal speed, could have controlled and stopped his vehicle well in advance as soon as he spotted the light of the oncoming vehicle.

90. The Defence disputes Badaal's evidence. The accused maintains that he was driving at a normal speed of 50-60 kmh. To challenge the credibility of Badaal, the Defence highlighted some inconsistencies between his previous statement to police and his testimony in Court. Badaal admits the fact that the speedometer reading 163 kmh is not recorded in his statement to police. The Defence called a witness from Carpenters to show that the speedometer is not one of Digital. The Defence Counsel argues that, given the condition of the roads in Fiji, and particularly of this road, it is inconceivable that a vehicle could have ever been driven at such a high speed.
91. It is a matter for you to decide which version is true and believable. I must tell you that there is no rule of evidence that if you decide to reject some parts of a witnesses' evidence, you should reject it wholesale. You may accept some parts of evidence and reject the rest or reject it as a whole. It's a matter entirely for you. You may have come across people, in their urge to convince others to believe their story, exaggerate things. Having considered entirety of evidence led in trial and the demeanour of the witness, you decide if the witness is telling the truth or not.
92. If you accept the evidence of the Prosecution that the accused was driving at an excessive speed, you may draw the inference that he was aware of the substantial risk involved in his driving that serious harm will occur.
93. If you are satisfied that the accused was aware of the substantial risk involved in his driving, you proceed to consider if the accused was justified in taking that risk in the circumstances known to him.

94. In this regard, Prosecution says that the accused had been a driver for ten years and being a resident of the area and as a regular user of this road he should have been aware of the condition of the road and the risks involved and it was not justifiable for him to take the risk by speeding up his vehicle on this road at night time.
95. Before coming to your final conclusion as to the issue of recklessness, you should take into consideration the explanation advanced by the accused in his evidence to justify the course of action which he said he took.
96. He said that he applied breaks but it did not work. He further said that the oncoming vehicle was coming towards him flashing the headlight on and, to avoid a head-on collision, he cut the vehicle to his right hand side causing it to be driven on the pipe beside the bridge and it finally fell on to the creek.
97. The Prosecution says that the accused is not telling the truth. Having carefully considered the position taken up by the Defence Counsel at the cross-examination of Badaal, the photographs and the sketch plans tendered, you decided if the accused is telling the truth and if he was justified in his conduct.
98. The Defence contends that the Prosecution failed to prove the third element of manslaughter in this case. It took up the position that Akash died because of medical negligence. They say that the cause of death was asphyxiation, and the aspiration was caused by the gastric content entering into the air ways and lungs because the proper precautions were not taken to protect the airway after the operation. Doctor Padarath was called to support their version. He said that the death of Akash is a clear result of medical negligence. You heard what the Pathologist said in her evidence. You decide if the Prosecution has established beyond reasonable doubt that the conduct of the accused caused the death of Akash.

99. If you find that the accused was driving recklessly and that his conduct caused the death of Akash you should find the accused guilty of Manslaughter. If you are not sure if he is reckless but you are sure that he was driving dangerously and the impact caused as a result of his driving caused the death of Akash you should find the accused guilty of the lesser count of Dangerous Driving Occasioning Death. However, if you are not sure his conduct caused the death of Akash but he died of medical negligence, you should not find the accused guilty of any of these offences.
100. If you are sure that the accused drove dangerously but not sure if Akash's death was caused as a result of accused's conduct, you may find the accused guilty of Dangerous Driving Occasioning Grievous Harm, even though the accused is not charged for that offence in the information, if you are satisfied that serious bodily harm was caused to Akash Sharma. I have explained the elements of this offence in relation to the count 2.
101. If you are sure that the accused drove dangerously and, as a result of his conduct, serious bodily harm was caused to Badaal Sharma, you should find the accused guilty on count 2 of Dangerous Driving Occasioning Grievous Bodily Harm.
102. Your opinions should answer the following questions:
- a. Is the accused guilty or not guilty of Manslaughter on Count 1?
 - b. If you find the accused not guilty on count 1, is he guilty or not guilty of lesser offence of Dangerous Driving Occasioning Death?
 - c. If you find the accused not guilty on the above two offences, is he guilty or not guilty of Dangerous Driving Occasioning Grievous Bodily Harm to Akash Sharma?

d. Is the accused guilty or not guilty on count 2?

103. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

104. Any re-directions?

Aruna Aluthge

Judge

At Suva

23 November 2020

Solicitors: Office of Director of Public Prosecution for State

AK Singh Law for Defence