

IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION

Criminal Case No: 10 - 2019

STATE

-v-

**VIKLESH SHYAMAL PRASAD**

Before : RM Fotofili L.  
For Prosecution : Inspector Lenaitasi S. [ Police Prosecution ]  
Accused : Ms Henao G. [ Legal Aid Commission ]  
Date of Sentence : 10<sup>th</sup> January 2020

**SENTENCE and RULING**

**BACKGROUND**

1. **VIKLESH SHYAMAL PRASAD**, the prosecution had preferred the following charge against you:

Count 1

**Statement of Offence**

**DANGEROUS DRIVING**: Contrary to section 98 ( 1 ) and 114 of the Land Transport Act of 1998.

**Particulars of Offence**

**VIKLESH SHYAMAL PRASAD** on the 25<sup>th</sup> day of December, 2018 at Tavua in the Western Division, drove a motor vehicle registration number IR. 778 on Goldfield Road, Toko, Tavua in a manner which is dangerous to the public.

Count 2

**Statement of Offence**

**DRIVING MOTOR VEHICLE WHILST THERE WAS PRESENT IN THE BLOOD A CONCENTRATION OF ALCOHOL IN EXCESS OF THE PRESCRIBED LIMIT**: Contrary to section 103 ( 1 ) ( a ) and 114 of the Land Transport Breathe Test and Analysis Regulation 2000.

**Particulars of Offence**

**VIKLESH SHYAMAL PRASAD** on the 25<sup>th</sup> day of December, 2018 at Tavua in the Western Division, drove a motor vehicle registration number IR. 778 on Goldfield Road, Toko, whilst there was present in your blood a concentration of 1438 milligrams of alcohol which was in excess of the prescribed limit.

Count 3

**Statement of Offence**

**BREACH OF BAIL CONDITION:** Contrary to section 25 ( 1 ) ( b ) and 26 ( 1 ) of the Bail Act 2002 and the Bail Amendment Act of 2012.

**Particulars of Offence**

**VIKLESH SHYAMAL PRASAD** on the 25<sup>th</sup> day of December, 2018 at Goldfield Road Toko, Tavua in the Western Division, breached the condition of bail by not complying with the condition imposed by the Tavua Magistrate Court vide Tavua Case file number 69 – 18, driving motor vehicle on a public road when he was disqualified from driving period of 18-12-18 to 05-01-19.

2. On the 12<sup>th</sup> of November 2019, the prosecution offered no evidence in relation to Count 1 – Dangerous Driving and you have been acquitted accordingly of that count.
3. You pleaded guilty to the remaining counts, that is, Count 2 and Count 3.
4. You admitted the facts proposed by prosecution.
5. The prosecution tendered an analyst result [ job no. 2181539 ] relating to a blood sample and that blood sample is said to be yours.
6. I enquired with prosecution how the blood sample was obtained and I am advised that they obtained it from the hospital which you were taken to.
7. You informed me that you had no idea how that blood sample was obtained. In other words, you are saying that you did not give consent for your blood to be given or tested.
8. There is a general rule in criminal law that relevant evidence is admissible evidence. Even unlawfully obtained evidence can still be admitted subject to the court's discretion [ see for example the Court of Appeal case of **Mototabua v State** [2007] FJCA 13; AAU0016U.2006S ( 23 March 2007 ) which was upheld by the Supreme Court ].

9. This principle too is encapsulated in our 2013 Constitution at section 14 ( 2 ) ( k ) which reads:

*Every person charged with an offence has the right... not to have unlawfully obtained evidence adduced against him or her unless the interest of justice require it to be admitted.*

10. I do not have the full evidence before me except the submission by the parties in relation to the blood sample.
11. The interest of justice is not confined to the interest of one party. It is an encompassing or all involving one. An ordinary person's perspective or subjective or objective perspective may not do it. A 'God' perspective might. The interest of everyone should be borne in mind.
12. The right of the defendant or patient or citizen to privacy [ section 24 of the 2013 Constitution ], the right to be free from scientific or medical treatment or procedures without an order from the court or without his or her informed consent [ section 11 ( 3 ) of the 2013 Constitution ], freedom from unreasonable search and seizure [ section 12 of the 2013 Constitution ], assuming the hospital or a staff obtained and or released the blood sample to police, was this a breach of any of his constitutional rights? Was proper procedures followed before the sample was released? Does police powers to investigate or gather evidence override any of this right? Even if the court deems that it was obtained unlawfully but decides to admit the evidence, what precedent would that mean for citizens who wish to have their privacy or constitutional right safeguarded balanced with the State's right to conduct lawful investigation or enquiry. Overall is it in the interest of justice that this piece of evidence be admitted even if procedures were not followed or if it was obtained unlawfully.
13. At this stage, I am of the view that the appropriate course is not to rely on this piece of evidence [ blood sample ] or rule it inadmissible. I will make further enquiries which most likely will require evidence being given or a *voir dire* hearing being held, before I make a determination about the admissibility of this piece of evidence.
14. I will also recheck with prosecution whether they still intend to rely on the blood sample as evidence against the defendant in relation to Count 2.
15. I have to vacate the defendant's guilty plea to Count 2 where the blood sample would be relevant. I enter a plea of not guilty on behalf of the defendant in relation to Count 2.

16. I will now deal with the defendant regarding Count 3 which relates to breaching his bail condition.
17. I am satisfied that your guilty plea and admission in court is voluntary and that you understand the consequences. The evidence tendered in support of your admission to Count 3 also supports your guilty plea.
18. I have also taken judicial notice of the records in your other file Tavua CF 69 – 18. In that case, you were charged with driving with excess alcohol in your blood above the legal limit. You first appeared before me in that case on the 18<sup>th</sup> of December 2018. I granted you bail with conditions. One of those conditions was for you to surrender your license and you were disqualified from driving. That condition that you were not to drive would expire on the 5<sup>th</sup> of January 2019.
19. I imposed that condition on you not to drive during the festive season. I am empowered to do that and include it as part of your bail condition pursuant to section 22 and 23 of the **Bail Act 2002**.
20. That condition was still in place when you drove a motor vehicle on the 25<sup>th</sup> of December 2018. You had driven the vehicle with 3 family members to get more drinks at town. You lost control of the vehicle on your way back home. It was Christmas day. The vehicle tumbled for about 16 meters after you lost control and drove onto the oncoming lane bumping a stone.
21. In your caution interview with police, you said that you came to town to buy beer. It was the company vehicle. You came with your wife and 3 other family members. You admit that you were under the influence of alcohol at the time. You admit you lost control of the vehicle and it went to the other side of the road. The weather was fine at the time. There were no defects with the vehicle. You knew about your bail condition.
22. There was no reasonable cause or justification for breaching your bail condition.
23. I find you guilty and convict you of Count 3.
24. You are a first offender.
25. You spent 14 days in remand.
26. You are 27 years old. You have a baby which would be about 5 or 6 months old now. You are remorseful for your actions. You seek a non-conviction because of your employment. You ask for a second chance.

## **LAW**

27. The maximum sentence that is imposable by law for absconding or breaching a bail condition can be a fine of up to \$2,000 and or imprisonment of up to 12 months.

## **TARIFF**

28. The tariff for breaching a bail condition and absconding bail are the same. It is between a suspended sentence to 9 months imprisonment [ see for example - **Ulumatai v State** [ 2019 ] FJHC 114; HAA90.2018 ( 22 February 2019 ) ].

## **STARTING POINT**

29. Considering the objective seriousness of the offence, a 1 month imprisonment term is selected as a starting point.

## **AGGRAVATING FEATURES**

30. You breached your bail condition within 7 days after it was imposed on you. This was defiant and shows your disregard for the law.
31. You risked the lives of the passengers in your vehicle and other road users.
32. I consider the distance that you drove to be lengthy.
33. I increase your sentence to 4 months imprisonment.

## **MITIGATION**

34. You are a first offender.
35. You cooperated with police when they questioned you.
36. You have a family to support.
37. You are remorseful.
38. I reduce your sentence to 2 months imprisonment.

### **GUILTY PLEA**

39. You have pleaded guilty early.
40. I reduce your sentence to 1 month and 5 days imprisonment.

### **SUSPENSION**

41. I can suspend your imprisonment term either in whole or in part pursuant to section 26 (1) and (2) (b) of the **Sentencing and Penalties Act 2009**.
42. I also take into account the factors outlined in section 4 of the **Sentencing and Penalties Act 2009** when deciding whether or not to suspend your sentence.
43. I accept that I have powers to order that no conviction be entered or recorded against you [ section 15 and 16 of the **Sentencing and Penalties Act 2009** ].
44. Your sentence will be aimed at deterrence and is to punish you adequately.

### **SENTENCE**

45. You are sentenced to 1 month and 5 days imprisonment.
46. You have spent 14 days in remand and I will consider this as time served.
47. You have 19 days imprisonment remaining.
48. I am inclined to suspend your remaining sentence but only in part.
49. 12 days imprisonment will be suspended for the next 1 year.
50. Do not commit another offence punishable with imprisonment in the next 1 year or you risk this 12 days imprisonment held in reserve being activated.
51. You will serve 7 days imprisonment immediately.
52. I will enquire with prosecution now about Count 2 which is the only count remaining.
53. 28 days to appeal.



Dated at Tavua this 10<sup>th</sup> day of January, 2020

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Lisiate T.V. Fotofili  
**Resident Magistrate**