IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No. AAU 0130 of 2015
(High Court Case No. HAA 035 of 2013)

BETWEEN : **UMLESH CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Fernando, JA

Counsel : **Mr. S. Singh for the Appellant**

Mrs J. Prasad for the Respondent

Date of Hearing : **12 September 2018**

Date of Judgment : **04 October 2018**

JUDGMENT

Gamalath, JA

[1] The facts relating to the appeal disclose a case of dangerous driving of a Truck (GM 243) along Princess Road, 6 Miles at Tacirua on 24 November 2008, which had collided with a mini-van that came from the opposite direction of the road, causing the death of four passengers of the mini-van and five other passengers of the minivan who received grievous bodily injuries.

[2] The appellant was charged in the Magistrate's Court at Nasinu, on four counts of Dangerous Driving Occasioning Death, Contrary to Section 97 (2) (c) and 114 of the Land Transport Act 35 of 1998 and five counts of Dangerous Driving Occasioning Grievous Bodily Harm, Contrary to section 97 (4) (c) and 114 of the Land Transport Act 35 of 1998. After trial the Learned Magistrate found the appellant guilty of all charges and accordingly, on 8 July 2011 the appellant was sentenced to a total term of 2 years imprisonment, which was suspended for 3 years. His license was partially suspended for 6 months with the condition that during the period of six months he was permitted to drive only on Sundays. In addition, he was also fined $450.00.

[3] Against the conviction the appellant appealed to the High Court. A counter appeal was lodged by the State only against the sentence.

[4] On 11 September 2015 the Learned Appeal Judge of the High Court dismissed the Appellant's appeal against the conviction and allowed the appeal of the State against the Sentence.

[5] Accordingly, enhancing the punishment, the Learned Appeal Judge substituted the sentence of the learned magistrate with the sentence of 5 years. Further, the appellant was disqualified from driving for life. The fine that had already been paid was converted to court cost.

A brief account of the facts

[6] The fatal accident between the truck and the minivan had happened at a particular place on the Princess Road. The minivan was proceeding from Nausori to Suva whereas the truck towards the opposite direction. Except for one witness (who was also a passenger in the minivan one Ema Kaibau, whose evidence was called by the prosecution in deference to an order by the learned Magistrate) every other eye witness to the collision has stated in their respective evidence that the appellant drove the truck in an excessive speed , (as

assessed by one witness it was placed at a point close to 100 mph), zigzagging on the road on a heavily rainy gloomy day, a moment prior to the collision.

[7] Importantly, it was not a head-on collision, but a collision in which the front of the truck had collided with the rear part of the minivan, hurtling the minivan off the road.

[8] Every eye witness without any exception (including Ema Kaibau) has maintained that the minivan was on its correct lane ("right side" according to the phrasing of some witnesses) at the time of the accident, meaning that either the whole truck or a part of it had been on the wrong side of the road, for it was moving towards the opposite direction.

[9] In a nutshell the evidence of the case is as follows;

1. that the collision took place at a mountainous area;
2. that the two vehicles were moving towards the opposite directions;
3. that it was raining heavily, at around 4.15 pm, rather a gloomy day;
4. that according to some eye witnesses the truck was being driven at the speed of about 100 kmph.
5. that the truck was on the wrong lane, coming down the hill in a zigzag manner before it collided with the rear part of the minivan, throwing the van off the road, killing 4 passengers and injuring others severely.

<u>The Grounds of Appeal</u>

[10] Turning to the grounds of appeal advanced before us by the Counsel for the appellant he informed the Court that he is relying only on the Grounds 1,3,5,,6 and 7, for those are the only grounds of appeal that contain " matters of law". Be that as it may, I shall now examine the Grounds upon which the appellant relies in the prosecution of the appeal.

"1st Ground of Appeal"

("First Ground of Appeal")

> *"The Learned Appellant Judge erred in law affirming the Trial Magistrate's decision in convicting the Appellant and failing to evaluate the evidence adduced by the prosecution and the defense adequately and/or at all particularly with regards to numerous material contradictions in relation to the manner of driving of the minivan driver."*

[11] Having examined the evidence carefully I am convinced that there are no material contradictions (either inter se or per se) to be found through the evidence adduced in the trial. The Learned Magistrate had evaluated the evidence quite satisfactorily. The evidence of Ema Kaibau, whose evidence was led on an application made by the defense at the trial also had testified to the fact that the mini-van was on the correct lane ("right side of the road") when the accident occurred, suggesting that the appellant was on the wrong lane for a reason only known to him. In the light of such material , the Learned Appeal Judge's conclusion that the "Learned Magistrate as judge of fact and law had properly evaluated the evidence before the trial" is an unassailable conclusion. I find that the Learned Appeal Judge had quite correctly re -evaluated all the necessary material that came up through the magistrate's court proceedings. There is no merit in this ground of appeal and it should, therefore, fail.

"2nd Ground of Appeal"

Third Ground of Appeal:

> *"The Learned Appellant Judge erred in law in upholding the decision of the Trial Magistrate when he misdirected himself on the standard of proof by apportioning the blame and/or cause of accident between the minivan driver and the Appellant"*

[12] In relation to this ground, having examined the reasons adduced by the learned Magistrate, I am convinced that at no stage, in his well considered judgment, he had apportioned the blame between the appellant and the minivan driver, in a manner that offends the standard of proof involved in a criminal case. At paragraph [22] of the summing up the learned magistrate has stated that:-

a. "It is pertinent, what the State has to prove beyond reasonable doubt, is that the manner of driving of the accused at the relevant time was dangerous in all the circumstances. If the State is unable to prove the element of dangerous driving then the accused should be acquitted of all 8 counts.

b. The learned Magistrate quite accurately guided himself by referring to the decisions in **State v Seniloli** [2004] FJHC 48; HAC 028.2003S (5th August 2004) and **State v Tuiloa** [2008] FJHC 251; HAC 003.2007 (24 June 2008). The Learned Appellate Judge had correctly evaluated the approach of the learned magistrate on this issue and found that there was no error on the part of the learned magistrate's findings. I am in agreement with him on his findings on this issue.

c. In the circumstances, I am unable to accept the contention advanced through this ground of appeal. This ground is without merit.

"3rd Ground of Appeal"

(The Fifth ground of Appeal)

"The Learned Appeal Judge erred in law in upholding the decision of the Trial Magistrate when he denied the Appellant by his Counsel to make submission on no case to answer which was a right accorded to the Appellant at the close of the Prosecution case by virtue of Section 231(1) of the Criminal Procedure Act (Decree) 2009".

[13] On this point, I wish to refer to the proceedings at the trial in the magistrate's court; (Proceedings on 22 October 2012) ;

"The prosecution has closed the case after calling the evidence of the witness, Ema Kaibau; According to the proceedings, when the learned Magistrate held that there was a 'case to answer' the counsel for the defence had made no intervention to state that he wished to make a "no case to answer submission". According to the evidence all what he had stated was as follows:-

> *"My client does not wish to give sworn statement under Section 179(1)(b) (ii). "He wish to make a statement'.*
> *Immediately after that the appellant made an unsworn statement, which was in any case impermissible in law; "Sir, accident on that day, it was not my fault and the Statement which I have given to the police is my true statement."*

[14] Thereafter, seemingly acting on an afterthought, on 22 January 2013, after 3 months, the Counsel for the Appellant after the resumption of the trial made a fresh application to make a 'no case to answer' submission, which the learned Magistrate correctly turned down.

[15] The Learned Appeal Judge had correctly delved into this matter in his judgment when he held that sections 178 and 179(1) of the Criminal Procedure Act do not clearly spell out the procedure to be followed in situations of this nature. The Learned Appellate Judge was of the opinion that it was unfortunate that as a result of an oversight the learned magistrate had not called upon the appellant to make a no-case to answer submission. The Learned Appeal Judge, nevertheless decided that that he had not caused any material miscarriage of justice to the appellant.[para18 of the Judgment].

[16] In the light of what I have already quoted from the proceedings of the magistrate's court I am unable agree with the Learned High Court Judge's view that the failure on the part of the learned magistrate was "due to an unfortunate over sight". It is the vigilance on the part of a counsel who properly attends to the interest of his client that becomes

paramount in a trial. There are proper cases where a no case to answer could become absolutely important, given the unsatisfactory nature of the evidence adduced by the prosecution. This in my view is not a case that comes within that category. The decision of the learned magistrate to call for a defense at the conclusion of the prosecution was quite justifiable and in deed the appellant had promptly offered a defense in response.
In the circumstances this ground of Appeal should also fail.

"4th Ground of Appeal"
<u>(The 6th Ground of Appeal):</u>

[17] This relates to the visit the Learned Magistrate had made to the scene of the incident on 14 May 2012, one day prior to the commencement of the trial in the Magistrate's Court.

[18] The learned Appeal Judge had dealt with this issue adequately when he determined that; *"In my view the above complaint was not tenable. The trial process had all the mechanism to deal with the above alleged "irregularity". Through the power of cross examination, the respondent, through his counsel could put questions to PW1 and PW8 to elicit the information they required. Furthermore, the scene visit only assisted as to showing the directions of the road at that time. As to the road conditions of the road at the material time the scene visit on 14 May 2012 was of no assistance at all."*

[19] I could not agree more with the reasons of the Learned Appeal Judge on this issue. In the light of above this ground should also fail for want of merit. I have closely examined the legal authorities cited in favor of the proposition advanced by the Counsel for the appellant. They are dealing with the irregularities occurred in the scene visits carried out during the pendency of the trial. In this instance there was no application made by either party to visit the scene of the crime whilst the proceedings were in progress.

[20] The counsel for the appellant could not refer to any irregularity or illegality that had occurred as a result of the visit to the scene of the incident that was supposed to have been made by the learned magistrate prior to the commencement of the trial proper. Whilst the trial was in progress neither party, particularly the appellant's counsel at the trial could have applied for a visit to the crime scene, so that any doubt on the geographical lay out of the scene of the accident could have been dispelled. No party to the proceedings had made that application. Further, the "fair sketch plan of the crime scene and the photographs of the crime scene" were admitted in evidence as agreed facts. In the circumstances, I am unable to hold that there is any merit in this ground of appeal.

"5th Ground of Appeal"

(The 7th Ground of Appeal):

[21] This is the ground against the sentence:-

> *"The Learned Appellate Judge erred in law in substituting the trial magistrate's suspended sentence of 3 years and $450.00 fine with a custodial sentence of 5 years on Counts 1- 4 and 2 years on counts 5 – 8 together with a disqualification for life for driving".*

On this issue the learned Appeal Judge had the following to state in his judgment; Paragraph [27];

(i) The aggravating factors were as follows:

1. "The Accused's attitude as inferred from the learned magistrate's finding of facts. The accused knew he was driving a 7-ton truck. He knew if there was an accident with other vehicles, a fatal injury to him would be a remote possibility. This is because of the size and strength of his 7-ton truck. Consequently, on this raining day, when the road was wet and it was dark, he saw no need to slow

down. Even if he was within the 60 or 50 km p/h speed limit, the weather conditions and the wet road would make it dangerous even to travel at the speed limit. Circumstances require he slow down, even to 30 to 10 kmph, to protect other members of the public, especially so when he's driving a 7-ton truck. He failed to do so".

(ii) Through his offending, the accused had caused deaths to 4 members of the public, and 5 injuries to others. The family members of the 4 dead are serving a life sentence with the loss of their loved ones. Five others were injured. The accused still has his life. You must not complain when your liberty is taken away, because you have caused a lot of heart aches to a lot of people, who had lost their loved ones.

(iii) Through your offending, you had caused property damages to the owner of the minivan, LM 25 and other truck, E 7353, when you crashed into them, at the material time. You also caused damages to PWD when you damaged the truck, as a result of your offending". Having said the above, the Learned Appeal Judge has considered the mitigating factors".

[22] I am unable find anything objectionable in the judgment of the Learned Appeal Judge on this matter. The enhanced sentence is well within the tariff for an offence of this kind.

[23] In these circumstances there is no merit in this ground of appeal as well.

Prematilaka, JA

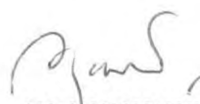
[24] I agree with the reasons and conclusion of Gamalath, JA.

Fernando, JA

[25] I agree with the reasoning and the conclusion reached by Gamalath, JA.

The Orders of the Court are:

1. The appeal is dismissed.
2. The Judgment of the High Court is affirmed.



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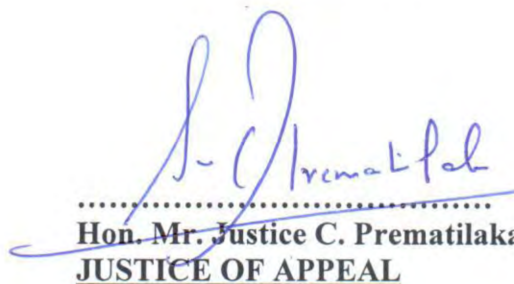
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL



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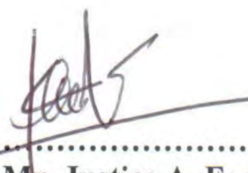
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.