

IN THE RESIDENT MAGISTRATE'S COURT

AT NADI

CRIMINAL JURISDICTION

Criminal Case No: 3972 Of 2017

BETWEEN : **THE STATE**
AND
APENISA DRUGU TAMANISAU

BEFORE : **NILMINI FERDINANDEZ**
RESIDENT MAGISTRATE

Date of Sentence : 10th day of December, 2020

Corporal Va for the Prosecution

Mr. Tunidau for Accused present

JUDGMENT

1. The accused in this case, **APENISA DRUGU TAMANISAU** has been charged for **Careless Driving** contrary to Section 99(1) and 114 of Land Transport Act.
2. Particulars of the offence states that:
APENISA DRUGU TAMANISAU on 22nd day of September, 2016 at Nadi, in the Western Division, drove a motor vehicle registration number FC 116 on Queen's Road, Barara without due care and attention.

BACKGROUND

- 3.1 The accused first appeared in court on summons and the charge was read out to him on the 3rd November 2017. He opted to waive off his right to counsel and pleaded not guilty to the charge against him.
- 3.2 The trial commenced on 24th May, 2019 and the accused was represented by counsel Mr. Tunidau.
- 3.3 At the trial the prosecution called the following witnesses.
- i.) **Shirly Lal**
 - ii.) **Azeem Ali**
 - iii.) **WPC 3186 Preeti Kumar**
- 3.4 When the prosecution closed its case, the accused opted to give evidence and to call a witness namely, **Laisani Roko** to give evidence on his behalf.
- 3.5 Thereafter, the trial concluded and the prosecution informed court that they would rely upon the evidence placed at the hearing and that they would not make any closing submissions. Although the defence counsel has opted to tender written submissions, the same have not been filed despite the time granted.

THE LAW

- 4.1 The accused in this case is charged under Section 99 (1) of the Land Transport Act which states as follows:
- (1) A person who drives a motor vehicle on a public street without due care and attention commits an offence and is liable on conviction to the prescribed penalty.*
- 4.2 Elements that need to be proven by the prosecution in a charge of **Careless Driving** are that;
- a.) The accused drove **a motor vehicle on a public street.**

- b.) The accused drove the said motor vehicle **without due care and attention.**

4.3 Section 57 of the Crimes Act states that;

1. *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*
2. *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

4.4 Section 58(1) states that “*A legal burden of proof on the prosecution must be discharged beyond reasonable doubt*”.

4.5 The burden of proof lies on the Prosecution and in this case the prosecution has to prove beyond reasonable doubt the following elements to secure a conviction.

- a) The **accused** in this case drove a **motor vehicle on a public street** on the *22nd day of September, 2016*;
- b) The accused drove the said motor vehicle **without due care and attention.**

4.6 Justice Nazhat Shameem explaining the test applicable for Careless Driving stated the following in **Kumar v State [2002] FJHC 291; HAA014.2001S (12 April 2002)**;

*There are many authorities which say that the test for both Dangerous Driving and Careless Driving, is whether the accused has departed from the standard of a reasonable, prudent, competent and experienced driver in all the circumstances of the case. The accused is guilty of either offence even if he committed an error of judgment (*Simpson -v- Peat (1952) 1 ALL ER 441*)*

or was an inexperienced driver (*McCrone -v- Riding (1938) 1 ALL ER 157.*) The difference between Careless Driving and Dangerous Driving in Fiji, is whether the manner of driving (which fell below the requisite standard expected) created a dangerous situation. Thus a careless driver is also a dangerous driver, if his careless driving caused a pile-up of vehicles on a busy motorway resulting in death and injuries. The question of what is careless as opposed to dangerous is one of fact, usually best left to the trial court to decide, on the evidence. However, on a charge of Causing Death by Dangerous Driving, it is no defence that the driver was driving carelessly and not dangerously. The only question is whether the driver's manner of driving fell below the standard expected of a reasonable and prudent driver, and thereby caused a dangerous situation as a result of which, a person died.

EVALUATION OF EVIDENCE

- 5.1** PW1 Shirley Lal is the driver of the vehicle that had fallen into the drain and turned upside-down after the accident.
- 5.2** According to her, on the 22nd of September 2016 at about 2.15 pm she has been driving her car back to her office in Lautoka from Nadi on the Queens Highway. Near Barara Flats where the road had two lanes per one side of the road, the witness has been travelling on the right lane at a speed of approximately 80kmph when the accident occurred.
- 5.3** Just before the accident, she has noticed a 3 ton truck (Cab) which was slightly in front of her (to her left), all of a sudden going to the right and then going back to the left. And then suddenly it has given the signal and has turned across her lane quickly.
- 5.4** Since the said turn was so sudden the witness has been unable to stop her car, but has managed to reduce her speed a little bit by applying brakes.

She has also managed to quickly sway into the side lane and go past accused's vehicle without a collision but in doing so her car has gone over the drain and has tumbled.

5.5 When her car finally stopped from tumbling, a person has come quickly and has tried to remove her seat belt and has helped her, as she was in a upside-down position at that time. Thereafter, the accused truck driver too has come and helped her to come out of the car.

5.6 Witness has spoken with the truck driver at that time and he has stated to her that she was over speeding. The witness identified, the said driver as the accused in this case, at the trial.

5.7 It has been suggested to the witness at Cross Examination that she has been travelling with another person who is her boyfriend and that they have been kissing at the time of the accident, the entirety of which was denied by the witness.

5.8 She also denied the suggestion that the accused had given the signal to turn to the right, 15m before turning and confirmed that he just turned to the side lane without first entering the right lane.

6.1 According to PW1, **PW2 Azeem Ali**, is the first person who has come and helped her after the accident.

6.2 On this day PW2 has been travelling on a bus that was heading to Lautoka from Nadi and has witnessed the accident. According to him at that time his bus was not even 100m away from the accident and the passengers in his bus including him as well as the driver have clearly seen the accident.

6.3 Explaining how it happened, he stated that at Barara Flats just before the accident took place, PW1's car has been travelling towards Lautoka on the right lane when the truck driven by the accused that was travelling in the left lane suddenly turned into the side lane that allows vehicles to turn towards Nadi, blocking PW1's car that was on the right lane. When the

truck blocked PW1's way she has lost control of her car because she had nowhere to go.

- 6.4 He was definite that the accused turned his indicator to show that he was turning, right at the side lane and then he turned blocking PW1's way. At that time PW1's car was quite close to the side lane and it has missed hitting the truck very narrowly. Then it has flipped and gone into the drain.
- 6.5 When the accident happened the bus in which PW2 was travelling has slowed down and the witness has then pulled the bell string and gotten off the bus to help PW1.
- 6.6 He has run to the car and has helped the victim with her seat belt and has taken her down. Then the truck driver too has come near the car and both of them have helped the victim to come out of her car. The witness identified in court the accused in this case as the truck driver.
- 6.7 Upon cross examination this witness denied the suggestion that he was not focussing on the road and vehemently rejected the suggestion that the 1st people to arrive to help were a Fijian girl and the accused.
- 6.8 Further, when the defence counsel suggested that PW1 has spoken with PW2 outside the courtroom, the witness admitted the same, but explaining it further he stated that PW1 only stated "*It was ok*" to his question "*How was it?*" and that there were no lengthy discussions on what has happened in court.
- 6.9 The witness also rejected the proposal by the learned defence counsel that there was another person with the victim when the accident took place and stated that he would have seen if there was anybody else with the victim, when he went to help her.
- 6.10 Throughout the cross examination this witness's stand that the accused never gave right indicator 15m before turning and that the accused turned into the side lane towards Nadi, without entering the right lane first, has never wavered. He was confident that he saw PW1's car swerving to

avoid the collision when accused's truck entered the side lane and that she had to enter the side lane half way to avoid hitting before it flipped.

- 7.1 **PW3 WPC 3186 Preeti Kumar** was the police officer who has attended to the accident scene and has prepared the Sketch Plan.
- 7.2 When she arrived at the scene PW1's car has been on other side of the road facing towards Nadi, but upside-down. The accused's truck has been parked by the side of the side lane.
- 7.3 She has found out that before the accident the accused has been driving on the left lane towards Lautoka and according to her, if he had wanted to go to the restaurant on the other side of the road, he should have first changed into the right lane from the left lane and then turned into the side lane.
- 7.4 The cross examination does not seem to have affected her evidence-in-chief at all.

- 8.1 PW1's evidence as to how the accident had happened and the cause of the accident has been corroborated sufficiently by the evidence of PW2, who seems to be an independent witness. Since PW2 has been travelling in a bus going towards the same direction and has been right behind PW1's car at a higher elevation, it is highly acceptable that he could witness the accident very clearly.
- 8.2 According to both the witnesses, the accused has been travelling on the left lane towards Lautoka when he suddenly has lighted his right indicator before turning into the side lane in the middle of the roads. Accused has not first entered the left lane before he turned into the side lane. Also, PW1's evidence that she had swerved to the right and avoided collision and in doing so, her car flipped and went into the drain has been well corroborated by the evidence of the PW2.

- 8.3 On the face of it, it is very clear that the accused has only turned his indicator right at the junction of the side lane and that he has not taken steps to give proper indication to the drivers behind him of his intention to turn into the side lane, before entering the said side lane to turn towards Nadi.
- 8.4 As such, from the evidence of the prosecution it is evident that the accused has been driving his motor vehicle without due care and attention on the date of the accident.
- 9.1 **The accused** while giving evidence has stated that he was driving his Twin Cab Truck on Queen's High Way towards Lautoka on the left lane at the time of the accident. As such, the accused does not deny the occurrence of the accident and the fact that he was driving his vehicle on the Queen's Highway on the 22nd of September 2016 is not denied. The accused seems to deny only the element that he drove his vehicle **without due care and attention**.
- 9.2 Accused further stated to court that since he has had no breakfast that day, he has wanted to go to a restaurant that was situated on the other side of the road towards Nadi. So he has given the trafficator 70m before the junction of the side lane and has waited for the only car behind him, a Grey colour Fielder to go past him. According to him he has been travelling very slowly (in a speed of 20 Kmph) waiting to get into the right lane.
- 9.3 After the Grey Fielder went past him, he has looked behind through the side mirror. At that point another car, a Goodman Fielder Co. car has gone past him but it has caught on some loose gravel on the road that were about one meter ahead of him; and when the car that was over speeding could not control and has veered off the road, the accused's vehicle has still been on the left lane. Thereafter, the accused has moved

into the left lane and after entering the side road has parked his vehicle by the side of the road towards Nadi.

- 9.4 According to the accused, the only reason for the accident to take place was the car tires catching the loose gravel on the road. However, it is noted that none of the prosecution's witnesses were cross examined about the loose gravel on the road. Not even the Investigating officer was asked whether there were loose gravel on the road when she arrived at the scene or whether she found out that the reason for the accident was the loose gravel. As such, the accused's stand at the trial that PW1 lost control of her car due to the loose gravel on the road seems to be an afterthought of the accused and not the truth.
- 9.5 The accused said that he went near the car that fell into the drain, to help. According to him, at that time an Itaukei girl who has been waiting nearby for the bus also has gone to the car. With her the accused has helped the lady in the car as well as a passenger, to come out of the car. Accused never spoke about PW2 who claimed to have assisted the victim together with the accused. It is further noted that PW2 was never challenged at cross examination about his presence at the car after the accident.
- 9.6 Although the accused stated that there was another passenger in PW1's car, PW2 who has approached the car immediately after the accident has not seen a passenger in the said car. According to him PW1 has been alone in her car. On the other hand, the defence has not established the importance of the presence of another person in the victim's car, for this case.
- 10.1 DW2 **Laisani Roko**, is the Itaukei girl who according to the accused had arrived at the scene first after the accident.

- 10.2** She stated to court that the accident took place when she was waiting at the bus stop to go to Namaka.
- 10.3** According to her, the accident has taken place around 5 or 6pm. However, while PW1 has stated that it happened around 2.15pm, the accused too has stated that it was at 2 pm that he travelled from Nadi to Lautoka and the accident occurred at *Barara Flats*. As such, it can be accepted that the time of accident stated by the accused and PW1 roughly tallies. Therefore, DW2's stand about the time of the accident seems to be incorrect.
- 10.4** According to DW2, she has been waiting near the junction (which is near the side lane to turn towards Nadi) for a bus to go to Namaka (towards Nadi) on the opposite side of the road from where the accident has taken place. She has been facing Lautoka side as she was waiting for a bus coming from that side.
- 10.5** She stated that she saw accused's vehicle 15-20m away from the junction travelling on the left lane heading towards Lautoka. His trafficator lights have been on indicating that he wanted to turn to the right. While the accused was trying to turn to the right, another vehicle that has come behind the accused's vehicle was over speeding and has tried to *take pass* it. That car has lost control on some loose gravel on the road and has veered off the road. Then the car has tumbled over to the electricity post and has turned upside down.
- 10.6** According to her, she has been standing at a distance of just 4 steps from the tumbled car and as such, she has immediately approached the car from the passenger's side while the accused has approached from the driver's side. The witness has seen the tumbled car going past many other vehicles before the accident, and therefore she was of the opinion that it was over speeding.
- 10.7** Although PW2 has given a lengthy explanation on how the accident took place step by step, it is not clear how she saw all that had happened

before the accident, as she has been standing on the other side of the road (Lautoka to Nadi) looking towards Lautoka just about 4 steps to the junction, while the vehicles involved in the accident were still approaching the junction behind her.

- 10.8** She was very firm in stating that the accused lighted his trafficator 15-20m before the junction and that PW1's car has come over-speeding behind the accused and while trying to overtake him, lost control due to the loose gravel on the road. However, it is unbelievable how she saw all that while she had her back towards the said vehicles and was waiting for a bus that would be coming from Lautoka side. She has even seen how PW1 has overtaken many vehicles on the other side of the road before trying to overtake accused's vehicle, while she was having her back towards PW1. If she is to actually see all that, she needed to be looking towards Nadi side and not towards Lautoka, as she claimed. As such, it does not seem that the witness has been stating to court all what she has seen with her own eyes and it is not safe to rely upon her evidence in deciding this case.
- 10.9** Although this witness has stated that she saw PW1 over speeding, she has not explained to court what she meant by over speeding at a place of road where the allowed speed limit was 80kmph, which is quite speedy. Simply because a vehicle drive past many other vehicles, it is not correct to arrive at an assumption that the vehicle was over speeding.
- 11.1** However, even the evidence of DW2 which is clearly meant to be favourable to the accused, has not revealed that the accused has first entered the right lane after giving the trafficator and before turning into the side lane to turn towards Nadi again.
- 11.2** Every driver has a duty to be cautious while driving, and especially turning and changing lanes. There is no evidence which proves that the accused has adhered to the road rules while turning into the side lane

from the left lane of the road and whether he has waited for the traffic in the right lane to go past him before he entered the right lane and thereafter the side lane.

- 11.3 Therefore, this court is satisfied that the accused has acted carelessly while turning into the side lane to enter into the road that goes towards Nadi and accordingly satisfied that the prosecution has managed to prove **beyond reasonable doubt** all the elements in the offence of **Careless Driving** contrary to Section 99(1) and 114 of Land Transport Act,

Conclusion

- 12 Hence, I find the accused guilty for the charge against him namely, **Careless Driving** contrary to Section 99(1) and 114 of Land Transport Act, and convict him for the same.
- 13 The right by law to appeal against this judgment is within 28 days from today

DATED at Nadi on 10th day of December, 2020.

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Nilmini Ferdinandez
RESIDENT MAGISTRATE

