

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
 A T LAUTOKA
 Appellate Jurisdiction
Criminal Appeal No. 59 of 1981

Between :

SURENDRA PRASAD S/O Ram Prasad Appellant

-and-

R E G I N A Respondent

Mr. Krishna Counsel for the Appellant
 Mr. D. Williams Counsel for the Respondent

J U D G M E N T

This is an appeal by Suresh Prasad against two convictions for motoring offences following the death of Vijay Kumar who had allegedly fallen from the defendant's truck.

Suresh Prasad the defendant was charged for:

- (i) carrying one passenger in excess of his licence contrary to Regulation 55(1) of the 1974 Traffic Regulations;
- (ii) permitting a person to ride in an insecure position on a heavy goods motor vehicle contrary to Regulation 56(a).

The offences allegedly occurred on 18th May, 1980 on Votualevu Road and the grounds of appeal are that:-

- (i) the defendant was not identified in Court.
- (ii) there was no evidence that Votualevu Road is a public road; and
- (iii) there was no evidence that the deceased was in an insecure position.

The evidence was brief.

P.W.1, Corpl. Gabriel, stated that on 20th May, 1980 he told the defendant to bring his lorry BE192 to the police station where he observed that it was a new vehicle without side-supports or tailgate. There was a raised section 3" high round the lorry's edges.

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P.W.2, Corpl. Ramend, said that he took a cautioned statement from "the defendant". The statement is signed in the name of Suresh Prasad and explains that the deceased and Suresh Prasad had been working on the motor lorry on 18th May, 1980. In the evening Suresh Prasad was taking one Sukhu and his wife to a doctor when he saw the deceased beside Votualevu School and picked him up. The deceased sat on the tray at the rear of the lorry. Suresh Prasad's statement explained that he stopped for the deceased to alight and anticipating that the deceased had alighted, he drove on again but became disturbed because the deceased had not spoken. Thereupon Suresh Kumar turned back at the Technical School but did not see deceased in the road. He had begun to suspect that the deceased may have fallen off. When Suresh Prasad was returning home after taking the woman to the doctor he saw the deceased lying injured in the road. He put the deceased in his truck and took him to hospital.

Mr. Krishna for the appellant Suresh Prasad says that at no time did either of the police witnesses point to the appellant and identify him positively. He contends that in the circumstances there was nothing connecting the appellant with the person charged.

There is no doubt that the person charged by the police was the Suresh Prasad who signed the cautioned statement. The person appearing in court in answer to the summons must have responded to the name Suresh Prasad when called in Court. One "Thomas Kumar" would not respond in Court to the charge against Suresh Prasad. Of course there are probably several persons called Suresh Prasad. However, only one Suresh Prasad would occupy the defendant's special place in the magistrate's court. P.W.1 and P.W.2 both spoke of "the defendant" when they were referring to the person they had interviewed. P.W.1 said he saw the lorry at the shop of "the defendant, Suresh Prasad", thereby identifying the person in court not only by name but by his practice in Court. He also said "I spoke to the defendant".

At the time P.W.1 gave evidence there could only have been one "defendant, Suresh Prasad" in the Court.

Likewise P.W.2 said he took a cautioned statement from "the defendant." There was only one defendant in the Court.

Persons in Court are usually referred to by the positions they occupy for the time being. When one refers to the magistrate one does not have to point to the person on the bench and say "that person". Reference to the prosecutor can only be to the person fulfilling that role; reference to defence counsel does not need elaborating by pointing him out; he is there in that role. The person occupying the role of defendant is properly identified as "the defendant."

When the magistrate addressed the person charged at the close of the prosecution as to his defence if any he recorded "the defendant" elects to give unsworn evidence. To whom did the magistrate speak? Obviously to the person occupying the role of and identified in court as the defendant.

Apart from that the defendant said in his unsworn statement "Whatever I said to the police is correct". If there could have been any doubt as to identity those words would undoubtedly have removed it. The two police officers in court said they spoke with the defendant who was present in Court; the reply in court of the defendant is that he spoke to the police.

The case of *Middleton v Rowlett*, 1954 2 A.E.R. 277, to which I was referred has no application to this case. In *Middleton's* case there was a failure to identify the person who had been driving a car dangerously. Thus the question "Who was driving the car?" was never put to prosecution witnesses in *Middleton's* case. If the question had been put, and if the prosecution witnesses had said "the defendant" was driving, there could be little doubt that the person driving would have been identified thereby.

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In the instant case "the defendant" was identified as the driver by P.W.1 who said "the defendant" admitted he was the driver. That evidence was not challenged in any way and the learned magistrate accepted it as he was entitled to do. Similarly in his cautioned statement to P.W.2 "the defendant" identified himself as the driver.

Ground one fails.

At the appeal, defence counsel accepted that Votualevu Road was a public road but shifted his ground to complain that there was no evidence that the truck was on Votualevu Road as alleged in the charge.

P.W.1, police corpl. Gabriel, said that on the night of 18th May, 1980. he went to the scene of a fatal accident in Votualevu Road. I do not suppose there was more than one fatal accident in Votualevu Road, that evening. The caution in the cautioned statement alleges that the defendant drove the truck in Votualevu Road when the deceased fell from it. The statement shows that the defendant was born at Votualevu and resides at Votualevu; he picked up the deceased at Votualevu school. None of that evidence was challenged in cross-examination. The statement clearly shows that the deceased fell from the defendant's lorry in a road in Votualevu vicinity. It was clearly a road to which the public have access and the caution/^{and} statement of the defendant taken together sufficiently identify the road as Votualevu Road, apart from the evidence of P.W.1 that the scene was in the Votualevu Road.

Ground II fails.

On Ground III the appellant contends that the deceased could have securely held on to some projection on the driving cab or on to the 3" upraised portion at the edges of the tray. Therefore, he argues the deceased could not in the absence of other evidence be accepted as occupying an insecure position. He submits that the word "insecure" must bear its ordinary meaning. In that sense passengers in a car, bus or cab of a lorry are secure in that they cannot involuntarily be thrown or jerked into the road.

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A person on the tray of a lorry with sides 3' high could scarcely be jerked into the road if there were room for him to sit on the "floor" of the tray. If for some reason he had to stand then there would be scope for him to fall off and his safety would depend upon his own ability to secure or protect himself from being jerked off.

Where, as in the instant case, the lorry has no sides or taigate the passenger's position is such that his security depends entirely upon his own ability to maintain that position.

There is a risk which is by no means remote of his involuntarily losing his grip and balance and falling over the edge.

In other words his position, as alleged in count II, is insecure.

Ground III fails.

The appeal is dismissed. The appellant will pay \$35.00 towards the costs of the appeal.

LAUTOKA,

22/1/82

(J.T. Williams) SGD.
Judge