

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 015 of 2014

BETWEEN : **THE STATE**
Appellant

AND : **LEVENI WAITUI**
Respondent

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. Y. Prasad for the Appellant
Ms. V. Tamanisau for the State

Date of hearing : 16 June, 2014
Date of Judgment : 23 July 2014

JUDGMENT

1. On the 7th November 2013 in the Magistrate's Court at Nausori, the respondent entered pleas of guilty to the following offences:

FIRST COUNT

Statement of Offence

CAUSING DEATH BY DANGEROUS DRIVING: Contrary to section 97[2] and 114 of Land Transport Act No. 35 of 1998.

Particulars of Offence

LEVENI WAITUI on the 24th day of February, 2013 at Nausori in the Central Division drove a motor vehicle registration number RSL 199 on Princess Road, Waila in manner which was dangerous to the public having regards to all circumstances of the case and thereby caused death to **SAIASI SIMON PETERS SEWABU**.

SECOND COUNT

Statement of Offence

FAILURE TO COMPLY WITH REQUIREMENTS FOLLOWING AN ACCIDENT: Contrary to regulation 63[1] and 87 of Land Transport [Traffic] Regulation 2000.

Particulars of Offence

LEVENI WAITU on the 24th of February, 2013 at Nausori in the Central Division being the driver of motor vehicle registration number RSL 199 involved in an accident on Princess Road, Waila resulting in death failed to stop and give necessary assistance and his name and address of the owner and all other information as require.

THIRD COUNT

Statement of Offence

DRIVING MOTOR VEHICLE WITHOUT DRIVERS LICENCE: Contrary to section 56(3)(a)(6) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

LEVENI WAITUI on the 24th day of February 2013 at Nausori in the Central Division drove a motor vehicle registration number RSL 199 on Princess Road, Waila without being a holder of a valid driver's licence.

FOURTH COUNT***Statement of Offence***

DRIVING A MOTOR VEHICLE IN CONTRAVENTION OF THIRD PARTY POLICY RISKS: Contrary to section [1] [a] [2] of motor vehicle [Third Party Insurance] Act 177.

Particulars of Offence

LEVENI WAITUI on the 24th day of February 2013 at Nausori in the Central Division drove a motor vehicle registration number RSL 199 on Princess Road Waila when a policy of insurance in respect of third party policy as complied under the provision of the Act.

2. He was sentenced on the 30th January 2014 by the Resident Magistrate as follows:

Count 1: 12 months imprisonment suspended for 2 years.

Count 2: A fine of 2 penalty points.

Count 3: A fine of 2 penalty points.

Count 4: A fine of 2 penalty points.

His driving licence was suspended for a period of 6 months.

3. The State being granted leave to appeal out of time appeals the sentence passed for Count 1 on the grounds that it is manifestly lenient and not within the accepted tariff for the offence.
4. The facts are that on the 24th February 2013 at about 5.45pm the respondent was driving on Princess Road when he fell asleep behind the wheel. A man heavily intoxicated was sleeping in the middle of the road. The respondent ran over him, killing him. The driver had been given the car to drive, but he had no valid driving licence and therefore no insurance. To compound matters the respondent failed to stop after the accident.

The learned Magistrate in passing sentence noted the authority of **Shelvin Sharma** [2005] FJHC 464 where Shameem J set the tariff at 2 – 4 years with non-custodial sentence for cases of momentary inattention. The actual maximum penalty is \$10,000 or 10 years imprisonment and a disqualification for life.

5. The Magistrate failed to state why he was passing such a lenient sentence. He was aware of the tariff and he was aware of the maximum penalties, because he stated both in his sentence. A Magistrate is duty bound to provide reasons for his sentence, especially if he is passing a very lenient or a very heavy sentence. It is unfortunate that the Magistrate in this case gave no reasons whatsoever. He did however refer to the case of **Shelvin Sharma** [2005] FJHC 464 in which Shameem J held that a non-custodial sentence could be passed in cases of “momentary inattention,” while driving, but then he did not say he was applying that case nor did he make any findings on the actual driving of the accused that afternoon.
6. The State submits in very helpful written submissions that a driver with a driver’s licence would have had the necessary drivers training to have been able to avoid this accident. They submit that because he was unlicensed, the concept of “momentary inattention” is not relevant as a mitigating factor.
7. The respondent submits also by helpful written submissions that having had no history of a bad driving record then “the summary of facts can lead to the conclusion that it involved “momentary inattention”.

Analysis

8. The accident happened at about 5.45pm in late February when it would have been daylight. The facts refer to the fact that the driver fell asleep while driving and he then ran over the victim. He did not have a licence to drive. He did not stop. The respondent displayed appalling behavior which was not even referred to by the Magistrate. It is not stated in the facts why

he did not have a licence. It could have been that he never had one or it could have been that it was suspended. In either case he should not have been driving but he did with shocking consequences. In no way can it be said that this was "momentary inattention". If a driver falls asleep at the wheel he is obviously not fit to drive. If he drives knowing that he is unlicensed he is also unfit to bear the responsibilities that a driver must carry. This driver can never be said to be a fit and proper person to be in charge of a vehicle at any time, let alone for one moment when he loses attention. The Magistrate not having addressed this issue and not having given any reasons for his lenient sentence, this Court would set aside the sentence passed below and sentence afresh pursuant to section 256(2) of the Criminal Procedure Decree 2009.

The New Sentence

9. For the first offence of dangerous driving causing death I take a starting point of three years imprisonment, the mid-point of the tariff set by Shameem J in **Shelvin Sharma** (supra). The aggravating features of the case are represented by the other charges and it would be unfair to add time to his sentence for those. For his plea of guilty and for his clear record I deduct one year and the sentence for the first count is two years imprisonment which will not be suspended.
10. The State does not appeal the sentences on the other counts, so they will remain as they are.



P.K. Madigan
Judge

At Suva
23 July, 2014