

IN THE RESIDENT MAGISTRATE'S COURT

AT NADI

CRIMINAL JURISDICTION

Miscellaneous Traffic Case No: 23 of 2018

BETWEEN : **SHINTARO TSUCIDA**

AND

STATE

BEFORE : **NILMINI FERDINANDEZ**

RESIDENT MAGISTRATE

Date of Sentence : **28th day of February, 2022**

IP Chand for the Prosecution

Accused present

Mr. J. Sharma for Accused

JUDGMENT

1. The applicant **SHINTARO TSUCIDA** has been issued with a Traffic Infringement Notice (TIN) for the offence of **Failure to Obey Traffic Direction** contrary to Section 73(1)(f)(8) and 114 of Land Transport Act 1998 by Cpl Sanjeev. He has initiated this case by challenging the said Traffic Infringement Notice (TIN).
2. Particulars of the offence on the TIN states that:
Shintaro Tsuchida on the 31st day of August, 2018 at Nadi in the Western Division drove a motor vehicle registration number JA 803 on Wailoaloa Road failed to stop, obey traffic direction as directed by Police Officer namely PC 4903 Anish.

3. BACK GROUND

- 3.1 This application has been first mentioned in court no.2 on the 25th March 2019 when the same has been transferred to court no.1.
- 3.2 The offence in this case has occurred together with the offence in the Traffic case no. 365/18 and therefore, on the 14th May 2020 the parties have agreed to take up the trials in both the cases together.
- 3.3 Accordingly, trial commenced on the 15th May 2020 and the evidence for both the cases were recorded at the trial in the Traffic case no. 365/18. The same evidence was adopted in this case too.
- 3.4 Since the prosecution has a duty to first prove that the applicant has actually violated the relevant traffic laws, the prosecution called the following witnesses to give evidence on this day.

PW1 4903 Anish

PW2 PC3802 Shareef Khan

PW3 A IP 3844 Sanjeev

- 3.5 After the prosecution closed its case, the counsel for the applicant informed court that the accused opt not to call any witnesses and closed their case, too.
- 3.6 Upon the grant of 21 days by court, the counsel for the applicant has filed their closing Submissions in writing. However, the Respondent-Prosecution has informed court that they would rely only upon the evidence in the hearing and would not make any submissions.
- 4.1 The learned counsel for the applicant has taken up an objection in his closing submissions stating, inter alia, that the Traffic Infringement Notice (TIN) relevant to this case is invalid as it is inconsistent with the Constitution.
- 4.2 Accordingly, this court will first consider the said objection before proceeding to analyse the evidence placed before this court at the trial.

4.3 The learned counsel has relied upon the decision of the Hon. High Court in the **Pasifika Enterprise v. Land Transport Authority [2020] FJHC 517** when taking up this objection and therefore, this court will now consider the said decision.

4.4 The said case was a civil action filed in the Civil Jurisdiction of the High Court seeking mainly a declaration that the Traffic Infringement Notice (TIN) issued relevant to that case was in breach of Section 14(2) and Section 15 of the Constitution of the Republic of Fiji and therefore null and void.

4.5 It is clear that the plaintiff in the said case has mainly challenged paragraph 8 in the TIN which states,

*If you do not pay your fixed penalty and late payment fee in full or provide a statutory declaration or elect to dispute this notice in court, within 12 months from the date this notice is issued to you, **this notice will take effect as a conviction** and the Land Transport Authority may suspend your licence and seek the maximum penalty and demerit points applicable, from the court.*

and accordingly, the Regulation 6 of the Land Transport (TIN) Regulations.

4.6 While exercising its inherent jurisdiction, the High Court has decided that,

a) Regulation 6 of the Land Transport (TIN) Regulations, 2017 which fixes a penalty for a traffic infringement has the effect of shifting the burden of proof to a person issued with a TIN to prove his innocence with the result that it violates the presumption of innocence where a person “would be liable to be prosecuted in Court.”

b) If the Notice is not disputed within the imposed time limit, it will take effect as a conviction which can only be entered by a Court but not otherwise.

c) Accordingly, the conviction notice not only violates the right to a fair trial before a Court of law (Section 15 (1) of the Constitution) but also the right of presumption of innocence guaranteed under Section 14 (2) (a) of the Constitution.

4.7 However, the situation before this court is different to the situation in the said case of **Pasifika Enterprise v. Land Transport Authority** as the applicant in the present case has already disputed the TIN within the given time limit and is before this court wherein the respondent has the responsibility to establish guilt of the applicant. As such, the applicant retains his presumption of innocence until proven guilty by the respondent through evidence.

4.8 As such, notwithstanding the fact that this court has no inherent jurisdiction to decide whether the TIN in this case is inconsistent with the Constitution, it is decided that there is no necessity to consider the validity of the TIN at this point based only upon the reason that the applicant retains his presumption of innocence and therefore, the objection taken up by the learned counsel for the applicant is dismissed.

5. THE LAW

5.1 The applicant in this case has been charged for the offence of **Failure to Obey Traffic Direction** contrary to Section 73(1)(f)(8) and 114 of Land Transport Act 1998.

5.2 Section 73 of the Land Transport Act provides that;

73. - (1) A police officer may, for the purposes of traffic control -

(a) direct a driver to move his motor vehicle from the place where it is standing and -

(i) remove the motor vehicle from the vicinity; or

(ii) proceed to an adjacent portion of the street, or of a neighbouring street, indicated by the police officer;

(b) give directions to the driver of a motor vehicle as to the-

- (i) manner of approaching or departing from a place;*
- (ii) manner of taking up or setting down passengers, or loading or unloading goods, at a place; or*
- (iii) parking of motor vehicles;*

(c) seize and remove to a place of safe custody a motor vehicle or trailer -

i) where the motor vehicle or trailer is involved in an accident, for the purpose of having it or any portion of it examined, or for production as an exhibit in any proceedings under this Act;

(ii) where it is parked contrary to a parking offence provision;

(iii) where it is left on the public street for a period exceeding 12 hours and is in the opinion of the police officer abandoned;

(iv) where the motor vehicle or trailer is in, or left in, a position that in the opinion of the police officer is hazardous or dangerous to other road users or the public;

(v) where, in the opinion of the police officer, the motor vehicle or trailer is in, or left in, a public street, in such a position as to obstruct or partially obstruct access to, or exit from, any property that is adjacent to a public street;

(vi) where the police officer has reasonable cause to suspect that the, vehicle is not registered pursuant to this Act or the regulations;

(d) give to a person on a public street such directions as are necessary for regulating traffic, including the forming of a line;

(e) where the police officer finds a person loitering on a public street and the police officer is of the opinion that the presence of the person in the public street may interfere with the free flow of traffic, request or direct that person to move on;

(f) give directions, including a direction to stop, to the driver or person in charge or owner of a vehicle whom the police officer finds committing an offence under this Act or any regulations (relating to that vehicle or otherwise) or whom the police officer reasonably believes to have committed such an offence;

(g) for the purposes of sections 72 and this section, direct the driver of a motor vehicle to cause the mass of the motor vehicle, including any trailer attached to the motor vehicle, to be ascertained by means of a weighing device. (In this paragraph 'mass' means the weight of the vehicle and the load.)

(2) A police officer or an authorised officer may require the driver of a motor vehicle to stop and remain stationary so that the officer may examine the vehicle.

(3) An authorised officer under this Part may exercise the powers vested in a police officer under subsection (1), either in whole or in part, except for those powers provided for under subparagraph (c)(i) and paragraph (e) of subsection (1).

(4) A person to whom a police officer or authorised officer gives a direction under this section shall comply with that direction.

(5) Where a police officer or authorised officer gives -
(a) a signal, order or direction to a driver of a motor vehicle; or
(b) an order or direction to a pedestrian,
to stop, the driver or pedestrian shall stop for so long, and then proceed in such a manner, as the police or authorised officer directs or orders.

(6) A police or authorised officer may take all reasonable measure including entering locked or secured vehicles, for the purpose of enforcing the provisions of this Act.

(7) A police officer or authorised officer shall not be held liable for any damage to or loss of any item from a motor, vehicle during its seizure and removal to a place of safety in accordance with paragraph (c) of subsection (1).

(8) A person who disobeys a direction given under this

section commits an offence and is liable on conviction to the prescribed penalty.

- 5.3 According to Sec.114 of Land Transport Act, the penalty for the offence under Sec. 73(8) is a fine of \$200 or 30-days imprisonment.
- 5.4 Elements that need to be proven by the prosecution regarding the charge of **Failure to Obey Traffic Direction** are that;
- a.) A police officer has given the accused a direction to stop his vehicle.
 - b.) The police officer reasonably believed that the accused has committed an offence under Land Transport Act.
 - c.) The said accused has disobeyed the said direction to stop.
- 5.5 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.*
- 5.6 Section 58(1) states that “A legal burden of proof on the prosecution must be discharged beyond reasonable doubt”.
- 5.7 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 has driven the motor vehicle with registration number JA 803 on Wailoaloa Road on the 31st day of August 2018.

- b) Police Officer namely PC 4903 Anish has reasonably believed that the accused has committed an offence under Land Transport Act
- c) Therefore, the Police Officer PC 4903 Anish has directed the accused to stop the above vehicle
- d) The accused has failed to stop and thereby, failed to obey the traffic directions of the said Police Officer

6.1 At the very outset it needs to be noted from the evidence placed before this court, that there is no dispute between the parties that the applicant has driven his motor vehicle with the registration number JA 803 on Wailoaloa Road on the 31st day of August, 2018.

6.2 However, the applicant disputes rest of the elements in the charge.

6.3 Therefore, the prosecution has an onus to prove that,

- a) Police Officer PC 4903 Anish has reasonably believed that the accused has committed an offence under Land Transport Act
- b) PC 4903 Anish has directed the accused to stop the above vehicle
- c) The accused has failed to stop and thereby, failed to obey the traffic directions of the said Police Officer

7 Prosecution's Evidence

7.1 **PW1 PC 4903 Anish**, is the police officer who is alleged to have directed the accused to stop his vehicle.

7.2 According to his evidence at the trial, he was a member in the police team that were assigned to do random breath tests along Wailoaloa Road on the 31st day of August 2018.

7.3 He has resumed duty on that day at 7pm and around 11pm has started, with some other police officers, to randomly check vehicles that travelled on Wailoaloa Road.

7.4 He has explained at cross examination how the police team has placed the Traffic Signs at the place where they were conducting the Random

breath tests and how their two vehicles, one Highway police patrol car and one Booze bus, have been parked by the side of the road at that time. Accordingly, there have been two signs of "SLOW DOWN" and two signs of "RANDOM BREATH TEST AHEAD". The sign boards have been placed on both sides of the road with the board with "SLOW DOWN" sign placed first and the "RANDOM BREATH TEST AHEAD" sign placed about 10 steps after that.

- 7.5 When this witness has given the signal to stop the vehicle with Registration number JI- 803, it has failed to stop at their check point and thereafter, this witness together with Cpl Sanjeev has followed the said vehicle in the Highway Patrol car which is equipped with Highway lights and siren and has managed to stop it few kilometres away from the check point. At this point the defence has shown the witness a print of the google map of the scene of the offence on which the witness has been directed to mark as 'A' the place where the check point was and as 'B' the place where the police have managed to stop the vehicle. The same was tendered to court marked as **De. Ex.1.**
- 7.6 After managing to stop the vehicle this witness has approached its driver and has demanded his Driving Licence and while having a quick conversation with him, he has smelt liquor from the breath of the driver, wherefore the witness has proceeded to test the driver on Alcotest 5820 machine.
- 7.7 In the meantime, Cpl Sanjeev has issued the driver with a TIN for Failure to Stop.
- 7.8 The witness has identified the applicant in court as the driver of the vehicle who he has arrested that night.
- 7.9 This witness has been cross examined about not mentioning in his statement to police on the 31st August 2018 about the driver failing to stop, regarding which he has sufficiently explained that he had no idea that the applicant would challenge the TIN issued for Failure to stop by

Cpl Sanjeev at 2330 on the day of the offence and therefore, he did not mention it in his first statement made on the same date just 20 minutes after issuing the TIN. His first statement, which was tendered to court by the defence marked as **De.Ex.2**, contains only the facts relating to the charge in the other case (Traffic Case No: 365 of 2018) against the applicant for drunken Drive. However, the witness has made another statement later after it was revealed that the applicant has challenged the TIN.

7.10 This witness informed court upon cross examination that they have done random breath tests on about 80 drivers that night and that they have arrested about 3-4 drivers for Drunk Driving.

8.1 The next witness in the combined trial, **PW2 PC 3802 Shareef Khan** is the police officer who has recorded the statement of the applicant at the Caution Interview. However, his evidence is not much relevant to this case as the applicant has been interviewed only on the charge against him for drunken Driving in the other case (Traffic Case No: 365 of 2018).

8.2 Nevertheless, it is noted that this witness has informed court at cross examination that he was not aware that the applicant has been charged also for Failing to obey Traffic Directions and that he became aware of it only when Sgt Sanjeev has told him about it later.

9.1 **PW3 AIP 3844 Sanjeev** is the police officer that has issued the applicant with the Traffic Infringement Notice (TIN) and he has given evidence at the trial stating similar facts to **PW1 PC Anish**.

9.2 According to him he has been authorized by the Commissioner of Police to conduct Radar Operations, Traffic bookings and breathalyzer operations in the area and on the 31st of August 2018 he has opted to conduct random breathalyzer tests along Wailoaloa road, Nadi.

- 9.3 At about 2300hrs the police team that consisted of him, PC Anish, Cpl Rajesh and Sgt Rohit has set up their operations check point on Wailoaloa road and has resumed conducting random breathalyzer tests.
- 9.4 While conducting the breathalyser operations at their check point the witness has stopped the vehicle with registration number JA803 and when the said vehicle failed to stop at the check point, the witness with PC Anish has followed the said vehicle and has managed to stop it few meters away from the check point.
- 9.5 The witness stated to court how they always place road signs on the road when they conduct a Check point, warning the drivers about police officers conducting breathalyser operations and produced to court the sketch plan he has prepared showing the Layout of their check point. He has marked on the Sketch Plan as 'A' where the police have placed the first indicator about the check point and as 'B' the place where the police have managed to stop the vehicle driven by the accused. The sketch Plan was tendered to court as evidence marked as **Pr.Ex.3**.
- 9.6 He stated to court that when PC Anish was having a conversation with the driver, he has started to write the TIN to be given to the driver for failure to stop. The TIN that was served to the driver that night was marked as **Pr.Ex.2**.
- 9.7 **PW1**, PC Anish has then tested the driver on the road side test device namely the Alcotest 5820 and since he has been tested above the prescribed limit PW1 has arrested the driver and has handed him over to this witness to be further tested on 'Dragger 7110'.
- 9.8 In cross examination, this witness has explained to court the reason as to why a Check point to conduct random breathalyzer tests was set up in the evening on the 31st of August 2018. Since there had been many complaints received at his office that a large number of drivers drink and drive along Wailoaloa road, the Commissioner of Police has instructed

this witness, a week prior to the date in question, to hold Breathalyzer tests along that road.

- 9.9 Explaining at cross examination as to who actually stopped the accused in this case, the witness stated that PC Anish has tried to stop the accused first, but since he has failed to stop, this witness who has been standing just 2m away from PC Anish and PC Ravo that has been standing 2m away from the witness also have signalled the accused to stop. But the accused has failed to stop and has driven away.

10 Evaluation of evidence

- 10.1 It is an accepted fact that the applicant in this case has driven his motor vehicle with the registration number JA 803 on Wailoaloa Road on the night of 31st August 2018.
- 10.2 It is evident from the evidence of PW3 that the numerous complaints received by the Commissioner of Police about the large number of drivers that drive along Wailoaloa road after drinks was the reason for conducting the random breathalyzer tests on Wailoaloa road in the evening of the 31st of August 2018.
- 10.3 According to the available evidence, during the operations on that day the police team has stopped about 80 drivers with the suspicion that they may be drunk, and 3-4 drivers have been actually arrested for drunk driving. The applicant too was one among the drivers that have been stopped at the check point by the police under suspicion. As such, this court is satisfied that PC 4903 Anish has reasonably believed that the applicant might have committed an offence under the Land Transport Act when he has tried to stop him at the check point.
- 10.4 PC 4903 Anish's evidence that has been well corroborated by the eyewitness PW3's evidence, proves to court that PC Anish has actually directed the applicant to stop his vehicle, but the applicant has failed to stop and thereby, has failed to obey the traffic directions of PC Anish.

- 10.5 The google map tendered to court marked as **De. Ex.1** by defence too corroborates prosecution's stand as it clearly shows that the applicant's car has not stopped near the check point but has driven further and turned into another road before it was finally stopped by the police officers.
- 10.6 Since the applicant has opted to remain silent and has not called any witnesses to give evidence on his behalf his defence in this case is not very clear. However, both PW1 and PW3 have elaborated to court how the check point has been set up on Wailoaloa road that evening giving sufficient notice to the drivers that random breathalyser tests were in operation. Therefore, the setting up of the check point on Wailoaloa road has to be obvious to anyone passing by and the applicant cannot claim that he did not see any police officers or any barriers on the road.
- 10.7 Accordingly, this court is satisfied that the prosecution has been successful in proving all the essential elements of the charge against the applicant in this case.
- 10.8 Although the learned counsel for the applicant has cross examined the three witnesses for the prosecution at length on different lines in order to challenge the evidence of the prosecution, their evidence on the essential elements of the charge have remained unchallenged.

11 Conclusion

- 11.1 Whilst the Prosecution has been successful in proving beyond reasonable doubt that the applicant has **Failed to Obey Traffic Direction**, the applicant has not managed to create a reasonable doubt.
- 11.2 Therefore, this court is satisfied that the prosecution has managed to prove **beyond reasonable doubt** that the applicant has **Failed to Obey Traffic Direction** contrary to Section 73(1)(f)(8) and 114 of Land Transport Act.
- 11.3 Accordingly, I find the applicant guilty for the charge against him and convict him.

12 28 days to appeal.

DATED at Nadi on 28th day of February 2022.



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Nilmini Fernandez

RESIDENT MAGISTRATE

