

IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 199 OF 2013S

BETWEEN

THE STATE

APPLICANT

AND

SWADESH PRAKASH CHAND

RESPONDENT

**Counsels : Mr. R. Prakash for Applicant
Ms. S. Narayan for Respondent**

Hearing : 7 November, 2013

Judgment : 27 March, 2014

JUDGMENT

1. After a trial in the Nasinu Magistrate Court, the respondent (accused) was found guilty and convicted on the following count, on 5 July 2013:

Statement of Offence

DANGEROUS DRIVING OCCASIONING DEATH: *Contrary to section 97 (2) and 114 of Land Transport Act 35 of 1998.*

Particulars of Offence

SWADESH PRAKASH CHAND s/o PREM CHAND, on 8 day of November, 2007 at Nasinu in the Central Division, drove a motor vehicle on Nasinu Road in a manner which was dangerous to the public having regards to all the circumstances of the case and thereby caused the death of **PRIYANSHU PRITI SHARMA d/o SATEN SHARMA**.

2. On 16 July 2013, the respondent was sentenced as follows:
 - (i) 1 ½ years imprisonment, suspended for 3 years;
 - (ii) The respondent's driving license was suspended for 6 months, but only on Saturdays and Sundays;
 - (iii) 3 demerit points to his driving licence; and
 - (iv) \$250 fine.

3. The learned Director of Public Prosecution was not happy with the above sentence, and he filed his appeal on 22 August 2013. The 28 days appeal period expired on 13 August 2013, and thus the appeal was 9 days out of time. Strictly speaking, the learned Director of Public Prosecution had to show "good cause", for him to be given permission to appeal out of time.

4. On 22 August 2013, the learned Director of Public Prosecution filed a notice of motion and an affidavit in support in court, seeking leave to appeal out of time. Both parties appeared in court on 5 September, 2013. I have decided to deal with the leave application and appeal proper together. On 19 September 2013, I granted leave to appeal out of time to the learned Director of Public Prosecution, and said I would give my reasons, when I deliver my judgment on the appeal proper.

5. The parties filed their written submissions, and on 7 November 2013, I heard them on the appeal proper. I have carefully read and considered the parties' submissions.

6. Section 97(2) of the Land Transport Act 1998 reads as follows:

"...2. A person commits the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle –

 - (a) under the influence of intoxicating liquor or of a drug;*
 - (b) at a speed dangerous to another person or persons; or*
 - (c) in a manner dangerous to another person or persons ..."*

7. None of the parties complained about the learned Magistrate's judgment delivered on 5 July 2013. I have carefully read the court judgment, including the court record, and in my view, the parties were justified in not challenging the court's judgment. The learned Magistrate correctly

applied the law and the facts, to finding the respondent, guilty as charged and convicting him accordingly.

8. On sentencing, the law had been the same as when Her Ladyship Madam Justice Nazhat Shameem said the following in **State v Benjamin Padarath**, Criminal Case No. HAC 13 of 2004S, High Court, Suva, which I quote as follows:

*“...Previously, prior to the enactment of the Land Transport Act 1998, the tariff for offences of causing death by dangerous driving was 9 months to 2 years imprisonment. Applying the principles in **Boswell** (1984) Cr. App. R, and **Guilfoyle** (1973) Cr. App. R. 549, non-custodial sentences or very short custodial sentences were reserved for cases where death was caused as a result of “**momentary inattention**” and there were no aggravating factors. **Drivers who showed “a selfish disregard” for the safety of other road users** were to be given custodial sentences at the higher range of the tariff. Under the Penal Code the maximum sentence possible was 5 years imprisonment...*

*In 1998, Parliament created the offence of aggravated dangerous driving occasioning death with a maximum sentence of 14 years imprisonment, disqualification from driving for a period up to life, and a maximum fine of \$20,000. As I said in **lowane Waqairatavo v. State** Criminal Appeal HAA 127 of 2004S, this was a clear indication to the judiciary that the tariff for such offences should be increased. Indeed the offence of aggravated dangerous driving causing death is a more serious offence than that of dangerous driving causing death under section 97(2) of the Act which has a maximum sentence of 10 years imprisonment. In that case an 18 month sentence of imprisonment was upheld by the court. Indeed I said that the tariff should now be between 2 to 4 years for a section 97(2) offence of dangerous driving occasioning death. Logically therefore, offences for aggravated dangerous driving causing death should attract sentences at the highest end of the tariff...”*

9. In **lowane Waqairatavo v The State**, Criminal Appeal No. HAA 127 of 2004S, Her Ladyship said the following:

“...The tariff for the offence of causing death by dangerous driving under the Penal Code was 9 months to 2 years imprisonment. The maximum

sentence under the Penal Code statute is 5 years imprisonment. However the offence under the Land Transport Act has a maximum penalty of 10 years imprisonment with a minimum fine of \$1000. Clearly, it was the intention of the legislature to increase the tariff for causing death offences. Presumably this is to reflect the alarming numbers of road deaths in Fiji...

Accordingly therefore, a non-custodial sentence for this offence must be the exception rather than the rule. Indeed, a starting point should be picked from between 2 years to 4 years imprisonment, depending on the gravity of the offending. The gravity of the offending is to be assessed on the circumstances such as the numbers of deaths, and the seriousness of the fault, which led to the offending..."

10. The law on the imposition of a fine and the disqualification of drivers from holding or obtaining a driver's license, in Land Transport Act 1998 matters, had also been settled by Her Ladyship in her judgments in **State v Jitesh Prasad**, Criminal Appeal No. HAA 038 of 2003S, High Court, Suva; **State v Kameli Ratuvo**, Criminal Appeal No. HAA 060 of 2002s, High Court, Suva and **Vinod Prasad v The State**, Criminal Appeal No. HAA 055 of 2003, High Court, Suva. The above authorities are mandatory readings for all Magistrate Courts dealing with Land Transport Act 1998 matters. Partial disqualifications are not permitted. Fines must be imposed between the minimum and the maximum fines possible. It cannot go below the minimum, or above the maximum fines imposed.

11. Coming to the facts of this case, the learned Magistrate had obviously erred in his sentencing. In paragraph 16 of his sentencing remarks, he said, "...*The accused's rush and negligent driving claimed a little girl's life. Therefore, it cannot be taken lightly...*" This I agree with. When reading the learned Magistrate's judgment, he attributed the respondent's excessive speed in his driving, at the material time, as the major cause of the accident. I also read the court record, especially each witnesses' evidence, to get a grip on what happened, prior to the accident. The respondent was given his employer's vehicle to do some work related activities, but in between, he wanted to drop something at his father's house. He admitted, in his police caution interview statement (Prosecution Exhibit No. 2) that, he was travelling between 60 to 65 kmph before the accident (Questions and Answers 19, 23 and 29).

12. The Nasinu Road, on which the accident occurred, runs through a highly populated area, which included people's residence and an industrial area. It was a sunny day. According to the respondent, he saw a bus and a 3-ton truck in front of him, on the same lane. He decided to overtake both vehicles. According to the 3-ton truck driver, he saw the deceased and her 2 sisters getting off the bus. He was following the bus. He had 20 years experience as a driver. He slowed his truck down, stopped and motion to the girls to cross the road. He was being courteous to other road users, an essential skill of an experienced driver. At that point in time, the respondent was driving his vehicle at 60 to 65 kmph behind the 3-ton truck. He had 8 years driving experience. Instead of stopping behind the 3-ton truck, he decided to overtake the same – an obvious negligent decision. The 3-ton truck driver tried to warn him by putting on his hazard lights, pressing his horn, and waving his hand, but to no avail. The respondent overtook the truck. As he passed the truck, he saw the deceased and her sisters.

13. The deceased ran to the other side of the road, and was in fact, standing on the gravel part of the road, which is normally used as a footpath. The respondent swerved to the right to avoid hitting the girls and in the process, hit the deceased, who was standing on the gravel part of the road. According to an eye-witness, the deceased “flew” in the air when hit by the respondent's vehicle. According to the police sketch plan, she “flew” 18.6 meters from the point of impact. It was obvious, logically that, the respondent was driving at an excessive speed, at the time, in that he was unable to stop his vehicle, when the circumstances demanded he did so. If anything, the manner of the respondent's driving, at the material time, was dangerous to other road users. He was speeding excessively, despite his denials. All the available evidence confirmed he was speeding at the time. Given what Her Ladyship Justice Shameem said, in **State v Benjamin Padarath** (supra), this was a driver who showed a selfish disregard for the safety of other road users, and a custodial sentence was therefore inevitable.

14. I would not alter the aggravating and mitigating factors the learned Magistrate found. The tariff was a sentence between 2 to 4 years imprisonment. I would start at 3 years imprisonment. For the mitigating factors identified by the learned Magistrate, I would reduce the 3 years by 1 year. The balance is 2 years imprisonment.

15. For the above reasons, the learned Director of Public Prosecution had shown “good cause” for permission to appeal out of time. He had merit in his appeal. I allow the State's appeal against sentence, in the following way:

- (i) The Nasinu Magistrate Court sentence of 16 July 2013 is quashed and set-aside;
- (ii) In substitution thereof, the respondent is sentenced to 2 years imprisonment, with a non-parole period of 18 months imprisonment, effective forthwith;
- (iii) The respondent is disqualified from holding or obtaining a driver's licence for 3 years, effective forthwith. Three demerits points to go to his driving license.

I order so accordingly.

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JUDGE

Solicitor for Applicant : **Office of the Director of Public Prosecution, Suva.**
Solicitor for Respondent : **Diven Prasad Lawyers, Suva.**