

moving very slow in front of (Accused) vehicle. Than (Accused) vehicle while overtaking lost control and went off road onto the foot path where the three girls were walking and bumped the girls and fence. (PW-2), (PW-3) and (P-4)'s right leg was also bumped in the process whereby they received injuries. (PW-4) manages to free herself while (PW-2) and (PW-3) had to seek assistance from surrounding people who came to lift the said vehicle up to free their legs. Than the three girls were conveyed to Lautoka Hospital for their injuries. (PW-2) and (PW-3) was admitted at Trauma ward with the seriousness of their injuries while (PW-4) was treated and sent home.

Upon receipt of report, police constable 3863 Josese Wara (PW-5) attended to the scene of accident, draw the sketch plan and made necessary measurements. (Accused) vehicle was towed to Land Transport Authority (LTA) yard for inspection whereby there was no defects found. On the same day (Accused) called into the station and was interviewed under caution by (PW-5) for the offence of Dangerous Driving and served and warned for prosecution. (Accused) has a Provisional Driving Licence with an experience of one year.

4. Appellant was convicted and sentenced to 9 months Imprisonment for each count to serve concurrently on 23.12.2014.
5. This appeal against the sentence dated 13.1.2015 was filed on 21.1.2015.
6. The grounds of appeal against the sentence are:
 - (i) That the learned Magistrate erred in law and in fact in sentencing the appellant to prison for 9 months.
 - (ii) The learned Magistrate failed to consider that the appellant is the sole bread winner in the family.
 - (iii) That learned Magistrate failed to consider that the appellant was only 20 years old and was a young first offender and in permanent employment.
 - (iv) The learned Magistrate erred in law and in fact in failing to consider that this sentence of 9 months could have been suspended given all the circumstances of the case and compelling reasons outlined in the mitigation.
 - (v) The learned Magistrate had erred in writing that the appellant is 26 years old and married and working as carpenter, whereas he is 21 years old unmarried and working as a sales representative.
7. Both parties have filed written submissions.
8. The guide line Judgment considered by the learned Magistrate Sharma v State [2005] FJHC 464; HAA 0097J.20005S (30 September 2005) is a case of causing death by dangerous driving. In that case the learned Magistrate had considered the following paragraphs.

"The decisions on sentences for the offence of causing death by dangerous driving are relevant to the old Penal Code offence. The maximum sentence was 5 years imprisonment. The sentences under the old regime ranged from a suspended sentence where the driving which caused death arose from momentary inattention, or mere carelessness, to a short custodial term where the offender had driven recklessly in bad conditions. Even under the old regime Fatiaki J in Sefanaia Marau said that offenders should not assume that they would automatically receive a non-custodial term. Much depended on the circumstances of the case, the driving record of the offender, any consumption of alcohol or drugs and other related offences such as driving without a license or third party insurance.

In 1998 Parliament passed the Land Transport Authority Act, and increased penalty for causing death by dangerous driving to 10 years imprisonment. There can be no clearer Parliamentary intention as to sufficiency of penalty. To reflect such Parliamentary intention, I held in lowane Waqairatavo that the tariff for such offences must increase to 2 to 4 years imprisonment. In that case, I upheld an 18 month term for a minibus driver who drove at high speed on a highway and made a U-turn without properly checking that his way was clear. He pleaded guilty and the other driver involved in the accident was also partly to blame. In that case I said that an appropriate sentence would have been 2 years imprisonment and that the 18 month term imposed was therefore neither harsh nor excessive."

9. Considering above the learned Magistrate had decided that the tariff should be 6-12 months imprisonment.
10. However in State v Krishna [2009] FJHC 50; HAC 115.2008 (20 February 2009) Hon. Mr. Justice Isikeli Mataitoga gave a sentence of \$500 fine with default sentence of 60 days imprisonment and 3 demerit points awarded against the accused. The accused was found guilty after trial on one count of Dangerous Driving Occasioning Grievous Harm, contrary to Sections 97 [4] [c] and 114 of the Land Transport Act 1998 [LTA].
11. In State v Singh [2005] FJHC 383; HAA0103J.2005S (9 December 2005) the state appealed against a sentence of fine of \$150 with default sentence of 60 days imprisonment. The facts were that on the 13th of May 2003, at 9.40pm the Respondent was driving his motor vehicle along Queens Elizabeth Drive. The complainant was walking along Queen Elizabeth Drive, on the loose gravel on the side of the road, near the Bowling Club. The Respondent bumped him, causing him to fall down. The Respondent reversed, stopped for two minutes, then drove away. The complainant was taken to the CWM Hospital. He was found to have a broken leg and superficial cuts. The Respondent was charged with dangerous driving occasioning grievous bodily harm. The accused was a taxi driver with clear record of 24 years.

12. Hon. Madam Justice Nazhat Shameem in dismissing the appeal held:

"In these circumstances I am not persuaded that the learned Magistrate erred in principle. He chose not to disqualify the Respondent and gave reasons for his decision.

The fact that another court might have imposed a harsher penalty is irrelevant. The sentence imposed was not wrong in principle."

13. In cases of Causing death by Dangerous Driving Fiji Courts have adopted the guidelines of English Court of Criminal Appeal in **Guilfoyle** (1973) 57 Cr. App. R. 549 and **Boswell and Others** (1984) 6 Cr. App. R(s) 257.

14. Hon. Madam Justice Nazhat Shameem in **State v Raikoti** [2003] FJHC 120; HAA 0021J.2003S (16 July 2003) held:

*"In **Guilfoyle**, Lawton L.J. said that cases of causing death by dangerous driving fell into two broad categories, that of the accident being caused by momentary inattention, and that of the accident being caused by the accused driving in a manner which has shown "a selfish disregard for the safety of other road users or his passengers or with a degree of recklessness." Offenders can also be divided into two categories; those with a clean driving record, and those with records which show a continuing pattern of bad driving. An accused person with a good record and who is guilty of the "momentary inattention" type of dangerous driving can be disqualified from driving with no custodial sentence. However, where the accused has a bad record, and has shown a selfish disregard for other road users, thus killing the deceased, a custodial sentence would be appropriate.*

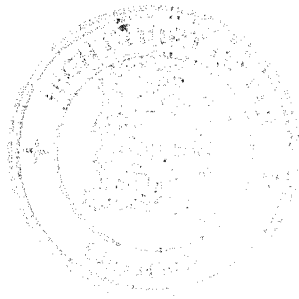
*"In **Boswell** (supra) Lord Lane CJ identified a number of aggravating and mitigating factors in cases of causing death by dangerous driving. Aggravating factors include the consumption of drink or drugs, excessive speed, and prolonged and persistently bad driving. Mitigating factors include momentary inattention, a plea of guilty and a good driving record. Although (as I said in **Ajnesk Kumar -v- The State** Crim. App. No. HAA0014 of 2001S) **Boswell** was a case of causing death by reckless driving which is a more serious offence than causing death by dangerous driving, these guidelines are helpful. In order to sentence an offender for the offence of causing death by dangerous driving, the sentence needs to first decide which category the case falls into, and which category of offender the accused falls into."*

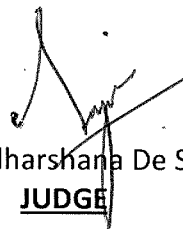
15. The learned Magistrate had failed to consider above Judgments in selecting a tariff for the offence. Therefore the correct tariff should be from a fine & suspended term to 12 months imprisonment. The above guidelines could be also used for this offence as well in arriving at the final sentence in the way suggested by Hon. Madam Justice Nazhat Shameem.

16. The state in their submissions have cited **State v Krishna** and **State v Singh** (supra) and conceded that the learned Magistrate had selected a wrong tariff.

17. Further learned Magistrate had identified the mitigating factors as: 26 years, carpenter, earns \$100 per week and married. From above summary of facts it is clear that all this are factually wrong.

18. The appellant submitted to the court that he is only asking that the sentence be suspended.
19. This background warrants this court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.
20. Accordingly I take a starting point of 6 months. I add another 6 months for the aggravating factors. I deduct 3 months for the mitigating factors. Further 3 months to be deducted for the Guilty plea. The final sentence is 6 months imprisonment. The appellant had served the sentence from 23.12.2014 for a period of 3 months. The balance is suspended for a period of 2 years.
21. The appellant is explained the suspended sentence.
22. Appeal allowed. Sentence varied.




Sudharshana De Silva
JUDGE

At Lautoka
18th March 2015

Solicitors : Applicant in person
Office of the Director of Public Prosecutions for Respondent