IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 25 OF 2019

BETWEEN: **SHALVIN SHALENDRA KUMAR**

APPELLANT

A N D: **THE STATE**

RESPONDENT

Counsel: Mr. S. Kumar for Appellant
Mr. R. Kumar for Respondent

Date of Hearing: 02nd December 2019

Date of Judgment: 22nd May 2020

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrate's Court in Nausori with one count of Dangerous Driving Occasioning Death, contrary to Sections 97 (2) (b) and 114 of the Land Transport Act. The Appellant pleaded not guilty to the offence; hence, the matter proceeded to the hearing. During the hearing, the Prosecution adduced the evidence of twelve witnesses, and the Appellant gave evidence for the Defence. The learned Magistrate on the 11th of March 2019 delivered the Judgment, finding the Appellant guilty of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (c) of the Land

Transport Act. The Appellant was then sentenced to a period of 32 months imprisonment with a non-parole period of 25 months on the 8th of August 2019. Aggrieved with the said conviction and the sentence, the Appellant filed this Petition of Appeal on the following grounds, *inter alia*;

i) *That the Learned sentencing Magistrate erred in law and fact by not informing and/or advising the Appellant about section 139 of the Criminal Procedure Act 2009; whereby the Appellant had the right to make choice for trial de-novo or continuation of case by new Magistrate; see HAA 040 OF 2013 his Lordship Mr. Justice P. Madigan delivered on the 6th of March 2015 paragraphs 24 to 36 inclusive whereby his Lordship allowed the appeal and ordered retrial.*

ii) *That learned trial Magistrate has erred in law and in fact in convicting the Appellant for Dangerous Driving Occasioning Death contrary to section 97 (2) (c) of the Land Transport Act when the Appellant was not charged for that offences;*

iii) *That learned Trial Magistrate erred in law and in fact when she fail to hold that the Prosecution had failed to prove elements of charge required in Section 97 (2) (b) of the Land Transport Act for which the accused was charged;*

iv) *That the learned trial Magistrate erred in law and fact in convicting an accused person for the offence of Dangerous Driving causing death when there was not a scintilla of evidence of dangerous driving by the accused; see Decision in the case CHANDAR PAL v STATE Supreme Court 1974 delivered on the 17th of January, 1974 delivered by Acting Chief Justice Grant who correctly stated that the cases are not decided on suppositions;*

v) *That the learned trial Magistrate erred in law and in fact in failing to give just and fair decision by failing to evaluate the evidence adduced by Prosecution and the Defence adequately particularly with regard to the material contradiction of the evidences of prosecution witnesses, her Judgment is based upon assumptions and suppositions of what could have occurred which is prejudicial to the accused; see Cr. Case of HAC 0044.2004S SIMIONE KAITANI AND 3 OTHERS per Gates J as he was then now former Chief Justice;*

vi) *That the learned trial Magistrate erred in law and in fact in taking irrelevant considerations into account and left out relevant consideration regarding expert evidence of motor vehicle examiner and speeding expert see case Criminal Appeal No. HAA 29/2009 STATE v NABIKO [2009] FJHC 113 per his Lordship Mr. Goundar J Relevant Paragraphs 9, 10, 11, and 12 of the said Judgment;*

vii) *That the learned trial Magistrate erred in law when she delivered an undated judgment which is contrary to section 142 (c) of Criminal Procedure Act and she did not deliver the said decision within as reasonable time as such she breached Section 15 Sub-Section 3 the Constitution of Republic of Fiji when this case was concluded;*

viii) *That the learned sentencing Magistrate has erred in law when he sentenced the Appellant to 32 months imprisonment on the charge of Sections 97 (2) (c) and 114 L.T.A. 35 of 1998 for which he was not convicted is harsh and excessive considering the circumstancing of offending.*

2. Upon being served with the summons, the Respondent appeared in court. I then directed the parties to file their respective written submissions, which they submitted as per the directions. The appeal then proceeded to the hearing. The learned counsel for the

Appellant, and the Respondent made their respective oral submissions and arguments during the hearing. Having carefully considered the record of the proceedings in the Magistrate's Court, the grounds of appeal, and the respective written and oral submissions of the parties, I now proceed to pronounce the Judgment as follows.

Ground I

3. The first ground of appeal is founded on the contention that the second learned Magistrate failed to inform the Appellant about his rights as stipulated under Section 139 (2) of the Criminal Procedure Act. Section 139 of the Criminal Procedure Act states that:

   i) *Subject to subsections (1) and (2), whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Act or otherwise), by another Magistrate, the second Magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by the second Magistrate, or the second Magistrate may re-summon the witnesses and recommence the proceeding or trial*

   ii) *In any such trial the accused person may, when the second Magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and shall be informed of such right by the second Magistrate when he or she commences the proceedings.*

   iii) *The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced and may order a new trial.*

4. Section 139 (1) of the Criminal Procedure Act has given the second Magistrate discretion either to continue the hearing on the evidence recorded by his or her predecessor or to re-summon the witnesses and recommence the trial. However, the second Magistrate must inform the accused before the exercise of his discretion that the accused has a right to demand the court to re-summon and reheard the witnesses who had already given evidence before the previous Magistrate. If the accused demands as such, the second Magistrate has to re-summon and reheard those witnesses demanded by the accused.

5. In this case, the first learned Magistrate had heard the evidence of the Prosecution and the Defence. Before she delivered the Judgment, she was promoted as an acting Master of the High Court and transferred to the High Court in Suva. The second Magistrate then took over the proceedings of the matter. However, the first learned Magistrate had made her Judgment, which was delivered by the second learned Magistrate on the 11th of March 2019. The second learned Magistrate then sentenced the Appellant on the 8th of August 2019.

6. The Appellant contends that the second Magistrate erroneously failed to inform him about his right to demand to re-summon and reheard the witnesses under Section 139 (2) of the Criminal Procedure Act. Thus the conviction and the sentence are invalid and wrong in law.

7. In this matter, the first learned Magistrate had heard the whole of the evidence adduced during the trial and made her Judgment, finding the Appellant guilty of Dangerous Driving Occasioning Death contrary to Section 97 (2) (c) of the Land Transport Act. The second learned Magistrate has not acted on the evidence recorded before the previous Magistrate to find the accused guilty. He has only sentenced the Appellant upon hearing the mitigation and sentencing submissions of the parties. There was no purpose to re-summon and reheard the witnesses as the previous Magistrate had already determined the guilt of the Appellant. Therefore, this case does not fall under the scope of Section 139 of the Criminal Procedure Act. I accordingly find no merits in the first ground of appeal.

Ground II & III

8. For the convenience of determination, I will determine the second and the third grounds of appeal together. Both grounds are based upon the contention that the learned Magistrate had wrongly convicted the Appellant to the offence of Dangerous Driving Occasioning Death contrary to Section 97 (2) (c) of the Land Transport Act, when he was charged with Dangerous Driving Occasioning Death, contrary to Section 97 (2) (b) of the Land Transport Act.

9. According to the Charge in the Magistrate's Court, the Appellant was charged with one count of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (b) of the Land Transport Act. The statement of offence and the particulars of the offence of the Charge states that:

> ***Statement of Offence (b)***
>
> *DANGEROUS DRIVING OCCASSIONING DEATH: Contrary to Section 97 (2) (b) and 114 of the Land Transport Act No 35 of 19998.*
>
> ***Particulars of Offence (b)***
>
> *SHALVIN SHALENDRA KUMAR on the 7th of May, 2015 at Nausori in the Central Division drove a motor vehicle registration number EJ 760 on the Wainibokasi road, Luvuluvu in a manner which was dangerous to the public having regards to all the in circumstances of the case and thereby caused death to GENESIS TUVANAWA.*

10. Section 97 (2) of the Land Transport Act states that:

> *"A person commits the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle—*

a) *under the influence of intoxicating liquor or of a drug;*

b) *at a speed dangerous to another person or persons; or*

c) *in a manner dangerous to another person or persons.*

11. Megaw LJ in **R v Gosney (1971) 3 All ER 220 pg 224)** defines the driving in a dangerous manner as follows:

> *"We would state briefly what in our Judgment the law was and is on this question of fault in the offence of driving in a dangerous manner. It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively was dangerous, but there must also have been some fault on the part of the driver, causing that situation."*

12. The requirement of the fault on the part of the driver, causing the situation as dangerous driving, has been embedded in Section 97 (2) of the Land Transport Act. Shameem J in **State v Narayan [2009] FJHC 34; HAC188J.2008 (the 6th of February 2009)** has found that the element of fault is necessary for convicting a person to the offence of the Dangerous Driving Occasioning Death.

13. In **Narayan (supra)**, the accused was charged in the Magistrate's Court with one count of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (b) of the Land Transport Act. The Accused pleaded guilty to the offence, and admitted the summary of facts. The learned Magistrate had then convicted the accused and proceeded to the sentencing hearing. The summary of facts revealed that on the 23rd of June 2008, the accused was driving his motor vehicle registration number EV 565 along the Queens Road at Qaributa, Navua. Whilst driving in a manner dangerous to the public, he lost control of his vehicle, it veered into the wrong lane, and collided with two other vehicles. It then collided with a third vehicle, driven by Preetika Lal (the deceased), who died within minutes of the impact.

14. The learned Magistrate then found that the summary of facts had not disclosed as to how the accused was driving dangerously. The matter was then referred to the High Court to review the conviction entered by the learned Magistrate. Shameem J in reviewing the conviction, found that:

> *"The difficulty for the learned Magistrate in this case however, was not just that she could not sentence because she did not know how dangerously the accused drove. The difficulty was that the facts failed to disclose any fault at all. The conviction, as she rightly pointed out was a nullity."*

15. In view of section 97 (2) of the Land Transport Act and the above discussed judicial precedents, Section 97 (2) (a) (b) and (c) has created three distinct offences based on three different categories of faults caused by the accused. *(**vide Naidu v State [2018] FJHC 135; HAA07.2017 (the 2nd of March 2018)**)* Accordingly the main elements of the offence of Dangerous Driving occasioning Death contrary to Section 97 (2) (b) are that:

    i) The accused
    ii) drove a vehicle
    iii) which was involved in an impact
    iv) occasioning the death of a person
    v) at a speed dangerous to other persons.

16. The main elements of the offence of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (c) are that:

    i) The accused
    ii) drove a vehicle
    iii) which was involved in an impact
    iv) occasioning the death of a person

v) in a manner dangerous to other persons.

17. Accordingly, the offence under Section 97 (2) (b) is founded on the allegation that the accused had driven the vehicle at a speed dangerous to other persons. Such a speed has made the situation as dangerous driving.

18. I have discussed the main elements of the offence of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (b). I now examine the Charge against the Appellant.

19. Sections 58 and 61 of the Criminal Procedure Act has stipulated the main ingredients of the charge or information. It states that:

"Every charge or information shall contain—

i) A statement of the specific offence or offences with which the accused person is charged; and

ii) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged."

20. Section 61 Criminal Procedure Act states that:

i) *A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*

ii) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.

iii) The charge shall contain a reference to the section of the law creating the offence.

iv) After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.

21. Accordingly, the statement of offence and the particulars of offence are the two main components of the Charge. The statement of offence describes the offence, and the particulars of offence explain the nature of the charge. It is not required to use the language of legal parlance in the statement of offence and particulars of offence. It should be in ordinary language, avoiding as far as possible the use of technical terms. Moreover, it is not necessary to state all the essential elements of the offence in the statement of offence.

22. The Fiji Court of Appeal in **Shekar & Shankar v State (Criminal Appeal No AAU0056 of 2004)** discussed the purpose of a charge, where it held that:

> *"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as it reasonably practicable, it is not necessary slavishly to follow the section in the Act."*

23. In **State v Singh (Criminal Appeal No AAU0097 of 2005S)** the Fiji Court of Appeal expounded the purpose of the particulars of offence, where it observed that:

> *"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the Prosecution adduces."*

24. Accordingly, the statement of the offence discloses the offence with which the accused is charged, while the particulars of the offence explain the nature of the offence.

25. In this case, the statement of the offence has disclosed the offence of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (b) of the Land Transport Act. The particulars of the offence have not properly explained the nature of the alleged offence. It has not disclosed the alleged manner of driving, which caused the situation as dangerous.

26. The statement of offence had accurately described the offence with reference to the relevant section in the Land Transport Act. The only omission in the particulars of offence is the nature of the fault. Wherefore, I find that the statement of offence and particulars of offence disclose the offence of Dangerous Driving Occasioning Death contrary to Section 97 (2) (b) of the Land Transport Act, but with incomplete particulars. Hence, the charge is not bad or unknown to the law but defective with incomplete particulars.

27. Unfortunately, neither the learned Magistrate nor any of the parties noticed the said defectiveness and proceeded to the hearing. Even at the conclusion of the Prosecution case, the learned Magistrate has failed to understand the said defect. She had finally found this defect, probably two years after the completion of the hearing when she was doing the Judgment in 2019.

28. Having found the said defectiveness of the Charge, the learned Magistrate had erroneously concluded in paragraphs 3 and 4 of her Judgment that the particulars of the offence have disclosed an offence under Section 97 (2) (c). She had further concluded that if the Prosecution intended to charge the Appellant under Section 97 (2) (b), the Prosecution needs to prove that the Appellant was driving at a speed dangerous to others. Alternatively, if the Prosecution intended to charge the Appellant under Section 97 (2) (c) as disclosed in the particulars of the offence, the Prosecution needs to prove the Appellant was driving in a manner dangerous to others. The learned Magistrate had said in paragraphs 3 and 4 of the Judgment that:

> *(3) "Looking at the particulars of the offence, they do not lay out particulars to section 97 (2) (b) but is that of Section 97 (2) (c).*

(4) *"If the Prosecution intends to rely on Section 97 (2) (b) they will need to prove that Shalvin was driving at a speed dangerous to the public alternatively relying on the particulars of the offence they need to prove that Shalvin drove the vehicle in a manner dangerous to another person (s)."*

29. It appears that the learned Magistrate had erroneously concluded the particulars of the offence had disclosed an alternative offence to the offence as stated in the statement of the offence. As discussed above, the particulars of the offence only explain the nature of the offence and do not disclose an offence with which the accused is charged. (*vide Section 59 of the Criminal Procedure Act*). If the Prosecution intended to charge the Appellant with alternative counts of either under Section 97 (2) (b) or 97 (2) (c), it must be disclosed in the statement of offence and explained in the particulars of the offence.

30. The Appellant was entitled to know the basis upon which the State had presented the case against him; and, that basis had not been anything else other than on the basis disclosed and explained in the Charge. (***vide Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019)***).

31. In **Yang Xieng Jiong (supra)**, the accused was charged with one count of Murder based on individual liability. However, the Prosecution presented the case during the hearing on the basis of aiding and abetting two other accomplices. The Fiji Court of Appeal found that the trial of the accused was a mistrial.

32. Apparently, in this case, the Prosecution had presented their evidence-based on Section 97 (2) (b) of the Land Transport Act. The sixth, seventh, and the tenth witnesses of the Prosecution had adduced evidence regarding the speed of the bus driven by the Appellant. The Appellant had pointed out and presented evidence to establish that he failed to stop the bus due to a technical fault. Hence, it appears the Prosecution, as well as the Defence had conducted the trial on the basis that the Appellant had driven the bus at a speed dangerous to others. On the contrary, the learned Magistrate had found the Prosecution had conducted

the hearing on the alternative basis either under Section 97 (2) (b) or 97 (2) (c) of the Land Transport Act.

33. Shameem J in **Rao v State [2007] FJHC 81; HAA102J.07S (the 6th of December 2007)** had outlined the correct approach in dealing with a summary of facts or the evidence that do not disclose the offence as charged but a lesser offence, where her Ladyship has stated that:

> *"When a Magistrate finds, on an outline of facts, that the facts disclose a lesser offence, then the matter should be pointed out to the prosecutor. The prosecutor can then withdraw the charge and file another, alleging the lesser offence. If he or she does not, then the Magistrate should vacate the guilty plea and proceed to trial on the basis of a not guilty plea. At the end of the prosecution case, he may advise the parties that he considers there is insufficient evidence to support the charge, but there is sufficient evidence to support the lesser offence. The Accused should be given an opportunity to cross-examine any of the witnesses again on the lesser charge so he or she is not prejudiced. At the end of the trial the Magistrate may convict of the lesser offence."*

34. In view of the above-discussed reasons, I find the conviction entered against the Appellant is wrong and unsafe. I accordingly find merits in the second and third grounds of appeal.

Ground VIII

35. In view of the above findings, I do not wish to proceed to the remaining grounds of appeal against the conviction. However, I make some observations regarding the eighth ground of appeal, which is against the sentence. According to the Judgment of the first learned Magistrate, the Appellant was convicted for the offence of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (c) of the Land Transport Act. However, the second learned Magistrate, who replaced the first learned Magistrate, had sentenced the Appellant

to the offence of Dangerous Driving Occasioning Death contrary under Section 97 (2) (b) for which the Appellant was not convicted. The sentencing of the Appellant to an offence for which he has not been convicted is wrong and cannot be stand.

36. Having found that the conviction entered against the Appellant is wrong in law, I now proceed to determine whether the court could order for a retrial pursuant to Section 256 (2) (c) of the Criminal Procedure Act.

37. Waidyarathne JA in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order for a retrial comprehensively. His Lordship observed that:

> *"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it.*
>
> *Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the Appellant due to non-availability of evidence at the new trial may fevour an acquittal of the Appellant."*

38. The prosecution case is founded on the evidence of twelve witnesses, including few eyewitnesses. I am mindful of the date on which this alleged offence took place, and the time the Appellant has served his sentence so far. However, it is my opinion that the strength of the prosecution case and the interest of justice have outweighed the prejudicial impact on the accused if an order of retrial is granted. Hence, I find a retrial against the Appellant would serve the interest of justice.

39. In conclusion, I make the following orders:

i) The appeal against the conviction and the sentence is allowed.

ii) The conviction is set aside, and the sentence is quashed.

iii) A retrial is ordered before another Resident Magistrate.

iv) The Appellant is ordered to appear before the Nausori Magistrate's Court as directed by the Court.

40. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

At Suva
22nd May 2020

Solicitors
Sunil Kumar Esq. for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.

Judgment read in Court
on 22-05 2020