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

CRIMINAL APPEAL NO.AAU 017 of 2020
[In the High Court at Suva Case No. HAC 354 of 2018]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**MICHAEL JUNIOR MOW**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. P. Madanavosa for the Appellant**
	:	**Mr. S. K. Waqainabete for the Respondent**
Date of Hearing	:	**28 February 2023**
Date of Ruling	:	**01 March 2023**

RULING

[1] The respondent had been indicted in the High Court at Suva upon two counts of manslaughter and two counts of dangerous driving occasioning grievous harm contrary to section 239 of the Crimes Act, 2009 and section 97(4)(c) and 114 of the Land Transport Act No. 35, 1998 respectively committed on 02 November 2017 at Viwa Road, Tailevu, in the Eastern Division.

'***FIRST COUNT***

Statement of Offence

MANSLAUGHTER: *Contrary to Section 239 of the Crimes Act, 2009.*

Particulars of Offence

MICHAEL JUNIOR MOW *on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of* ***PAULO***

BELAGIO *and at the time of driving, the said* ***MICHAEL JUNIOR MOW*** *was reckless as to the risk that his conduct would cause serious harm to another.*

SECOND COUNT

Statement of Offence

MANSLAUGHTER: *Contrary to Section 239 of the Crimes Act, 2009.*

Particulars of Offence

MICHAEL JUNIOR MOW *on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of* ***VILIVO MASAU*** *and at the time of driving, the said* ***MICHAEL JUNIOR MOW*** *was reckless as to the risk that his conduct would cause serious harm to another.*

THIRD COUNT

Statement of Offence

DANGEROUS DRIVING OCCASIONING GRIEVOUS HARM: *Contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.*

Particulars of Offence

MICHAEL JUNIOR MOW *on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to* ***JONE RAVILI****.*

FOURTH COUNT

Statement of Offence

DANGEROUS DRIVING OCCASIONING GRIEVOUS HARM: *Contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.*

Particulars of Offence

MICHAEL JUNIOR MOW *on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to* ***VILIMONI TUIVUYA****.*

[2] At the commencement of the trial, the respondent had pleaded not guilty to the first two counts but pleaded guilty to the third and fourth counts. After trial, the assessors had returned with the unanimous opinion that he was guilty of the first and the second counts. The learned High Court judge had disagreed with the assessors and found the respondent not guilty as charged but found him guilty of the offence of dangerous driving occasioning grievous harm under section 97(4)(a) of the Land Transport Act in relation to the 02nd and 03rd counts and convicted him accordingly. The respondent was sentenced to an aggregate imprisonment term of 04 years with a non-parole period of 02 years and his driving licence was suspended for 05 years with immediate effect with the 05 years' suspension running from the date of his release from imprisonment.

[3] The respondent had appealed against his conviction and sentence. However, he had tendered an application in From 3 dated 10 November 2021 seeking to abandon his appeal. Having followed the guidelines in **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) on 28 February 2023, this court allowed his application and accordingly his appeal is deemed abandoned in terms of Rule 39 of the Court of Appeal Rules.

[4] The appellant had appealed against the acquittal of the 01st and 02nd counts (two grounds of appal) and sentence (two grounds of appeal). However, the counsel for the appellant informed court that she would abandon the sentence appeal altogether and pursue only the 01st ground of appeal against conviction which is as follows:

> *'THAT the Learned Trial Judge erred in law and in fact in finding that the State had failed to prove recklessness to the criminal standard for the offence of Manslaughter.'*

[5] The State's appeal against conviction is timely. In terms of section 21(2) (b) of the Court of Appeal Act, the State could appeal against acquittal only with leave of court. For a timely appeal, the test for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018),

Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The learned High Court Judge had summarised the facts in the sentencing order as follows:

> *4. According to the facts of the case, on 02/11/17, in the evening, you drove the motor vehicle Registration No. EP113 along the Kings Road with five passengers and you were consuming beer with four of those passengers. The other passenger was a Form 7 student. You had consumed alcohol during daytime that day and also the previous night. You were unable to negotiate the bend at Viwa, Kings Road and collided with the oncoming truck Registration No. IL915. According to your cautioned interview, the vehicle you were driving had a defect where the steering wheel was pulling to the right and you have said that at the bend where the collision took place, your vehicle was pulling to the right. The impact occasioned the death of two of your passengers and caused grievous harm to two other passengers. Upon analysing a sample of you blood, it was revealed that you had 175mg of alcohol per 100ml of blood. The legal limit is 80mg per 100ml of blood.'*

[7] The learned High Court Judge had held that the prosecution had not established the fault element of manslaughter. As far as this case is concerned, both parties agree that the fault element is 'recklessness as to causing serious harm' (see also **Tapoge v State** [2017] FJCA 140; AAU121 of 2013 (30 November 2017).

[8] According to the High Court judge's reasoning, given the level of ethanol (175mg of alcohol per 100ml of blood) in the respondent's blood and the evidence of PW3 that even at 80mg Ethanol per 100ml of blood which is the legal limit, *'a person would have lack of self-control, poor coordination, poor judgment and even memory loss'*, and since the evidence does not disclose the point in time he reached the above legal limit (that is, whether it was before he engaged in driving the vehicle in the evening in question or during the time he was driving with the two deceased and the two injured)

there was a doubt as to whether there was a possibility for the respondent to have realized that there was such a risk as required to establish the offence of manslaughter under section 239 of the Crimes Act.

[9] It is clear from evidence that at the time of the accident the appellant was having alcohol in his blood far in excess of the legal limit and there was every possibility that it would have affected his self-control and resulted in poor coordination and poor judgment as a driver. As admitted by the High Court judge, in terms of section 30(1) of the Crimes Act evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. Defense of intoxication is not available in such an instance [see also **Hill v State** [2018] FJCA 123; AAU109.2015 (10 August 2018)].

[10] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [section 21(4) of the Crimes Act, 2009]. Thus, section 30(1) of the Crimes Act appears to apply even when the fault element is 'recklessness as to causing serious harm'. Thus, self-induced intoxication could not in law have negated his awareness of a substantial risk of an accident due to impaired self-control and resulting poor coordination and judgment because of the level of alcohol in the respondent's blood.

[11] The trial judge has further argued that the respondent had admitted in his cautioned interview that that his vehicle had a defect where the steering wheel was pulling to the right and this admission served as an explanation as to how the vehicle may have crossed over to the opposite lane and the accident, therefore, may have been something beyond the his control.

[12] However, if the appellant knew that there was a defect in his vehicle as a result of which he was not having full control of its movements on the road, that shows that having regard to those circumstances, it was unjustifiable for him to take the risk of driving the vehicle with the two deceased and the two injured in it. His admission also demonstrates that he had sufficient awareness of a substantial risk that driving a vehicle with such a defect will result in an accident.

[13] Section 21 of the Crimes Act defines what recklessness is. In **Ratabua v State** [2022] FJCA 185; AAU129.2016 (29 September 2022) the Court of Appeal further said that

> *[16] Recklessness has been described as the state of mind of a person who foresees the possible consequences of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees the probability that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is 'an attitude of mental indifference to obvious risk'. Driving at a furious speed through a narrow and crowded street is a reckless act. The person foresees that someone in the crowd may get injured by his act, but is 'mentally indifferent' to such obvious risk. Likewise, if A throws a stone over a crowd, without caring whether it would injure someone, and the stone falls on the head of one of the persons in the crowd, A is responsible for causing injury recklessly (see **Criminal Law: Cases and Materials Sixth Edition Reprint 2012 by KD Gaur** page 52)*
>
> *[17] Thus, recklessness involves subjective awareness of an unjustifiable risk of harm. If a doctor performs a difficult operation and is aware that it may prove to be fatal but goes ahead because there are no other safer options, he cannot be said to be reckless as it is justifiable to take the risk.'*

[14] In **Hill v State** [2018] FJCA 123; AAU109.2015 (10 August 2018) the Court of Appeal held:

> *[29] ……. A person who takes the control of the steering wheel under the influence of alcohol or drugs knowingly puts more than one person at risk of being killed ….'*
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> *[30] Manslaughter is involuntary when there is no intention to kill another human being. A condition for involuntary manslaughter is when, despite not intending to kill anyone, the person charged knows that their behaviour is dangerous or reckless, and may endanger lives. A good example of this is a drunk driver who kills a pedestrian. Even though the drunk driver did not set out with the intention to kill another human being, the driver ought to have known that operating a motor vehicle could cause danger to others, and that alcohol would make this activity more reckless. The drunk driver is therefore committing 'unlawful act manslaughter' as opposed to 'criminal negligence manslaughter' because he is driving under the influence of alcohol.'*

[15] Therefore, there appears to be a reasonable prospect of success in the appeal on the sole ground of appeal and I am inclined to grant leave to appeal.

Order of the Court:

1. Leave to appeal against acquittal is allowed.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL