**IN THE COURT OF APPEAL, FIJI**
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 0001 of 2016**
**[High Court Lautoka Criminal Case No. HAC 70 of 2014]**

**BETWEEN** : **STATE**

***Appellant***

**AND** : **JIMI BETE**

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. S. Babitu for the Appellant**
: **Mr. J. Uludole for the Respondent**

**Date of Hearing** : **14 October 2020**

**Date of Ruling** : **15 October 2020**

# RULING

[1] The respondent had been charged in the High Court of Lautoka with one count of "manslaughter arising from breach of duty" contrary to section 240 and 241(5) of the Crimes Act, 2009 and one count of "reckless or negligent act" contrary to Section 268(b) of the Crimes Act, 2009. The particulars of the two counts were:

***First Count***

> *"Jimi Bete on the 15th day of May 2014 at Malolo in the Western Division, having a duty of care whilst in control of a boat namely Gaunavou, was in breach of that duty, in that he omitted to take reasonable precaution as to the maneuvering of the boat thereby causing the death of Mark Timothy Hardaker"*

***Second Count***

*"Jimi Bete on the 15th of May 2014, at Malolo in the Western Division, whilst in control of a boat namely Gaunavou, was negligent as to the maneuvering of the boat thereby causing harm to Mosese Soqeta"*

[2] After the summing-up, on 04 December 2015 the majority of assessors had expressed an opinion that the respondent was not guilty of the first count but guilty of the second count. The learned High Court judge in the judgment dated 07 December 2015 had agreed with the assessors with regard to the first count but disagreed with them on the second count and acquitted the respondent of both counts.

[3] A timely notice of appeal against conviction had been tendered by the appellant on 05 January 2016. The appellant's written submissions had been filed on 17 May 2018. The written submissions for the respondent had been tendered on 06 August 2020.

[4] The evidence before court had been summarised by the trial judge as follows in his judgment.

> *5. 'The deceased Mr. Mark Hardaker with his friend Mr. Saiso went for a fishing tip on a fiber glass boat in the evening of 15th of May 2014, while they were vacationing at Mana Island Resort with their wives. They were accompanied by one Nicholas MacGee. Late Mosese Soqeta was the captain of the boat. On their way back to the island, they were hit by a boat that was captained by the accused. Mr. Mark Hardaker succumbed to death due to the injuries he sustained at this accident.*
>
> *6. The prosecution presented evidence that the accused was sailing his boat against the tide. It was a bit windy evening and sea was rough and choppy. The boat was travelling fast as it was going against the tide. The accused was seated at the back of the boat beside the engine. He was seated at the right side of the engine and was holding it with his left hand. The accused had stated in his caution interview that a captain of a boat is required either to stand and hold the engine or to sit beside the engine and look at the front from the right side of the boat. He went further and stated in his caution interview that he had to sit and look at the front from his right side as it was difficult for him to stand and look forward due to condition of the sea. The front portion of the boat was lifted up and was hitting the tide, which made the boat rugged. The accused had further stated in his caution interview that he did not see any boat coming in front of him. He was not aware about the boat which eventually collided with his until his boat hit on it.*

> *7. In the meantime, late Mr. Mosese, the captain of the other boat had stated in his caution interview that he saw the boat of the accused was coming towards them about 200 meters away. However, he had presumed that the captain of that boat might have seen his boat. After a while he suddenly saw the boat of the accused was very close to him and was going to hit his boat. He then accelerated his boat and tried to turn to right side to avoid the collision, but it was too late.*
>
> *8. None of the witnesses who travelled in the boat captained by the accused had seen this fatal boat prior to the collision. Moreover, two witnesses who were in the fatal boat also had not seen the incoming boat until it hit on them.*

[5] The respondent had remained silent throughout the trial.

[6] In terms of section 21(2) (b) of the Court of Appeal Act, the appellant could appeal against an acquittal only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] Grounds of appeal urged by the appellant.

> *Ground 1- That the learned Judge erred in fact by stating that there was no specific evidence of what the omission the accused made in breach of his duty of care towards the deceased person when in fact there was evidence which shows that the deceased failed to take any necessary precautions.*
>
> *Ground 2- The learned Judge erred in law in failing to consider section 22 of the Crimes Decree which specifically states what constitute a person to be negligent.*

***01st ground of appeal***

[8] The appellant argues that the main issue at the trial was whether the respondent made an omission while he was sailing his boat in that evening of the day of the incident, whether such omission caused the death of the deceased and amounted to a gross negligence that constituted a crime.

[9] Section 240 of the Crimes Act states that;

> *"A person commits an indictable offence if-*
>
> *a. The person makes an omission; and*
> *b. The omission causes the death of another person; and*
> *c. The first mentioned person-*
> *i. has a duty to the other person in accordance with Section 241,*
>
> *ii. the omission amounts to a negligent breach of the duty; such omission is or is not accompanied by an intention to cause death or bodily harm"*

[10] Section 241 (5) of the Crimes Act states that;

> *"(5). It is the duty of every person who has in his or her charge or under his or her control anything (whether living or inanimate, and whether moving or stationary) of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precaution to avoid such danger; and he or she shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to perform that duty".*

[11] Thus, a person is liable for the offence of manslaughter arising from breach of duty under section 240 of the Crimes Act, 2009 when he, having a duty towards another person as set out in section 241, becomes guilty of a negligent breach of that duty as a result of an omission on his part, which causes the death of the other person irrespective of whether such omission is or is not accompanied by an intention to cause death or bodily harm.

[12] Negligence is defined in section 22 of the Crimes Act as follows.

*'22. A person is negligent with respect to a physical element of an offence if his or her conduct involves —*

*(a) such a <u>great falling short of the standard of care</u> that a reasonable person would exercise in the circumstances; and*

*(b) such a <u>high risk</u> that the physical element exists or will exist—*

*that the conduct merits criminal punishment for the offence*

[13] In **<u>Tukainiu v State</u>** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal stated

*[44] A person is negligent if he is unaware of the risk in question but ought to have been aware of it or having foreseen it he does take steps to avoid it but those steps fall below the standard of conduct which would be expected of a reasonable person. In other words negligence is the inadvertent taking of an unjustifiable risk.*

[14] It is well settled that for a person to be convicted of manslaughter arising from breach of duty under section 240 of the Crimes Act, 2009 it must be shown *inter alia* that the negligence of accused goes beyond a mere matter of compensation between subjects and shows such disregard for the life and safety of others as to amount to a crime against the state deserving punishment. Thus, a very high degree of negligence would be required in the case of manslaughter arising from breach of duty.

[15] The ordinary principles of the law of negligence apply to determine whether the defendant was in breach of a duty of care towards the victim, and if so, whether it should be characterised as gross negligence and therefore a crime; it is eminently a jury question to decide whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances as to amount to a criminal act or omission (vide **<u>Adomako</u>** [1995] 1 A.C. 171 following **<u>Bateman</u>** (1927) 19 Cr. App. R. 8, CCA, and **<u>Andrews v DPP</u>** [1937] A. C. 576, HL)

[16] Where an allegation of manslaughter is based on an omission to act (not itself being unlawful), the issue to be left to the jury are whether a duty of care was owed to the deceased; whether there had been a breach of that duty; whether the breach had caused

death; and whether it should be characterised as gross negligence and, therefore, as a criminal act (vide **Khan and Khan** [1998] Crim. L. R. 830, CA.).

[17] Having cited ***Bateman*** and ***Adomako*** the learned trial judge had proceed to analyse the evidence and held as follows.

> '*17. In view of the evidence given by the three witnesses of the prosecution, who were in the boat that was captained by the accused, the sea was bit rough and choppy. It was a bit windy and bright sunny evening as it was still the daylight. The boat was traveling fast as it was going against the tide. They have heard sound of waves hitting the front side of the boat. The boat rugged as it was hit by waves. The evidence reveals that he was seated on the right side of the engine and was looking at front from the right side of the boat as he was required.*
>
> *18. Mr. Saso and Mr. MacGee both of them were in the other boat, had not seen the boat of the accused until it came and hit on their boat. Moreover, none of them had seen the way or the manner the boat of the accused came towards them. However, according to the caution interview of late Mr. Mosese, that he had seen the boat of the accused coming towards them some 200 meters away. He had presumed that the captain of that boat must have seen them, therefore he had not taken any steps to take his boat away from the direction of the incoming boat. When Mr. Moses had finally tried to turn the boat after seeing the boat of accused was very close and was going to hit on his, it was too late.*
>
> *19. There is no specific evidence of what the omission the accused made in breach of his duty of care towards the deceased person. The accused was seated on the right side of the engine and was looking at the front from right side of the boat as he was required. It was established that the boat was traveling against the choppy and windy sea, obviously it was not a condition for a captain of a fiberglass boat to stand and maneuver his boat. Accordingly, it is my opinion that the prosecution has failed to establish beyond reasonable doubt that the accused failed to take necessary precautions in maneuvering his boat in that evening and his conduct amounts to a gross negligence and a crime.'*

[18] I am in agreement with the conclusion of the trial judge. In fact Mosese, the captain of the boat where the deceased and the injured were, was the only person who had seen the appellant's boat and he had stated in his caution interview that he saw the boat of the appellant coming towards them about 200 meters away but he not taken any action to avoid a collision until the last few seconds. It appears from evidence that, unfortunately though, had it not been the last minute swerving of his boat by Mosese the appellant's boat might not have hit the deceased on the head (upon the side collision) as it would have been a head on collision between the two boats. To the extent of not

altering his course upon seeing the appellant's boat to avoid a collision there had been a higher degree of negligence on the part of Mosese which suggests that at its best the accident may have been the result of contributory negligence on the part of both captions perhaps giving rise to a civil liability sounding in monetary claims but not criminal liability attracting penal consequences.

[19] The appellant has cited *International Regulations for Preventing Collisions at Sea 1972 (Colregs),* Rule 5 and 6 and submitted that the trial judge had not considered them in the directions to the assessors or in his judgment. The appellant has further submitted that Fiji Maritime (Collision Prevention) Regulations 2014 that came into effect on 01 January 2015 has given effect to International Regulations for Preventing Collisions at Sea 1972 (Colregs) to which Fiji is a party. The appellant has not explained how the rules under the said international regulations would have impacted on the outcome of the case against the appellant. If at all, it looks as if both captions may have been in breach of some of those rules and been responsible jointly in the collision resulting in the death of the deceased and causing injuries to the injured.

[20] All in all, Mosese may have been more responsible and more to be blamed for the collision than the appellant. The first ground of appeal has no merits and no reasonable prospect of success in appeal.

***02nd ground of appeal***

[21] The appellant complains that the trial judge had not considered section 22 of the Crimes Act, 2009. It is true that the trial judge had not specifically mentioned section 22 either in the summing-up or in the judgment. But the summing-up and the judgment capture the gist of section 22. In any event, I have already considered section 22 of the Crimes Act, 2009 under the first ground of appeal and come to the decision that the evidence of the case had not established such a high degree of risk taking or criminal negligence on the part of the appellant.

[22] There is no reasonable prospect of success in the second ground of appeal too.

[23] The same considerations apply to the second count under section 268(b) of the Crimes Act, 2009. Though the majority of the assessors had opined that the appellant was guilty the trial judge disagreed with them, in my view, correctly.

[24] **State v Kulavere** [1993] FJHC 34; Haa0027j.92s (6 April 1993) was a case where the accused was facing two charges. The first charge was manslaughter contrary to Section 198 of the Penal Code. It was alleged that the accused by an unlawful act, caused the death of one Sailasa Koroi. The second charge was an alternative to the first and alleged criminal recklessness contrary to Section 237(b) of the Penal Code. The second charge was that the accused navigated a vessel, namely an outboard powered fibre-glass punt, in a manner so rash or negligent that it caused harm to Sailasa Koroi. The accused pleaded guilty to the charge of manslaughter and consequently the state prosecutor had informed court that he would not proceed with the second count.

[25] The facts in ***Kulavere*** are very much similar to the facts of this case and section 237(b) of the Penal Code is similar to section 268(b) of the Crimes Act, 2009. Byrne J said as follows and then, acting under Section 44(1) of the Penal Code discharged the accused without proceeding to a conviction, subject to certain conditions.

> *'It is then submitted that on the basis of the facts which I have now outlined the deceased was at least equally if not wholly at fault in causing the accident.*
>
> *It is said that if the speed at which the Accused was travelling was more than it should have been then I should find that the deceased was equally at fault in coming down stream in a manner contrary to the practice in the area. It is submitted that Mr. Koroi could have been more to be blamed when one takes into account the fact that he had more navigable area to his left side than the Accused and therefore, if he had followed the normal practice and gone to mid-river so as to have a clear view before the sharp bend, the Accused would not be in Court today.'*

[26] I have been mindful of the role of the trial judge when he agrees as well as disagrees with the majority of assessors and find that the trial judge's judgment coupled with the summing-up cannot be faulted in both these respects.

[27] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

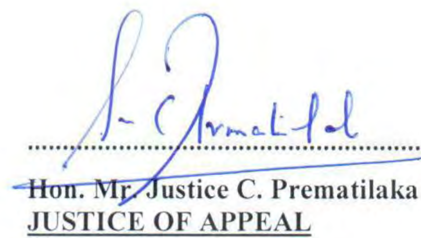
[28] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

[29] In either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable

be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

## Order

1. Leave to appeal against acquittal is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL