

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 354 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**MICHAEL JUNIOR MOW**

**Counsel** : Mr. M. Vosawale for the State  
Ms. S. Nasedra and Ms. N. Mishra for the Accused

**Hearing on** : 27 – 29 January 2020

**Summing up on** : 31 January 2020

**Judgment on** : 04 February 2020

**JUDGMENT**

1. The accused is charged with the following offences;

***FIRST COUNT***

*Statement of Offence*

***Manslaughter: contrary to Section 239 of the Crimes Act, 2009.***

*Particulars of Offence*

***MICHAEL JUNIOR MOW*** on the 2<sup>nd</sup> day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of **PAULO BELAGIO** and at the time of driving, the said **MICHAEL JUNIOR MOW** was reckless as to the risk that his conduct would cause serious harm to another.

***SECOND COUNT***

*Statement of Offence*

***Manslaughter: contrary to Section 239 of the Crimes Act, 2009.***

*Particulars of Offence*

**MICHAEL JUNIOR MOW** on the 2<sup>nd</sup> day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of **VILIVO MASAU** and at the time of driving, the said **MICHAEL JUNIOR MOW** was reckless as to the risk that his conduct would cause serious harm to another.

**THIRD COUNT**

*Statement of Offence*

**Dangerous Driving Occasioning Grievous Harm:** contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.

*Particulars of Offence*

**MICHAEL JUNIOR MOW** on the 2<sup>nd</sup> day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to **JONE RAVILI**.

**FOURTH COUNT**

*Statement of Offence*

**Dangerous Driving Occasioning Grievous Harm:** contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.

*Particulars of Offence*

**MICHAEL JUNIOR MOW** on the 2<sup>nd</sup> day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to **VILIMONI TUIVUYA**.

2. When the plea was taken at the commencement of the trial, the accused pleaded not guilty to the first two counts but pleaded guilty to the third and fourth counts. Therefore, the assessors were required to provide their opinion only on counts one and two. They were further directed to consider the alternative offence of aggravated dangerous driving occasioning death in respect of each of those charges.
3. The assessors have returned with the unanimous opinion that the accused is guilty of the first count and the second count as charged.
4. I direct myself in accordance with the summing up delivered to the assessors on 31<sup>st</sup> January 2020 and the evidence adduced during the trial.

5. The prosecution led the evidence of four witnesses. The accused opted to remain silent.
6. Given the admitted facts and the evidence given by the prosecution witnesses, there is no dispute over the following facts;
  - a) That the accused was the driver of the vehicle EP 113 which collided with the 5 ton delivery truck IL 915 on 02/11/17 at Viwa along the Kings Highway;
  - b) Paulo Belagio was a passenger in the vehicle EP 113;
  - c) Paulo Belagio died as a result of the collision between the vehicles EP 113 and IL 915;
  - d) Vilivo Masau was a passenger in the vehicle EP 113;
  - e) Vilivo Masau died as a result of the collision between the vehicles EP 113 and IL 915; and
  - f) Vilimoni Tuivuya and Jone Ravili sustained serious injuries after the collision.
7. Therefore, with regard to the first count and the second count, the prosecution had to prove beyond reasonable doubt that the accused's conduct caused the death of the deceased and that the accused was reckless as to the risk that his conduct will cause serious harm to the deceased.
8. In the opening address the prosecutor said that the accused was reckless because *"at the time the accused had driven the vehicle he was intoxicated, having been aware of his state of intoxication, he undertook to drive the vehicle . . . having regard to his state of intoxication and the manner he drove the vehicle, death was likely to occur"*.
9. Accordingly, the alleged conduct that caused the death of each deceased according to the prosecution is driving the vehicle whilst being intoxicated. To

prove recklessness as regards to the offence of manslaughter the prosecution should prove beyond reasonable doubt that the accused was aware of a substantial risk that serious harm will occur due to his conduct and having regard to the circumstances known to him it was unjustifiable for him to take that risk.

10. That evening on 02/11/17, the accused had driven to Korovou Town twice and there was no evidence of any incident that took place to warn the accused of any risk. As stated before, the position taken by the prosecution was that the accused was reckless because he undertook to drive the vehicle, having been aware of his state of intoxication. It was the evidence of PW3 that even at 80mg Ethanol per 100ml of blood which is the legal limit, 'a person would have lack of self-control, poor coordination, poor judgment and even memory loss'. Since the evidence does not disclose the point in time the accused reached the above limit of 80mg of alcohol per 100ml of his blood, (that is, whether it was before he engaged in driving the vehicle in the evening in question or during the time he was driving with the two deceased persons) there is a doubt as to whether there was a possibility for the accused to have realized that there was such a risk as the one that is required to establish the offence of manslaughter under section 239 of the Crimes Act, given the effect of alcohol.
11. However, it is pertinent to note that the offence of manslaughter being a basic intent offence, self-induced intoxication cannot be considered to determine whether the relevant fault element existed [See section 30(1) of the Crimes Act]. The dilemma in this case is that the prosecution relies on the level of intoxication of the accused at the material time to establish the fault element which is recklessness.
12. If you disregard the evidence in relation to the level of intoxication, what is left with regard to the accused's conduct is;

- a) The accused knew that there was a mechanical defect in the vehicle which caused the vehicle to pull to the right [cautioned interview, PE10];
  - b) The accused had been drinking beer while driving [PW1];
  - c) The vehicle driven by the accused [EP 113] crossed over to the opposite lane, returned to the proper lane and again crossed over to the opposite lane and then collided with the oncoming vehicle IL 915 [PW2].
13. It is clear that the immediate reason for the collision is the fact that the vehicle driven by the accused crossing over to the opposite lane while the vehicle IL 915 was coming towards EP 113 head-on, on that (opposite) lane.
14. The evidence was not clear as to the reason for EP 113 to cross over to the opposite lane. Even though PW2 said during cross-examination that the accused could have avoided the accident if he was not speeding, there was no evidence to suggest that the accused was driving at an excessive speed. The evidence of PW2 was that the speed limit in that area was 80kmph.
15. On the other hand, the accused had said in his cautioned interview that his vehicle had a defect where the steering wheel was pulling to the right. On this account, though the cautioned interview revealed that the accused knew about this defect, no evidence was presented to show that it was not safe for the said vehicle to be driven given that defect. In fact, it appeared to me that the attention of the prosecution was not drawn to the knowledge of the accused about this purported defect until it was mentioned by the defence counsel during the submissions made at the no case to answer stage. Moreover, the immediate response of the prosecutor was that the accused may have lied to the police regarding the said mechanical defect; that he may have made it up.
16. Therefore, there may have been a possibility that the vehicle in fact pulled itself towards the right side at the time of the incident and that the accused did not

realise that the defect was so serious until such time. In other words, a strong and an irresistible inference could not be drawn to the effect that the accused was reckless as to the risk of causing serious harm to the others by driving the vehicle EP 113, even his admission in PE10 to the effect that he knew that there was a mechanical defect is considered to be true. On the other hand, this admission serves as an explanation as to how the vehicle may have crossed over to the opposite lane and suggests that it may have been something beyond the accused's control.

17. Considering the paragraphs 12 to 16 above, it is clear that the evidence in this case does not establish beyond reasonable doubt that the accused was driving at an excessive speed or in such a manner that is sufficient to draw the irresistible inference that the accused was reckless as to the risk of causing serious harm to the deceased.
18. All in all, in my judgment, the prosecution has failed to prove the fault element relevant to the offence of manslaughter under section 239 of the Crimes Act, beyond reasonable doubt. Thus, the prosecution has failed to prove the first and the second charges.
19. However, I find that the admissions made and the evidence led in this case is sufficient to prove the offence of aggravated dangerous driving occasioning death under section 97(1) of the Land Transport Act, beyond reasonable doubt, in relation to the first count and the second count.
20. The fact that the accused drove the vehicle EP 113, the fact that the said vehicle was involved in an impact and the fact that the said impact occasioned the death of each deceased are admitted facts. Given the evidence of PW3, which I accept, it is proved beyond reasonable doubt that the accused had 175mg of alcohol per 100ml of blood where the legal limit is 80mg. Therefore it is established beyond

reasonable doubt, not only that the accused at the time of the impact was driving the vehicle under the influence of intoxicating liquor, but also the fact that more than the prescribed concentration of alcohol was present in his blood.

21. In the light of the forgoing, I am unable to agree with the unanimous opinion of the assessors. I find the accused not guilty of the first count as charged but find the accused guilty of the alternative offence of aggravated dangerous driving occasioning death. I find the accused not guilty of the second count as charged but find the accused guilty of the alternative offence of aggravated dangerous driving occasioning death.
  
22. Third and the fourth charges are on the face of it defective as the particulars of each charge does not disclose the elements of the relevant offence. The elements of the offence under section 97(4) are;
  - i.* the accused;
  - ii.* drove a vehicle;
  - iii.* that vehicle got involved with an impact occasioning grievous bodily harm to another person;
  - iv.* at the time of the impact, the accused was 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.
  
23. Each charge (three and four) reads that the accused drove “*in a manner that caused grievous bodily harm to*” the respective victim. Therefore, the particulars does not include any of the three limbs in the fourth element above. However, the accused did not raise any objection in relation to the two charges and he had pleaded guilty to the said charges. Moreover, in the statement of the offence the section cited is 97(4)(c), indicating that the accused is charged under the third limb of the fourth element. Considering these circumstances, I have decided to allow the said charges to remain as no prejudice was caused to the accused.

24. However, given the admissions and the evidence led in this case, I have decided to convict the accused for the offence of dangerous driving occasioning grievous harm under section 97(4)(a) of the Land Transport Act in relation to the third and the fourth counts. Though the evidence in this case do establish the more serious offence of aggravated dangerous driving occasioning grievous harm under section 97(3)(a) of the Land Transport Act, since the prosecution has opted for the lesser offence and the accused had pleaded guilty to that lesser offence, it would not be proper to convict the accused of the said aggravated form of the offence.
25. In the result;
- a) I find the accused not guilty of the first count as charged, but guilty of aggravated dangerous driving occasioning death under section 97(1) of the Land Transport Act and convict accordingly;
  - b) I find the accused not guilty of the second count as charged, but guilty of aggravated dangerous driving occasioning death under section 97(1) of the Land Transport Act and convict accordingly;
  - c) I find the accused guilty of the offence of dangerous driving occasioning grievous harm under section 97(4)(a) of the Land Transport Act in relation to the third count and convict accordingly; and
  - d) I find the accused guilty of the offence of dangerous driving occasioning grievous harm under section 97(4)(a) of the Land Transport Act in relation to the fourth count and convict accordingly.



A handwritten signature in blue ink, appearing to read 'Vinsent S. Perera'.

Vinsent S. Perera

JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused**