

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 4 OF 2024

BETWEEN: PENI LEBAIVALU QALODAMU APPELLANT

A N D: THE STATE RESPONDENT

**Counsel:** Ms. K. Boseiwaqa for Appellant  
Mr. T. Naimila for Respondent

**Date of Hearing:** 09<sup>th</sup> May 2024

**Date of Judgment:** 13<sup>th</sup> September 2024

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## J U D G M E N T

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- The Appellant was charged in the Magistrate's Court sitting at Nasinu with one count of Dangerous Driving, contrary to Sections 98 (1) and 114 of the Land Transport Act and one count of Driving a Motor vehicle whilst there is present in the blood concentration of alcohol in excess of the prescribed limit, contrary to Sections 103 (1) (a) and 114 of Land Transport Act. The particulars of the offences as charged in the Magistrate's Court are:

### *COUNT 1*

#### *Statement of Offence*

**DANGEROUS DRIVING:** *Contrary to Section 98 (1) of the Land Transport Act 35 of 1998.*

*Particulars of Offence*

*PENI LEBAIVALU QALODAMU on the 3<sup>rd</sup> day of June 2023 at Nasinu in the Central Division drove a motor vehicle registration number IA 364 along Ratu Dovi Road in a manner, which was dangerous to the public having regard to all circumstances.*

**COUNT 2**

*Statement of Offence*

**DRIVING MOTOR VEHICLE WHILST THERE IS PRESENT IN THE BLOOD A CONCEENTRATION OF ALCOHOL IN EXCESS OF THE PRESCRIBED LIMIT:** *Contrary to Sections 103 (1) (a) and 114 of the Land Transport Act 35 of 1998.*

*Particulars of Offence*

*PENI LEBAIVALU QALODAMU on the 3<sup>rd</sup> day of June 2023 at Nasinu in the Central Division being the driver of Vehicle Registration Number IA 364 along Ratu Dovi Road whilst there was present in 100 milliliters of blood a concentration of 118.8 milligrams of alcohol which was in excess of the prescribed limit.*

2. The Appellant pleaded guilty to the two counts, and then the learned Magistrate sentenced him on the 24th of October 2023. The Appellant was sentenced to four months imprisonment and suspended for two years for the first count. In respect of the second count, the Appellant was fined five penalty units in the sum of \$500 and, in default, seven days imprisonment.
3. Aggrieved with the said sentence, the Appellant filed this appeal on the following two grounds:

## APPEAL AGAINST SENTENCE

### Ground 1

*The learned Resident Magistrate had erred in law in exercising her discretion to enter a conviction and not considering a non-conviction in consideration of the Appellant's circumstances.*

### Ground 2

*The learned Resident Magistrate had erred in law and principle in imposing a disqualification of 12 months which is excessive in the circumstances of the Appellant considering that it was his first offence.*

4. In an appeal against the sentence, the Appellate Court will examine whether the sentencing Magistrate had fallen into error in exercising his/her sentencing discretion. In doing so, the Appellate Court would take into consideration the following factors:
  - i) Whether the sentencing Magistrate acted upon a wrong principle;
  - ii) Whether the sentencing Magistrate allowed extraneous or irrelevant matters to guide or affect him;
  - iii) Whether the sentencing Magistrate mistook the facts;
  - iv) Whether the sentencing Magistrate failed to take into account some relevant considerations.
  
5. The errors in sentencing discretion may be apparent either from the reasons given in the sentence or by making inferences from the length of the sentence. (*vide; Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)*). In doing that, the Appellate Court will determine whether the sentence given by the lower Court is within the permissible range. Even if there has been an error in exercising the sentencing discretion, the Appellate Court will still dismiss the Appeal if the Appellate Court considers the sentence given by the lower Court comes within the permissible sentencing range. (*vide; Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)*)

## First Ground of Appeal

6. In his mitigation submissions, the Appellant appears to have pleaded for an order to pay a fine without a non-conviction. As stipulated under Section 15 (1) (f) of the Sentencing and Penalties Act, the sentencing Court has been vested with a discretionary power to order the Offender to pay a fine without recording a conviction as one of the sentencing options.
7. It is prudent to consider the appropriate procedural framework as expounded in the Criminal Procedure Act with respect to taking the plea of the Accused in the Magistrate's Court. Section 174 of the Criminal Procedure Act deals with taking the Accused's plea in the Magistrate's Court. I do not wish to examine the whole of the section and only focus on Section 174 (1) and (2), which state that:
  - i) *The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
  - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*  
*(emphasis is mine)*
8. It is clear, as it appears under Section 174 (2) that the Accused shall be convicted if he pleads guilty and admits the truth of the charge before the learned Magistrate proceeds to sentence; hence, the learned Magistrate cannot proceed to sentence before convicting the Accused. Under such circumstances, it is uncertain whether the learned Magistrate is *functus officio* insofar as convicting the Accused, whereby restraining the learned Magistrate, during the sentencing process, to record a non-conviction pursuant to Section 15 and Part 9 of the Sentencing and Penalties Act.



9. Goundar J in Singh v State [2009] FJHC 128; HAR003.2009 (23 June 2009) held that once the conviction is properly entered, the learned Magistrate is *functus officio* in respect of the conviction. In Singh v State (supra), the Accused person pleaded guilty to the offence, and the learned Magistrate then convicted the Accused. However, the learned Magistrate then found that the summary of facts did not support the facts of the alleged offence. The learned Magistrate then transferred the matter to the High Court to review the conviction pursuant to Section 325 of the Criminal Procedure Code. Considering the conviction entered by the learned Magistrate, Goundar J held:

*“In the present case, the learned Magistrate after recording the conviction realized that the facts did not support the charged offences. Thus, a review is justified. This is because once the conviction is formally recorded; the learned Magistrate is functus officio as far as the conviction is concerned.”*

10. As such, it is important to determine whether the learned Magistrate is *functus officio* insofar as the conviction; thus, the learned Magistrate is prevented from recording a non-conviction under Section 15 or Part 9 of the Sentencing and Penalties Act.
11. Section 183 of the Criminal Procedure Act deals with the procedure of making a decision in the Magistrate’s Court after a full hearing of the evidence presented by the Prosecution and the Defence. It states that:

*“The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either—*

- a) find the accused guilty and pass sentence or make an order according to law; or*
- b) acquit the accused; or*
- c) make an order under the provisions of Part 9 of the Sentencing and Penalties Act 2009.*

12. There is a discernible difference in using the words under Section 183 (a) when the Court pronounces the Accused had committed the offence as charged in its judgment or decision. Instead of using the word “convict” as under Section 174 (2), Section 183 (a) deployed the word “ find the accused guilty” and then proceeded to the sentencing phase of the proceedings. There is not much difference in the High Court proceedings as similar wording has been utilized in the corresponding sections relevant to recording the guilty plea of the Accused in the High Court. (*vide; Sections 221, 237 and 240*) I do not wish to discuss the provisions relating to the High Court Proceedings as the focus of this Appeal is on the Magistrate’s Court proceedings.
13. I shall now proceed to discuss the relevant provisions in the Sentencing and Penalties Act concerning the recording of non-conviction once the Accused is found guilty of the offence. Section 15 of the Sentencing and Penalties Act outlines a range of sentencing orders that the Court could impose on the Accused. Among other sentencing options, the Sentencing Court could:
- i) *with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a community-based corrections order under the Community-Based Corrections Act 2018;*
  - ii) *with or without recording a conviction, order the offender to pay a fine;*
  - iii) *without recording a conviction, order the release of the offender on the adjournment of the hearing and subject to the offender complying with certain conditions determined by the court;*
  - iv) *without recording a conviction, order the dismissal of the charge; (vide; Section 15 (1) (e), (f), (i) and (j) of the Sentencing and Penalties Act)*

14. Moreover, Section 45 of the Sentencing and Penalties Act stipulates that the Court, upon being satisfied that the Accused is guilty of an offence, could dismiss the charge and not record a conviction.
15. As stated above, I shall now proceed to discuss whether the learned Magistrate is *functus officio* to record a non-conviction after convicting the Accused under Section 174 (2) of the Act. If it is not, whether the meaning of “convict”, as stated under Section 174 (2), is different to the meaning of “conviction\” as stipulated under Section 15 and Part 9 of the Sentencing and Penalties Act.
16. The House of Lords in **S (an infant) v Manchester City Recorder and Others [1969] 3 All ER 1230** has discussed the meaning of “convict the accused without hearing the evidence if the Accused pleaded guilty in the Magistrate’s Court under Section 13 (3) of the then Magistrate’s Court Act 1952 of the UK. The central plank of the issue in **S (an infant) v Manchester City Recorder and Others ( supra)** was that the juvenile offender requested the Magistrate’s Court to change his plea after pleading guilty to the offence on an earlier occasion, which is obviously distinct from the issue at hand in this matter. However, I find the observation made by their Lordships in **S (an infant) v Manchester City Recorder and Others ( supra)** regarding the “convict the Accused upon the plea of guilty and then proceed to consider to determine the suitable method of dealing with the Accused” has a persuasive assistance insofar to comprehend the meaning of “convict” as stated under Section 174 (2) of the Criminal Procedure Act. Outlining the scope of Sections 13 (3) and 14 (3) of the Magistrate’s Court Act 1952 of the UK, Lord Morris of Borth - Y - Gest adverted that:

*“Although reference is often made to the “acceptance” of a plea there is no necessity for any formal pronouncement. All that is denoted by such an “acceptance” is that a court is proceeding to consider what is the appropriate course to take in regard to a person who, as the court thinks, with full appreciation of what he is doing and with adequate understanding of what is involved in and what are the ingredients of a*



*charge preferred against him, has fully and freely acknowledged and confessed to the court that he is guilty of the charge. That the court is fully entitled to accept a plea is made clear by s 13(3) of the Magistrates' Courts Act 1952, which provides that: "If the accused pleads guilty, the court may convict him without hearing evidence". The words "convict" and "conviction" in the Act are not always used with the same meaning. If, however, the word "convict" in this subsection is used in the sense of a finding of guilt (as opposed to a finding of guilt coupled with the making of some order) the question that is now raised is whether the fact that there is an acceptance of a plea of guilty made by an accused (which may amount to "convicting the accused"—see s 14(3))—prevents a court from allowing a withdrawal of the plea at any time before sentence."*

17. Lord Morris of Borth - Y - Gest in **S (an infant) v Manchester City Recorder and Others** (**supra**) then went on to observe the summary procedure in the Magistrate's Court so as to explain that though there is, sometimes, space of time between the pleading of guilty or finding of guilty and the sentencing process so as to determine the appropriate step to deal with the Accused, it is still one judicial process and not two standalone separate stages. Lord Morris of Borth - Y - Gest observed that:

*"If magistrates are trying a case summarily they will not have completed their duty in regard to the case until they either: (a) dismiss the case; or (b) find the accused guilty and deal with him on that basis. The finding of guilt may involve reaching a conclusion in regard to disputed or contested facts. It may involve proceeding on the basis of or "accepting" a confession made in court by way of an unequivocal and unambiguous plea of guilty which so far as the court can tell was intentionally made with full appreciation of all that it involved. But if there is a finding of guilt the court will only have advanced part of the way in the discharge of its duty. There must be a separation in time between the one part of the duty and the other part. If the court has to consider what course to follow in regard to someone who is*



*found to be guilty it will be relevant and generally necessary to have information which will include information as to previous convictions. It would be quite wrong for the court to have such information before the time when there is a finding of guilt. But after such time and before the court has disposed of the case by making whatever order it deems appropriate the court is still engaged on its duty....”*

18. Lord Morris of Borth - Y - Gest then held that:

*“The word “conviction” may sometimes be used to denote merely a finding of guilt and sometimes to denote such a finding followed by an appropriate order. The language of s 14(3) of the Act of 1952 illustrates use in the former sense. A magistrates’ court may in order to determine “the most suitable method of dealing with the case” exercise its power to adjourn “after convicting” the accused and before sentencing him or otherwise dealing with him. So “the case” is merely adjourned. It is still before them. The magistrates are clearly not functus officio.”*

19. Lord Reid, in his speech in **S (an infant) v Manchester City Recorder and Others (supra)**, made a similar observation about the different meanings given to the word “conviction”, where Lord Reid said:

*“.....Much of the difficulty has arisen from the fact that “conviction” is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt.....”*

20. Drawing the observations made in **S (an infant) v Manchester City Recorder and Others (supra)** together, it is apparent that the meaning of “convict the Accused upon pleading guilty but before the sentencing” does not denote the final disposal of the matter but the finding of guilty based on the plea of guilty made by the Accused. Hence, the Magistrate

is not *functus officio* with respect to the *officium* entrusted upon him, i.e. to complete the entire adjudication process.

21. I shall now proceed to appraise whether the observation made by their Lordships in **S (an infant) v Manchester City Recorder and Others** (*supra*) could be applied *mutatis mutandis* within the legal structure stipulated under the Criminal Procedure Act and Sentencing and Penalties Act. In doing that, it is apt to consider the effect of applying these two Acts to each other. Section 3 (2) (f) of the Criminal Procedure Act states that:

*The provisions of this Act shall be subordinate to, and shall be read and applied subject to any provisions of another Act making specific provisions in relation to—*

- f) the sentencing of offenders and the imposition and enforcement of penalties applied by the courts in criminal proceedings;*

22. Meanwhile, Section 3 (1) of the Sentencing and Penalties Act states that the Act applies to all Courts exercising criminal jurisdiction. Hence, it is apparent that the phrase “shall convict the Accused and Proceed to sentence” stipulated under Section 174 (2) of the Criminal Procedure Act should be interpreted and applied subject to Section 15 and Part 9 of the Sentencing and Penalties Act.
23. Section 15 of the Sentencing and Penalties Act gives the Sentencing Court a jurisdiction to employ any of the sentencing options expounded under the sub-paragraphs (a) to (k) if the Court find a person guilty of an offence; hence, Section 15 is a forward-looking section from the finding of guilty made by the learned Magistrate pursuant to either Section 174 (2) or 183 of the Criminal Procedure Act. Consequently, the learned Magistrate is not required to revisit his or her conclusion of finding guilty made according to Section 174 (2) or Section 183 of the Criminal Procedure Act when exercising his/her sentencing jurisdiction under Section 15 of the Sentencing and Penalties Act. As discussed above, in **Singh v State (Supra)**, Goundar J expounded that the Magistrate is *functus officio* of

revising or reconsidering the conviction entered upon a guilty plea. Hence, the observation of Goundar J in **Singh v State (supra)** does not apply to Section 15 and Part 9 of the Sentencing and Penalties Act as the learned Magistrate is not revisiting or reconsidering the conclusion of finding guilty of the Accused under the procedure outlined in those Sections. This conclusion could equally apply to the procedure outlined under Section 45 of the Sentencing and Penalties Act.

24. Section 16 (2) and (3) of the Sentencing and Penalties Act outline the legal consequence of finding guilty without recording a conviction, as per Section 15 of the same Act. It states that:

- i) *Except as provided by any law, a previous finding of guilt without recording a conviction in the exercise of a power under section 15 must not be taken into consideration for any purpose.*
- ii) *A finding of guilt without recording a conviction in the exercise of a power under section 15 —*
  - a) *does not prevent a court from making any other lawful order that is authorised under any law as a consequence of the finding of guilt; and*
  - b) *has the same effect as if a conviction had been recorded for the purpose of*
    - (a) *appeals against sentence;*
    - (b) *proceedings for variation or breach of a sentence; and*
    - (c) *proceedings against the offender for a subsequent offence.*

25. Considering all the reasons discussed above, it is apparent that the phrase “convict the Accused,” as stated under Section 174 (2) of the Criminal Procedure Act, means the judicial pronouncement of the finding of guilt in consequence of the plea of guilty made by the Accused. It does not mean the final disposal of the matter. On that note, the conviction or non-conviction referred to under Section 15 and Part 9 of the Sentencing and



Penalties Act means the final disposal of the matter. As a consequence of these reasons, the learned Magistrate is not *functus officio* to record a non-conviction pursuant to Sections 15 (1) (e) (f) (i) and (j) or 45 of the Sentencing and Penalties Act after convicting the Accused according to Section 174 (2) of the Criminal Procedure Act.

26. Recapitulating the above discussion, once the learned Magistrate convicts the Accused under Section 174 (2) of the Criminal Procedure Act, he or she is *functus officio* insofar as the finding of guilty, as he or she has completed and judicially adjudicated that the Accused is guilty of the offence as charged, but not *functus officio* with respect to the remainder of the judicial process, i.e., to complete the sentencing process. Hence, the learned Magistrate is not *functus officio* in recording a non-conviction pursuant to Section 15 or Part 9 of the Sentencing and Penalties Act.
27. Sharma J in Chandra v State [2022] FJHC 778; HAA028.2022 (16 December 2022) observed that:

*25. The Magistrate's Court upon finding an accused guilty must convict before proceeding to sentence under the Sentencing and Penalties Act. The effect of sections 15(1) (e), (f), (i) or (j) of the Sentencing and Penalties Act is to give a discretion to the sentencer not to record a conviction or dismiss a charge as a sentencing option based on the mitigating factors and the nature of the offence committed.*

*26. An order not to record a conviction as per section 15(1) (e), (f), (i) or (j) read with section 16(1) of the Sentencing and Penalties Act forms part of the sentence. Accordingly, if a sentencer uses the discretion not to record a conviction in terms of the above sub sections then the conviction entered under section 174(2) of the Criminal Procedure Act is to be regarded as a conviction not recorded.*

28. While respectfully concurring with Sharma J’s above conclusion, it is my view, based on the above-discussed findings, that the convicting of the Accused under Section 174 (2) of the Criminal Procedure Act has a different meaning than the conviction or non-conviction referred to under Section 15 and Part 9 of the Sentencing and Penalties Act, that it is not necessary to term the convicting of the Accused under 174 (2) of the Criminal Procedure Act as a conviction not recorded, if the Sentencing Court subsequently opted to record a non- conviction pursuant to Section 15 or Part 9 of the Sentencing and Penalties Act.
29. Regarding this appeal, I observe that the learned Magistrate did not convict the Appellant before she proceeded to sentence him. She only found him guilty as charged at the beginning of the sentence, which is not technically incorrect (*vide; paragraph 5 of the Sentence*). However, I propose that it is a good practice to use the exact wording as stipulated under Section 174 (2) of the Criminal Procedure Act, i.e. to convict the Accused before embarking on the sentencing of the Accused under the Sentencing and Penalties Act.
30. It is evident that the consequences of recording non-conviction under Section 15 (1) (f) are distinctly different from the consequences of Sections 15 (1) (c) (i) and (j) and 45 of the Sentencing and Penalties Act.
31. The Supreme Court of Fiji in **R R Latchan v The State - SC Crim - CAV0005.2023 - 29.08.24** discussed the effect of Section 15 (1) (f) of the Sentencing Penalties Act, where Qetaki J observed that:

*“48. As well, the effect of an order under section 15 (2) (f) of the Sentencing and Penalties Act, needs to be clarified. The provision relates to situations where the accused person/ offender has been: (i) found guilty, and (ii) the court has ordered either that the conviction be recorded or that the conviction be not recorded, and (iii) subject to the order made (conviction recorded or otherwise), the offender is ordered to pay a fine.”*

32. Accordingly, the Accused is still required to pay a fine if the Sentencing Court records a non-conviction under Section 15 (1) (f) of the Sentencing and Penalties Act, which follows a term of imprisonment if the Accused defaulted the paying of the fine. (*vide*; Section 37 of the Sentencing and Penalties Act).
33. Gates CJ in **State v Batiratu [2012] FJHC 864; HAR001.2012 (13 February 2012)** outlined the factors that need to be considered if the sentencing Court envisages a discharge of the Accused without conviction, where Gates CJ outlined that:

*“[29] The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:*

- i) The offender is morally blameless.*
- ii) Whether only a technical breach in the law has occurred.*
- iii) Whether the offence is of a trivial or minor nature.*
- iv) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*
- v) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.*
- vi) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.*

34. I am conscious that the effect of the discharge without a conviction materially differs from that of a fine without a conviction. Qetaki J in **R R Latchan v The State - (supra)** distinguished the Batiratu guidelines from Section 15 (1) (f) of the Sentencing Penalties Act, where His Lordship observed that:



"46) ..... It is important to note that, whilst *Batiratu* and the legal and sentencing principles pronounced there are important and helpful, the case is distinguishable as the factors directly relate to the application of section 45 (Release without conviction) of the Sentencing and Penalties Act. The facts and circumstances of that case are also different from the present, involving an offender who had assaulted a police constable while on duty. The Magistrate had imposed a bond of \$500 for the offender to maintain peace and good behaviour for 2 years, without recording a conviction. The sentence was given under section 45(2) of the Sentencing and Penalties Act 2009. The subsection (2) states:

*"A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the undertaking to comply with the conditions applying under subsection (2), and any further conditions imposed by the court."*

35. After considering the factors enunciated under Section 16 (1) (a) (b) and (c) of the Sentencing and Penalties Act, which I discuss below, Qetaki J in **RR Latchan v The State - (supra)** still considered the *Batiratu* guidelines in making the decision regarding a recording of non-conviction with a fine under Section 15 (1) (f) of the Sentencing and Penalties Act. Therefore, I find *Batiratu* guidelines could be applied *mutatis mutandis* when the Sentencing Court envisages recording a non-conviction with a fine pursuant to Section 15 (1) (f) of the Sentencing and Penalties Act.
36. Section 16 (1) (a) (b) and (c) of the Sentencing and Penalties Act provides the circumstances that should be taken into consideration when the Sentencing Court contemplates recording a non-conviction:

*"In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including—*

- a) *the nature of the offence;*
- b) *the character and past history of the offender; and*
- c) *the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects."*

37. I shall now consider all these factors in seriatim.

### **The nature of the Offences**

38. Certain conducts in our ordinary lives are inherently capable of causing a risk of harm to others. Driving a motor vehicle carries an inherent risk or danger of damaging other vehicles or causing serious harm to others. (*vide Blackstone's 2020 Ed p 25; Hill v State [2018] FJCA 123; AAU109.2015 (10 August 2018)*) Such risks or dangers have been mitigated with a set of laws, rules and regulations governing the manner of driving motor vehicles. Sections 98 (1) and 103 (1) of the Land Transport Act are such laws that stipulate to maintain the driving of the drivers with due care and attention. Section 103 (1) of the Land Transport Act has prescribed that it is an offence if a person drives or attempts to drive a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood. According to Regulation 3 of the Land Transport (Breath Test and Analysis) Regulations 2000, the prescribed concentration of alcohol is 80 milligrams of alcohol in 100 millilitres of blood.
39. The legal regime in Fiji has found that driving a vehicle while having over 80 milligrams of alcohol in 100 millilitres of blood is a prohibited act. Such an action has the potential to undermine the driver's capacity to drive the vehicle with care and proper attention, thus exposing the public and other vehicles to the inherent risk associated with motor vehicle driving.
40. In this matter, the Appellant had driven his car alone on Ratu Dovi road while having 118.8 milligrams of alcohol in 100 millilitres of blood. While driving in such a manner, his car went to the oncoming lane and collided with the vehicle coming along that lane. Hence, I

concur with the conclusion of the learned Magistrate that the nature of this offence is serious. Applying the Batiratu guidelines, it is uncontestably apparent that the Appellant's alleged conduct is neither morally blameless nor a technical breach of the law. As I explained before, this is not a trivial or minor offence.

**The character and the history of the offender**

41. The Appellant was a first offender and maintained an unblemished character until this offending.

**The impact of a conviction on the offender's economic or social well-being and on his or her employment prospects.**

42. The Appellant's main contention is that this conviction would affect his employment and future prospects. Besides stating such, there is no material evidence or facts to confirm that his employment condition is such that his employment would be terminated upon such a conviction recorded by the Court. In addition, the learned Counsel for the Appellant informed this Court, during the hearing of this Appeal that the Appellant is still employed at the same employment besides that his employer is aware of the sentence imposed by the learned Magistrate. Of course, this is a knowledge of hindsight which was not before the learned Magistrate when she made the sentence. It is essential to provide compelling evidence or facts to the Court establishing that the recording of a conviction certainly affects the Accused's employment prospects if the Accused seeks a fine without a non-conviction. A mere statement that the conviction might affect in such a manner is undoubtedly not sufficient.
43. Considering the foregoing reasons, I find no compelling reasons to intervene in the learned Magistrate's conclusion of recording a conviction and imposing a fine pursuant to Section 15 (1) (f) of the Sentencing and Penalties Act. Hence, I find no merits in the first ground of appeal.



## **Second Ground of Appeal**

44. Considering the serious nature of this offending, where the Appellant had blatantly disregarded the safety of other road users and vehicles on the road while driving his car, having consumed alcohol over the prescribed limit, and then moving to the lane of his opposite direction and collided with a car came along the opposite lane, I find the learned Magistrate's conclusion of disqualifying the driving licence of the Appellant for 12 months sufficiently reflect the criminality and culpability of this offending. Hence, I find no merit in the second ground of appeal.
45. In conclusion, I make the following order;
- i) The Appeal is dismissed.
46. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read "R. D. R. T. Rajasinghe", is written over a horizontal dotted line.

**Hon. Mr. Justice R. D. R. T. Rajasinghe**

### **At Suva**

13<sup>th</sup> September 2024

### **Solicitors.**

Office of the Legal Aid Commission for Appellant.

Office of the Director of Public Prosecutions for the Respondent.