

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 153 OF 2018S

STATE

vs

SAIMONI UBITAU

**Counsels : Mr. J. Nasa and Ms. D. Rao for State
Ms. L. Manulevu and Mr. A. Waqanivavalagi**

Hearings : 8 and 9 February, 2021.

Sentence : 12 February, 2021.

SENTENCE

1. On the first day of the trial on 8 February 2021, defence counsel indicated to the court that the accused wanted to plead guilty to the two counts in the information. On 18 May 2018, when the information was put to him, in the presence of his counsel, he pleaded not guilty to the same. The accused, through his counsel, said, he was pleading guilty out of his own free will and no one forced him to take such approach.

2. The following information was then read and explained to him and he said he understood them:

“Count One

Statement of Offence

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

Particulars of Offence

SAIMONI UBITAU, on the 9th day of September, 2017 at Nasinu, in the Central Division, drove a motor vehicle with registration number LR 4358 along Kings Road, Nasole, in a manner that caused the death of MOHAMMED MAHFUZUR RAHMAN, and at the time of driving, the said SAMONI UBITAU was reckless as to the risk that his conduct would cause serious harm to another.

Count Two

Statement of Offence

DANGEROUS DRIVING OCCASIONING GRIEVOUS BODILY HARM: *Contrary to Section 97 (4)(c) and Section 114 of the Land Transport Act 35 of 1998.*

Particulars of Offence

SAIMONI UBITAU, on the 9th day of September, 2017 at Nasinu, in the Central Division, drove a motor vehicle with registration number LR 4358 along Kings Road, Nasole, which was involved in an impact occasioning grievous bodily harm to MOHAMMED FAIYAZ, and at the time of the impact SAIMONI UBITAU was driving in a manner dangerous to another person or persons.”

3. The accused then pleaded guilty to the two counts in the information. The case was then adjourned to 9 February 2021 to enable the prosecution to prepare their summary of facts, antecedent report, victim impact report and sentence submission. The defence was also given time to prepare their plea in mitigation and sentence submission.

4. On 9 February 2021, the prosecution presented their summary of facts in court. Basically they were as follows. The accused, on 9 September 2017, the day of the incident, was 24 years old, single and living with his parents at Nakasi Road, Nakasi. He was employed as a salesperson for Global Electronics. From 2010 to 2012, he was driving vehicles on a learner's permit. In 2012, he acquired his driving license. On the date of the incident, he had 7 years driving experience. He reached Form 6 level education at LDS College in 2008.
5. The deceased in count no. 1 was Mr. Mohammed Mahfuzur Rahman, and he was 56 years old. He was a tourist visiting Fiji from Bangladesh for a religious gathering. He was residing at the Nasole Mosque along Kings Road in Nasinu. Mr. Mohammed Faiyaz was the complainant in count no. 2. He was 35 years old at the time and a school teacher by profession. He was also residing at the Nasole Mosque along Kings Road, Nasinu.
6. According to the prosecution, the incident unfolded in the following way. On 8 September 2017, a Friday, the accused went to work at Global Electronics. He worked from 8 am to 5 pm from Monday to Saturday. After work on 8 September 2017 at 5 pm, he went to attend a family gathering at Lami. The family was collecting money ("soli") for a proposed family re-union in Sigatoka. The family gathering went on until 10 pm. Thereafter the accused went to a friend's place in Lami Village to drink grog ("yagona"). There were six people in the grog session. The grog session started on or about 10.30 pm on 8 September 2017 and finished at about 5 am on 9 September 2017 – a period of 6 ½ hours.
7. After that, the accused and his friends obtained some liquor from a nearby "black market" shop. He consumed 2 ½ cans of Woodstock liquor. They finished drinking liquor at 6.15 am. The accused then decided to return home to Nakasi. Here was a

24 year old young man, who worked 8 am to 5 pm (9 hours) on 8 September 2017, attended a family gathering from about 5 pm to 10 pm (5 hours), drank yagona from 10.30 pm to 5 am the next morning (6 ½ hours) and drank liquor from 5 am to 6.15 am (1 ¼ hours). He had been awake for the last 22 hours approximately. He had not slept on the night of 8 September 2018. He was a “walking time bomb!”

8. The accused then, at 6.15 am on 9 September 2017, decided to drive home to Nakasi in a Honda hybrid rental car registration number LR 4358. From Lami Village, he drove along Queens Road, through Reservoir Road, through Princess Road, then onto Kings Road at Samabula, then along Kings Road enroute to Nakasi. The road was not busy. It was slightly drizzling. He was driving on the outer left lane at 55 to 60 kmph. There was no defect in the vehicle prior to his driving. He passed the Valelevu roundabout. As he passed the Muairewa Taxi stand, he fell asleep. For a person who had not slept in the last 22 hours, this was not unusual. It was waiting to happen.
9. At 6.30 am on 9 September 2017, the deceased and Mr. Mohammed Faiyaz had just finished their morning prayers at the Nasole mosque. Thereafter they decided to have a morning walk along Kings Road. They were 3 meters from the mosque gate, walking on the footpath, when the accused’s vehicle, travelling between 55 to 60 kmph, while the accused was asleep at the wheel, climbed onto the footpath and collided first with Mr. Mohammed Faiyaz and then the deceased. Mr. Faiyaz was thrown into a drain on the side of the footpath. The deceased was dragged by the car, which hit and broke in two a nearby electricity post, and the car later came onto the Kings Road. Only then did the deceased fell off the car. Mr. Faiyaz and the deceased were later taken to CWM Hospital. Mr. Faiyaz was attended to medically and was hospitalized for the next 20 days. He suffered grievous bodily harm, which were itemized in his medical report and his discharged reports. The deceased died

at 1.42 pm on the same day. The cause of his death was severe traumatic head and brain injuries and other traumatic injuries, as a result of the incident mentioned above.

10. The matter was reported to police. An investigation was carried out. Accused was caution interviewed by police on 10 September 2017. He admitted the offences to police. He was taken to the Nasinu Magistrate's Court on 11 September 2017. On 17 April 2018, the Magistrate Court referred the matter to the High Court.
11. After the prosecution presented the above summary of facts, the court checked with the accused on whether or not he admitted the above summary of facts. Through his counsel, the accused admitted the above summary of facts, including the particulars of the offences in count no. 1 and 2. The court then found the accused guilty as charged on both counts and convicted him accordingly on both counts.
12. Prosecution said the accused was a first offender. The antecedent report and the second complainant's victim impact report was not challenged by defence. The defence then presented the accused's plea in mitigation in writing and verbally. They said the accused was now 26 years old, married with no children. He is a first offender. He pleaded guilty on the day of the trial. He had been unemployed since the incident, but received \$350 per week allowance from his father, for his assistance in his security business. He was remanded in custody for 31 days. He co-operated with police during the investigation. The parties later presented their sentence submission.
13. In the case of **State v Jessica Jasmine Joan Hill**, Criminal Case No. HAC 247 of 2013S, High Court, Suva (12 August 2015), I relied on the case of **State v Vilikesa**

Rinavuaka, Criminal Case No. HAC 239 of 2012S, High Court, Suva, and I said the following:

“Manslaughter”, as a criminal offence, is still considered by society and the law makers of this country as a serious offence, and thus had prescribed a maximum sentence of 25 years imprisonment (see section 240 of the Crimes Decree 2009). In the repealed Penal Code, Chapter 17, the maximum penalty for manslaughter was life imprisonment (see section 201 of the Penal Code)

Despite the above change in the legislation, the law and tariff on manslaughter is still the same, as when I said in State v Milika Videi, Criminal Case No. HAC 068 of 2009S, High Court, Suva, the following, “...Manslaughter is a serious offence. It carries a maximum sentence of life imprisonment. However, case laws in Fiji seemed to show that penalties for manslaughter range from a suspended sentence to 12 years imprisonment. Sentences in the upper range were reserved for cases where the degree of violence was high and the provocation given was minimal. Sentences at the lower end of the scale were often reserved for cases where the violence used was minimal and the provocation given was in the extreme: see Kim Nam Bae v The State, Fiji Court of Appeal, Criminal Appeal No. AAU0015 of 1998S: The State v Frances Bulewa Kean, Criminal Case No. HAC 037 of 2007; State v Amali Rasalusalu Criminal Case No. HAC 003 of 2003, High Court, Suva. The actual sentence passed will depend on the presence or otherwise of strong mitigating and/or aggravating factors...”

14. I relied on the same authorities in the case of State v John Subramani Gounder, Criminal Case No. HAC 194 of 2016S, High Court, Suva (30 January 2018). It must be noted that previous authorities had confirmed that sentences in the upper range were reserved for cases where the degree of violence was high and the provocation given was minimal. The word “violence” encompasses various forms and means, if you look at previous cases. It could include a punch, the use of a piece of timber or a weapon such as a spear, an iron rod, a cane knife, a chopper, a knife, a gun or a motor vehicle driven recklessly. All the above caused serious violence and harm to a person, leading to their deaths. In my view, the previous cases are saying that

whatever the means that caused violence and harm to a person, the punishment must be the same, if the degree of violence used are high and the provocation given was minimal. In my view, the same approach must be given to motor vehicle manslaughter, as a matter of precedent and in order to protect the public.

15. On the second count of “dangerous driving occasioning grievous bodily harm”, the maximum sentence applicable is a \$2,000 fine or a 2 years prison sentence, with a 12 months disqualification from driving (sections 97 (4)(c) and 114 of the Land Transport Act 1998).

16. In this case, the aggravating factors were as follows:
 - (i) **Reckless Driving Attitude.** As I said in **State v Jessica Jasmine Joan Hill**, Criminal Case No. HAC 247 of 2013S, High Court, Suva (12 August 2015), pages 4 and 5, “... A person driving a motor vehicle on any Fiji road is in charge of an instrument capable of unleashing extreme violence on other road users, if he or she, is not careful. It is equivalent to a person walking down the street with a loaded pistol in his or her hand. One wrong or careless move will result in an innocent bystander being seriously wounded or killed.” In this case, you had 7 years driving experience, two years on a learner’s permit and 5 years on a full license. It was well understood by all drivers, who had a valid driver’s license that, when you are in charge of a motor vehicle, you must be fit, sober and well aware of the surrounding circumstances. You must have had a proper sleep and rest before you drive a vehicle. This is the legal duty of care you owe to all road users, drivers and pedestrians alike. In this case, you did exactly the opposite. You worked from 8 am to 5 pm on 8 September 2017, attended a family gathering from 5 pm to 10 pm, drank “yaqona” from 10.30 pm to 5 am the next morning, drank liquor from 5 am to 6.15 am on 9 September 2017, and then you decided to

drive from Lami Village to your home in Nakasi in a motor vehicle. In a sense, you had voluntarily allowed yourself to be in charge of an instrument capable of unleashing extreme violence on other road users, if you are not careful. It is equivalent to you walking along Kings Road at Nasole with a loaded pistol, waiting for someone to be accidentally killed or wounded, with one single wrong move on your part. Your wrong move was sleeping at the wheel while the vehicle was travelling at 55 to 60 kmph at the time. No wonder the deceased was killed and Mr. Mohammed Faiyaz suffered grievous bodily harm. The degree of violence unleashed by you in this case was in the extreme, and the provocation by the deceased and Mr. Mohammed Faiyaz was non-existent. As a matter of fairness, you must expect a custodial sentence, as a deterrence to others. This custodial sentence is necessary to protect the public.

- (ii) **The loss of a life and the injuries to the second complainant.** The deceased's right to life had been taken away by you, and you have obviously caused pain and suffering to his family. You have also caused pain and suffering to the second complainant, as a result of the injuries you had caused him. His way of life had been altered negatively by your offending.

17. The mitigating factors were as follows:

- (i) At the age of 26 years, this was your first offence.
- (ii) Although you pleaded guilty on the first day of the trial, and approximately 2 years 9 months 16 days after first call in the High Court, you nevertheless, saved some court time.
- (iii) You were remanded in custody for 31 days.
- (iv) You co-operated with police during their investigation and when cautioned, you admitted the offence.

18. I will start with the more serious offence of manslaughter (count no. 1). I will start with a sentence of 6 years imprisonment. I add 2 years for the aggravating factors, making a total of 8 years imprisonment. I deduct two months for time already served, while you were remanded in custody for 31 days, leaving a balance of 7 years 10 months. For co-operating with police during the investigation, I deduct 10 months, leaving a balance of 7 years imprisonment. For being a first offender, I deduct 1 ½ years, leaving a balance of 5 years 6 months. For pleading guilty at trial time, I deduct 6 months, leaving a balance of 5 years. Had the guilty plea being given earlier or at first call, you would have got an additional 1 year discount. On count no. 1, I sentence you to 5 years imprisonment.
19. For count no. 2 (dangerous driving occasioning grievous bodily harm), I sentence you to 12 months imprisonment, and you are disqualified from driving for 12 months.
20. The summary of your sentences were as follows:
- | | | |
|------|---|---|
| (i) | Count no. 1: Manslaughter: | - 5 years imprisonment |
| (ii) | Count no. 2: Dangerous Driving Occasioning
Grievous Bodily Harm: | - 12 months imprisonment
And disqualified from
driving for 12 months,
effective forthwith. |
21. Because of the totality principle of sentencing, I direct that all the above sentences are to be made concurrent to each other, making a final total sentence of 5 years imprisonment.
22. Mr. Saimoni Ubitau, for the “manslaughter of Mr. Mohammed Mahfuzul Rahman” (count no. 1) and for “driving dangerously occasioning Mr. Mohammed Faiyaz grievous bodily harm” (count no. 2) at Nasinu in the Central Division, on 9

September 2017, I sentence you to 5 years imprisonment. I will not fix a non-parole period. You are also disqualified from driving any motor vehicle for 12 months. You are to surrender your driving license immediately.

23. You have 30 days to appeal to the Court of Appeal.



Solicitor for the State
Solicitor for Accused

: Office of the Director of Public Prosecution, Suva.
: Legal Aid Commission, Suva.

A handwritten signature in blue ink, appearing to be "Salesi Temo".

Salesi Temo
JUDGE