

IN THE MAGISTRATES' COURT OF FIJI

AT BA

[CRIMINAL JURISDICTION]

Traffic Case No: 4/20

STATE

v.

AMAN DAYAL

For Prosecution: Sergeant [4971] V. Vunaki
For Accused: Appearing In Person
Date of Trial: 26/10/2023
Judgment: 13/12/2023

JUDGMENT

Background

1. Aman Dayal [hereinafter referred to as 'the accused'] you are charged with a count of Driving in Excess of Speed Limit contrary to Section 24 (1) (b) and 87 of the Land Transport (Traffic) Regulation 20000.
2. *It is alleged that the accused on the 18th day of January 2020 at Ba in the Western Division drove a motor vehicle registration number FB 164 in Sarava, Kings Road at a speed of 85km/hr and such speed being in excess of the maximum speed limit permitted in the said area namely 60 km/ph by 25km.*
3. The accused is a Solicitor by profession and had instituted this proceeding in person pursuant to Section 92 (3) of the Land Transport (Amendment) Act 2017 contesting the issued TIN.
4. The Traffic Infringement Notice No: 3898789 [hereinafter referred to as 'the TIN'] was issued on the accused on 18/1/2020.
5. Thereafter the accused indicated his intention to contest the TIN as such filed for your contested TIN application on 20/1/2020 of which Notice was issued to the Prosecution also on like date and Traffic Case No 4/20 was assigned.
6. Therefore, there is no issue with the 90days timeframe stipulated under Section 92 (3) of the Land Transport (Amendment) Act 2017.

7. The matter was taken up for mention on 28/3/2023 and a Trial date was fixed for 26/10/2023.
8. On 26/10/2023 the matter was taken up for Trial and the Prosecution closed its case on like date.
9. The Prosecution called only 1 witness to prove its case, that is **PW 1- Sergeant 3290 Vueti Biunaiwai** and tendered as an exhibit, **the original TIN as PEX 1**.
10. At the end of the Prosecution's case, the Court found that so there is a prima facie case as such the accused was put to his defence.
11. The court gave the accused his options pursuant to section 179 of the Criminal Procedure Act 2009.
12. The accused chose not to give evidence and did not call any other witnesses.
13. Thereafter the matter was adjourned to today for Judgement, both the Prosecution and Defence informed Court they will rely on the Court Record.

Innocent until proven guilty

14. The right of an accused person to be presumed innocent until proven guilty according to law is a right guaranteed under Section 14(2) (a) of the Constitution. (Qio v State [2015] FJCA 68; AAU140.2014 (28 May 2015))

Burden and Standard of Proof

15. The burden of proof lies with the prosecution as stipulated in Section 57 of the Crimes Act 2009 which states as follows:
 - '57 (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.'
16. The standard of proof lies with the prosecution as stipulated in section 58 of the Crimes Act 2009 which states as follows:
 - '58 (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.'
17. The burden of proof of a case against an accused rests fairly and squarely always on the prosecution, that is the State-the complainant. The prosecution is never relieved of that responsibility, and it does not shift to the accused at all. If the evidence creates any doubt, should be given to the accused.
18. Each and every element of the offence should be proved beyond reasonable doubt by the Prosecution.

Legal Submissions made by the Accused.

19. The defense primary position in contesting the TIN stems from their submission that there is no such regulation that regulates the use of speed detectors used by Police Officers on our roads when determining the speed in which a vehicle is operated on. Further, the defense also submits that with no regulatory provisions on the use of speed detectors, there is no definitive guideline or measure in place to ascertain the accuracy and consistency of the speed measuring device.
20. It is important to add that the defense had taken up the above position from the outset of this contest of TIN proceedings, the same is reflected in the Court Record as far back as 3/2/2020. The defense had sought for a Calibration Certificate from the Prosecution as well as the confirmation from the Prosecution on the regulatory provisions on the use of speed detectors.
21. This Judgement will endeavor to collectively deal with the legal submission raised by the accused and the determination of the proceeding.

22. The Law

Regulation 24 (1) Land Transport (Traffic) Regulation 2000

Speeding

- (1) Subject to sub-regulation (2), a person must not drive a vehicle on a public street
 - (a) In a city or town at speed exceeding 50 km/h;
 - (b) Outside a city or town at a speed exceeding 80 km/h

Regulation 87 Land Transport (Traffic) Regulation 2000

Penalty

A person who fails to comply with a provision of these Regulations commits an Offence and is liable on conviction to the penalties prescribed in Schedule 2 of the Land Transport (Fees and Penalties).

23. From the facts of the Prosecution's case, they are relying on the second limb of Regulation 24 (1).

24. The elements of the offence of *Speeding* under Regulation 24 (1) are:

- i. *The Accused*
- ii. *drive a motor vehicle*
- iii. *on a public road*
- iv. *Outside a city or town*
- v. *at a speed exceeding 80 km/h*

The Analysis:

25. I refer to the evidence of the sole Prosecution witness and the submission of the Accused in the Court Record and I make specific reference to the salient points of evidence in the analysis of this Judgment.
26. There is no dispute as to the accused and his driving motor vehicle FB 164 on 18/1/2020 and there is no dispute to the element of driving on a public road outside a city or town in light of the alleged offending occurring at Sarava, Ba.
27. The only disputed element is the speed of the vehicle and that dispute by the defense is further expounded on their legal submission of there being no regulatory provisions regarding the use of speed detectors by the Police.
28. **PW 1** in his evidence told the Court that he is a police officer of 19 years of service with the Fiji Police Force. In the year 2020 he was based at the Lautoka Police Station. On 18/1/2020 he was based at the Lautoka Police Station with the Traffic Department and on that day, he had picked the radar gun from Ba Police Station and had picked the radar gun from PC Bainuia Traffic Department. He then went with PC Petero via motorcycles 5445Z and 801Z. They stopped at Sarava, Ba at the service station and parked the motorcycle there and then used the radar gun towards Ba for the 60 zone area. They stopped a vehicle that day, vehicle FD 164 and asked the driver to park on the side and informed the driver that he had been driving at a speed of 85 km/h and showed him the speed and asked for his Driver's License. The driver was informed the speed limit and that it was a 60 zone. PW 1 issued and served the driver with the TIN and informed him of fine of \$40 to pay within 90 days. The name of the driver is Aman Dayal, that is the name on the Driver's License. **PW 1 tendered the original TIN in Court as PEX 1.**
29. In cross examination he told the Court he did not recall if the accused had asked him to write down a serial # on the TIN, he did state that there was no serial # notes on the TIN that was issued. When asked as to how he knew the radar was operational, he answered that it was because they were using

the radar in all operations. He also stated in evidence that they tested in the station and checked the battery. He told the Court that there was no further test sting conducted prior to the use of the radar gun, there was also no reading taken prior to test it's use. He could not recall if there is any Regulation on the use of radar guns.

30. An element of Offence of which the accused is charged and of which the TIN is issued is the speed of the vehicle. To determine the speed of the vehicle, the Prosecution rely on the reading provided by the speed gun or speed detector instrument/device.
31. The defense in their legal submission before the Court which forms part of their contest to the charge, raise that the speed detector instrument has not been calibrated and if so there is no evidence of it from the Prosecution. Further to this, the defense position is also that there are no Regulatory provisions on the process or steps to be taken to calibrate a speed detector instrument or at least processes or steps to confirm the validity of its reading when measuring speed.
32. The Court had asked a series of questions from PW 1 based on his experience as a Traffic Officer of 6 years as well as his overall experience as a Police Officer of 19 years. The answers provided for PW 1 is before the Court and I will only refer to some of these when canvassing the element of speed together with the defense position in contesting the charge.
33. Firstly, there is no specific regulation under the Land Transport Act of 1998 that regulates the use of any speed detector instrument. I have perused the legislations that may offer some assistance to this issue however there is none to specify the usage of such instruments or the validating of its reading when used as evidence in a Court of Law.
34. Regulation 26 of Land Transport (Traffic) Regulation 2000 makes reference to '*speed measuring devices*' or could include its terminology as '*speed measuring equipments*'. Section 79 of the Land Transport Act of 1998 has some coverage on the use of equipment and stipulates as follows;

A police officer or authorised officer, in the performance of a duty under this Act, may use any equipment prescribed by regulations for the enforcement of the provisions of this Act.

35. The above provisions although makes reference to the use of equipment by a police officer lacks the biting point of the provision which is the regulation that of which such equipments are to be regulated and enforced.

36. This Court in its efforts to draw some sense in what has become a common traffic infraction of 'Speeding' and the common use of the 'radar gun', has had a look at some provisions that look to offer assistance to the charge before the Court.
37. The Interpretation Act of 1967 offers no definition of 'equipment' however Section 35 and 36 deals with the Powers and Duties of those holding office and the duties that is to be carried out by those holding such office. In conjunction with Section 35 and 36, the Court has also considered the Police Act of 1965 specifically Sections 7, 20 and 58 yet, while these provisions deal with the issuance of equipments to Police Officers by the Commissioner, that is as far as the provisions goes, there is nothing to specify if such equipments include equipments for the purposes of measuring speed and or its usage.
38. In questioning PW 1 on the Regulation and its provisions and its extension to the powers of which they operate on with the usage of the speed measurement equipment or radar gun, he simply responded that it was something not specifically offered in their training however is information obtained by inheritance from previous traffic officers which is passed on to newly injected traffic officers. PW 1 told the Court that because that is what he was told by the Traffic Officer before him, a PC George, that is what he has been continuing with in terms of measuring vehicle speed on the road. PW 1 informed the Court he was not aware of any specific training to cater to or assist them in the usage of speed measurement instruments or the ways to ascertain that the instrument is valid for usage – he told the Court that everything he knows on how to operate a speed measurement instrument, or the radar gun was all '*word by mouth*' learning.
39. I am inclined therefore to find in agreement with the accused that there is no such Regulation that regulates the usage of the speed measuring equipment or the radar gun that was used by PW 1 in this proceeding.
40. In establishing that there is no Regulation to attend to the regulating of such equipments, I now consider as to how the Prosecution can then establish the validity of such equipment. It is reasonable enough to know and expect that as with any equipment and in their term of usage, there is bound to be some 'wear and tear' as such it calls into question the functioning of the equipment at the time of its usage as well as the validity of its reading. It is for this reason, the needs for checks on an equipment is needed to ensure that it is working well on the day of its usage, this is where the need for calibration arises. PW 1 in his evidence that the radar gun used by them is shared between police station and there is no timeframe as to when it is changed etc therefore it calls into question how long an equipment can possibly be used before its functioning power is called into question. While PW 1

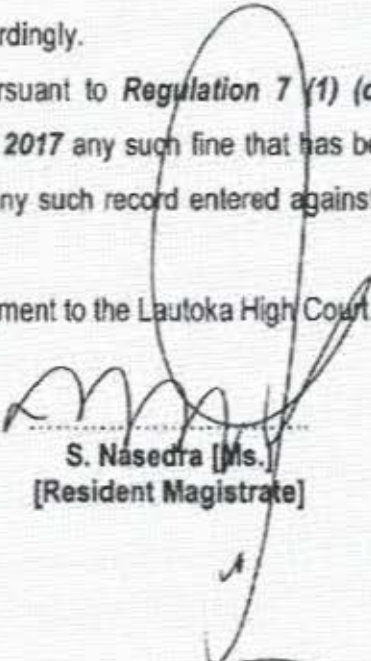
testified that they change out the battery and proceed to use the radar gun, he could not precisely tell the Court how exactly they can determine that the equipment is working properly.

41. I have had a brief read of decisions from the Australian Courts specifically Queensland, regarding this charge and to their aid, there is the presence of the *Traffic Regulations 1962* and it covers an extensive area of evidentiary matters on such equipments which includes their calibration. This Court found some assistance from an appeal decision by the District Court of Queensland in presiding over an appeal from the Magistrates Court where the appellant was convicted after a summary trial of exceeding the speed limit, it is the case of *Crossman v Queensland Police Service [2020] QDC 122* and while this case dealt with a digital speed camera system, it contains evidentiary provisions and deals with evidentiary expectations to facilitate proof of such matters where speed measurement equipments or devices are concerned. *Crossman* decided in favor of the Respondent and did not allow the appeal stating that the equipment had been properly calibrated and found that the presiding Magistrate in the summary Court had rightfully accepted the reading of the equipment as accurate. *Crossman* also stated as follows:

"...the effect of s 210c is to require the device to be tested in accordance with the manufacturer's specifications to ensure it operates correctly each time it is started at a place at which is to be used. Sergeant Haberland gave unchallenged evidence that he tested the device before and after using it, in accordance with his training and the manufacturer's requirements. The Magistrate did not err in finding that the device was tested properly".

42. *Crossman* also dealt with the evidentiary proof that needed to be established by the Prosecution in ensuring that the equipment was tested, calibrated to be working properly to which then a certificate is provided stating the details of when the test was conducted in a laboratory, in accordance with the specifications of the manufacturer and any further requirements as prescribed under the relevant Regulation – that is then put before the Court to be tested again for its accuracy in assisting the evidentiary proof towards the Prosecution's case.
43. The case of *Crossman v Queensland Police Service [2020] QDC 123* is also a relevant appeal decision from the Queensland District Court, the case deals with specifically the usage of 'laser speed detection device' for a summary trial of 'Exceeding Speed Limit' and offers a guideline as per Regulation on the evidential proof required for the accuracy of a speed reading from a laser speed detector.

44. After considering the evidence before the Court regarding the reading of the radar gun used by PW 1 on the day of the alleged offending and after considering the above discussions, I find that the Prosecution has failed in carrying out its burden beyond reasonable doubt in proving to this Court that the radar gun used by PW 1 offered accurate results of the speed of the vehicle driven by the accused. This Court has its doubts on the accuracy of the equipment used by PW 1 on the day, such doubts are reasonable. This Court is fortified in its finding also in light of the quality of evidence provided by PW 1, the same cannot be relied upon to warrant a conviction of the accused therefore I find that the Prosecution has failed to prove beyond a reasonable doubt that the accused is guilty of the Offence charged as per the TIN.
45. I therefore acquit the accused accordingly.
46. The Court further orders that pursuant to *Regulation 7 (1) (c) of the Land Transport (Traffic Infringement Notice) Regulation 2017* any such fine that has been paid for by the Accused for this TIN is to be returned to him and any such record entered against him as a result of this TIN is to be retracted.
47. 28 days to appeal against the Judgment to the Lautoka High Court.


S. Nasedra [Ms.]
[Resident Magistrate]

The Divisional Prosecuting Officer/West
Accused – In Person

