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

CRIMINAL APPEAL NO. 0014 OF 2018
[Suva High Court Criminal Action No: HAC 194 of 2016]

BETWEEN : **JOHN SUBRAMANI GOUNDAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Qetaki, JA
Morgan, JA

Counsel : **Mr G. O'Driscoll for the Appellant**
Ms E. Rice for the Respondent

Date of Hearing : **5th July, 2023**

Date of Judgment : **27th July, 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Qetaki, JA and agree that the appeal against sentence should be dismissed.

Qetaki, JA

Background and facts

[2] The appellant is appealing against sentence after leave to appeal was allowed by a single Judge (Prematilaka, RJA) on 7 October 2020.

[3] The information on the appellant read as follows:

First Count

Statement of Offence

Manslaughter: Contrary to section 239 (a)(b) (c) of the Crimes Act 2009.

Particulars of Offence

John Subramani Grounder on the 29 day of April, 2016 at Vuci Road, Nausori in the Central Division, drove a motor vehicle registration number LT4189 along Vuci Road South in a manner that caused the death of Sairusi Tosonacakacaka Vunakece and at the time of driving the said John Subramani Grounder was reckless as to the risk that his conduct would cause serious harm to others.

Second Count

Statement of Offence

Failure To Supply Sufficient Sample To Breath Analysis On The Direction Of A Police Officer: Contrary to section 103 (1) (b) and section 114 of the Land Transport Act 35 of 1998 and section 1A) (i)(ii) of the land Transport [Amendment]Decree No. 74 of 2012.

Particulars of Offence

John Subramani Grounder on the 29th April, 2016 at Vuci Road, Nausori in the Central division, upon being required by a Police Officer namely A/CPL 3415 Sikeli to undergo breath analysis, failed to provide sufficient specimen of breath in such a way for the said analysis to be carried out and satisfactorily achieved.

Third Count

Statement of Offence

Failure To Comply With Requirements Following An Accident: Contrary to section 63(1) and section 87 of the Land Transport (Traffic Regulations 2000).

Particulars of Offence

John Subramani Grounder on the 29th day of April, 2016 at Vuci Road, Nausori in the Central Division, being a driver of a motor vehicle registration No. LT 4189 involved in an accident on Vuci Road, Nausori failed to stop to give necessary assistance and his name, address and address of the owner and all information as required.

[4] Under section 135 of the Criminal Procedure Act 2009, the following facts were admitted by the accused now appellant, witnessed by the Counsel for Defence, State Counsel and the learned trial Judge and filed in Court. It is admitted that:

(a) The accused in this case is John Subramani Grounder.
(b) The accused was 37 years old on the 29 the day of April 2016 which was the date of the alleged incident.
(c) The accused was residing at Vuci South Road, Nausori.
(d) The deceased in this matter is Sairusi Tosonacakacaka Vunakece.
(e) The deceased was residing at Vuci South Road, Nausori.
(f) The accused was driving a taxi registration number LT 4189 on 29th April, 2016.
(g) The accused was caution interviewed at Nausori Police Station on the 29th of April 2016.
(h) The accused gave his answers in his caution interview voluntarily and out of his
(i) The Caution interview of the accused was tendered by counsel as agreed by the Prosecution and Defence.
(j) The Post Mortem Examination of the deceased was conducted by Dr. James Kalougivaki on 29th of April 2016 at 9:30am at CWM Hospital Mortuary.

[5] For the purpose of Sentencing the learned trial Judge had clearly set out the facts and circumstances of the case which appear in paragraphs 2 to 4 inclusive (pages 37-38) of the High Court Record.

[6] The trial took place on 22, 23 and 24 January 2018. After the summing up by the learned trial Judge on 26 January 2018, the assessors returned a unanimous opinion of guilty against the appellant in respect of all counts. The judgment was delivered on the same day with the learned trial judge agreeing with the assessors and convicted the appellant on all three counts. The appellant was on 30 January 2018 sentenced to 8 years imprisonment on the first count, 12 months imprisonment on the second count and 30 days imprisonment on the third count, all sentences to run concurrently with a non-parole period of 7 years.

[7] Aggrieved by the conviction and sentence the appellant filed a timely notice of appeal against conviction and sentence on 23 February 2018. His written submission was filed on 9 January 2020.The respondent's reply was filed on 19 June 2020.By a ruling on 7 October 2020, the learned single Judge refused to give leave to appeal against conviction but granted leave to appeal against sentence. In the said ruling Prematilaka, RJA raised the issue of having a guideline judgment for "*motor manslaughter*" stating:

> "*39. I think it is high time for the DPP to move the Court of Appeal or the Supreme Court to issue a guideline judgment (after complying with the procedural steps under the Sentencing and Penalties Act) regarding applicable tariff on manslaughter arising from reckless or gross negligent driving also known as "motor manslaughter" for future guidance. Needless to state that this is obviously a fit case to do so and the full court of the Court of Appeal may then consider the propriety of the sentence imposed on the appellant after having set the applicable sentencing guidelines and the tariff for "motor manslaughter"*

[8] Any appeal against conviction and sentence to this Court may be made with leave of Court, pursuant to section 21(a) and (b), of the Court of Appeal Act. The test for leave to appeal against both conviction and sentence is "***reasonable prospect of success***", as

established through case law: **Caucasus v State; Navuki v State; State v Vakarau; Sadrugu v State,** and others.

[9] When a sentence is challenged the test is not whether it is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles outlined in the case **Kim Nam Bae v State** AAU 0015 0f 2011 [1999] FJCA 21; (26/02/1999) namely that the sentencing judge.

i. Acted upon a wrong principle.
ii. Allowed extraneous or irrelevant matters to guide or affect him.
iii. Mistook the facts.
iv. Failed to take into account some relevant consideration.

[10] Section 23(3) of the Court of Appeal Act provides:

> *"On appeal against sentence the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

Grounds of Appeal against sentence

[11] The following grounds of appeal against sentence were urged by the appellant through his counsel before a single judge and in this Court:

(i) *That the learned trial judge erred in law in imposing a sentence of eight years with a non-parole period of 7 years imprisonment on the Appellant when in similar fact cases sentence has been significantly lesser.*

(ii) *That the sentence imposed was harsh and excessive in all circumstances of the matter leading to an error of law in the consideration of the same.*

(iii) *That the learned trial judge erred in law in disregarding current sentencing practice and the terms of any applicable guideline Judgment as specified in section 4(2)(b) of the Sentencing and Penalties Act 2009.*

(iv) *That the learned trial judge erred in law in failing to verify that the antecedent report submitted by the prosecution contained accurate and complete information relative to the Appellant.*

Appellant's Case

[12] The counsel for the appellant had filed the appellant's List of Authorities and Submissions on 4th and 5th May 2023 respectively. He also made oral submissions at the hearing of the appeal .The submissions addressed the grounds of appeal and the view of the learned single judge on the need for guideline judgment in sentencing in "*motor manslaughter*" cases-see paragraph [7] above. Grounds 3 and 4 of the appeal were not pursued by counsel as indicated for the reasons stated in paragraphs 32 and 33 of the appellant's written submissions.

[13] Counsel emphasized that this case involved gross negligence on the part of the appellant and submitted "*that due consideration should be had to the fact that this is a manslaughter matter that involves somewhat more than simple dangerous driving and not what might be termed a usual manslaughter whereby the tariff has been set dependent on the degree of provocation. There is still little guidance on the sentencing for manslaughter by a vehicle driver in Fiji and sentences imposed reflect the disparity in the sentencing for manslaughter by vehicle.*"

[14] Counsel also made reference to the statement by the Honorable Justice of Appeal Mr. Prematilaka, made at the leave stage, at paragraph 39 of his Judgment (page 13 of the Record of the High Court), as reproduced at paragraph [7] above. His written submissions contained an analysis of cases which may assist in the issue of a guideline judgment.

Grounds 1 and 2

[15] The appellant addressed both the grounds together as they are interrelated. In essence the appellant's argument is that, based on the authorities (List of Authorities), and taking account of the appellant's circumstances the appropriate sentence in this case, would be for a period of imprisonment for a period of 6 years with a non-parole period of 4 to 5 years.

[16] Further, Counsel submitted, based on his analysis, the range of sentences that need to be included, if there is to be a guideline judgment produced from this appeal.

[17] The appellant submitted that the trial Judge did not take into account the appellant's expression of remorse, which is identified as a personal mitigation. No consideration has been given to this in the sentence, and on the basis alone this appeal should be upheld with the sentence reduced accordingly.

[18] In conclusion, the appellant submitted that the sentence imposed was harsh and excessive partially due to the failure to account for mitigating factors raised but not considered, particularly with the remorse expressed. Counsel submitted that the sentence should be 6 years with a non-parole period of 4 to 5 years.

Respondent's Case

[19] The respondent filed written submissions on 30 June 2023, and counsel for the respondent also made oral submissions at the hearing.

[20] Counsel stated that **Kim Nam Bae (s**upra) provides that the tariff for manslaughter ranges from a suspended sentence to 12 years imprisonment. That this range is necessarily so broad as to provide little assistance to a sentencing judge. The broad sentencing range is due to sentences being imposed which reflect the facts in each case.

[21] That case law provides very little guidance apart from the fact specific examples. Within the broad range there is currently no distinct tariff for motor manslaughter. There have been a number of cases concerned with sentencing for motor manslaughter in Fiji, but none purports to be guideline cases.

[22] With reference to guidelines judgment, the respondent submits that in paragraph [39] of his ruling, Prematilaka, RJA, had suggested that the case was suitable for a guideline judgment, and states that the courts have in recent years set guidelines for various offences. For example, Eperama Tawake v State 2022 set tariffs for aggravated robbery. A need for clarity was needed as there had been large disparities in sentencing for what was colloquially referred to as street muggings. For essentially the same criminality, some defendants received as little as 18 months imprisonment whilst others receive prison sentences in excess of 10 years.

[23] A large number of aggravated robbery cases are dealt with in Fiji compared to the number of motor manslaughter cases. One of the aims of the guideline judgment is to promote consistency in approach in sentencing offenders and the need to promote public confidence (section 8(2) (a) and (b) of the Sentencing and Penalties Act 2009.) With relatively few cases of motor manslaughter, it is difficult to identify examples where there has been lack of consistency in approach to sentences by trial Judges.

[24] The appellant acknowledges the comprehensive list of cases provided by counsel for the appellant, which tend to fall in two main groups. Many resulted from mechanical defect or sub-standard driving and a smaller group involving bad driving associated with the consumption of alcohol, as in the present case.

[25] The cases similar to the present case are **Hill v State** FJCA AAU 0019 of 2015; **State v Degei** Suva High Court HAC 333 of 2018; **State Ratoto** Suva High Court, HAC 356 of 2018S and **State v Ubitau** Suva High Court HAC 153 of 2018S. It was submitted that in **Degei, Ratoto and Ubitau**, substantial discounts were given for guilty pleas.

[26] In **Hill v State** (a case most similar to this case), the head sentence was only 1 year less than the head sentence in this case, where Aluthge J although acknowledging that the present case postdated the sentence in Hill referred to the present case at paragraph 34 as follows:

> *"The learned counsel for the respondent have cited a similar manslaughter case, State v Grounder HAC 194 of 2016, where a sentence of 8 years imprisonment with a non-parole period of seven years had been imposed. Although the case was decided after the sentence of the present matter was passed, it indicates the current sentencing practice in Fiji in cases involving driving under influence of alcohol. Therefore, the learned sentencing judge has not fallen into error in selecting the starting point."*

[27] The Judge made no adverse criticism of the sentence in the present case. The respondent also made submission in relation to approaches in other countries such as England, Wales, and Australia, which no doubt will be considered when a guideline judgment for motor manslaughter cases in Fiji is considered.

[28] In direct response to the grounds of appeal, the respondent submitted that the appellant had argued both grounds at paragraph 30 of his submissions:

> *"Concluding submissions relative to grounds 1 and 2 it is submitted that based upon the authorities put forward and taking account of the Appellant's circumstances the appropriate sentence would be for a period of imprisonment for a period of 6 years with a non-parole period of 4 to 5 years."*

[29] The Court was reminded of the four principles that govern appeals against sentence, as stated in paragraph [9] above. It was submitted that the appellant has not argued the 4 principles outlined in the case **Kim Nam Bae v State** (supra).

[30] The respondent also submitted that the learned trial judge had considered all the factors he should have considered and the sentence should stand. Although counsel for the appellant argues that the appellant should receive a reduced sentence based upon the authorities listed, the case that most resembles the facts of the present case **(Hill v State)** received a head sentence one year less than the appellant.

[31] In response to the appellant's submission on remorse not being taken into account by the trial Judge, the respondent submitted that, there is little or no evidence of remorse in this case. The appellant was uncooperative, fled the scene, failed to give a sample of breath, pleaded not guilty. Appealed against sentence. It is clear he has not accepted his guilt. His actions are not the actions of someone who is truly remorseful.

Analysis

[32] The appellant's contention that the learned trial Judge erred in law in imposing a sentence of 8 years with a non-parole period of 7 years on the appellant when in similar cases sentences has been significantly low, and that the sentence imposed on the appellant was excessive in all the circumstances of the case, is not supported by the evidence at the trial or by the cases mentioned in a list provided on behalf of the appellant. There were variance and factors that distinguish those cases from this, for instance, where the accused pleaded guilty. Only **Hill v State** (supra) is closely related to this case in terms of facts and circumstances, and in that case the sentence was one year less than the sentence in this case. The sentence in this and **Hill's** case differ by 1 year only.

[33] The learned single Judge had in paragraph 39 of his Ruling was of the view that this is a fit case in which a guideline judgment would be appropriate to be given-see paragraph [7] above. Counsel for the appellant at the hearing indicated that the grounds of appeal were in expectation of such a judgement to be delivered in this case. Unfortunately, the procedural steps under the Sentencing and Penalties Act 2009 regarding applicable tariff on manslaughter arising from reckless and gross negligent driving also known as "*motor manslaughter*" has not been put in motion by the Director of Public Prosecutions (DPP). Such a steps would require inputs from both the DPP and the Legal Aid Commission, as well as this Court. The respondent is aware of the salutary objectives of having a guideline judgment, and its views are set out in paragraphs [21] to [25] herein under "*Respondent's Case*".

[34] Had the Procedural steps been taken for guideline judgment; this Court would consider the propriety of the sentence imposed on the appellant by the learned trial Judge after having set the applicable sentencing guideline and the tariff for motor manslaughter. Commenting on the object of the Sentencing and Penalties Decree 2009 (now Sentencing and Penalties Act 2009) this court (per Calanchini, P with Gamalath JA and Prematilaka RJA)' in **Ashwin Chand v State** (2016) FLR 2009 AAU63/12 (HAC 49/12) 27 May 2016 at paragraph [15] stated:

> *"The ultimate object of the decree coupled with the judicial guidelines is to help judges arrive at a just and fair sentence proportionate to the gravity of the offence for an accused considering all the circumstances of the case while maintaining an acceptable degree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing."*

[35] In my assessment, the sentence handed down by the learned trial Judge, given the cases cited and the circumstances of this case, was just and fair being proportionate to the gravity of the offence. The expression of remorse is acknowledged but it was not genuine, and counsel for the respondent is correct .I am in agreement with the respondent's submission that the sentence is not harsh or excessive. That it should stand undisturbed given the facts and circumstances of this case.

[36] The appellant has failed to show that the learned sentencing Judge, in sentencing the appellant, acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts, or failed to take account some relevant consideration.

[37] The grounds of appeal have no merit. They are dismissed, and the appeal against sentence is not allowed. The sentence is affirmed.

Morgan, JA

[38] I agree with the judgment in draft . its reasoning and conclusions .

Order of the Court:

1. *Appeal is dismissed.*
2. *Sentence is affirmed.*

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Walton Morgan
JUSTICE OF APPEAL

SOLICITORS:

O'Driscoll & Co. for the Appellant

Office of the Director of Public Prosecutions for the Respondent