IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 53 of 2017

BETWEEN : **DHARMESH DEEPAK REDDY**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Mr. I. Khan with Mr. M. Raratabu for the Appellant.
	:	Mr. A. Singh for the Respondent.
Date of Hearing	:	18 July, 2017
Date of Judgment	:	27 July, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court with two counts of aggravated dangerous driving occasioning grievous bodily harm contrary to sections 97 (3), (8) and 114 of Land Transport Act 1998 and one count of driving a motor vehicle whilst there was present in the blood a

concentration of alcohol in excess of the prescribed limit contrary to sections 103 (1) (a) and 114 of Land Transport Act, 1998.

[2] After a defended hearing the Appellant was found guilty and subsequently convicted for all the counts. After hearing mitigation the Appellant on 12 May, 2017 was sentenced to 22 months imprisonment and disqualified from driving for 2 years in respect of counts one and two to be served concurrently. For count three the Appellant was fined $400.00 to be paid two months after his release from the Corrections Centre in default 40 days imprisonment and was disqualified from driving for 2 years.

[3] The Appellant being dissatisfied with the sentence filed a timely appeal against sentence upon the following grounds:-

1. *That the learned trial Magistrate erred in law and fact in ordering a sentence of 22 months imprisonment which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.*

2. *That the learned trial Magistrate erred in law and fact in considering legal authorities which were not applicable/relevant to the charges before the Court and/or could have been distinguished to the facts before the Court and hence misdirected himself in taking into consideration the said legal authorities.*

3. *That the learned trial Magistrate erred in law and in fact taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.*

4. *That the learned trial Magistrate erred in law and in fact in not taking into adequate consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.*

[4] Both counsel have filed written submissions in respect of bail pending appeal and also the substantive appeal. By consent of both counsel and for completeness the court proceeded to determine the substantive appeal. Counsel also made oral submissions during the hearing of the appeal for which the court is grateful.

[5] The brief summary of facts as per the court record at paragraph 3 of the sentence were as follows:

"Briefly, the summary of facts were that 01st January, 2013 at about 1.45am at the Back road, Serevi Dakuikaba and his wife Lusi Dakuikaba and their 5 children were returning from a Prayer session at their Pentecostal Church, Nadi Back Road located on the left side and walking on the main road to return home and sharing the Gospel when the accused driving vehicle registration ED660 with the both lights turned off and hit the couple as they were walking ahead of the children and both flew to the drain and the children were frantically searching for them. As result of that collision, accused vehicle also landed on the drain. The accused was seated at the driver's seat and another itaukei lady seated at the passenger's seat. The quick response of a security Officer working that night Inoke Buadromo some distance away and with the timely reaction of the police, the 2 victims were found and transported to Nadi Hospital by a passing taxi. The victims were later transferred to Lautoka Hospital and later to Nadi Hospital and before they were later discharged. Both sustained injuries and both could not recall much information from after the accident. Serevi very first words in court "I want to thank God for

saving my life and to be present today". The accused had picked 2 itaukei ladies from Namaka lane and taken them to Purple Haze Nightclub at about 11pm and they were drinking until 1pm and on the way, accused met an accident. Inoke Buadromo rescued the accused and 2 itaukei ladies and both ladies sustained injuries and were also taken to Nadi Hospital. Regrettably, prosecution has not obtained latest medical reports on the 2 victims. Security Officer handed over the accused to the police. Accused was taken to Nadi Police Station by PC 3850 Viliame Driu and PC 1672 Ajay Kumar undertook the drag test and tested the mouth of accused and reading was 83 milligrams of alcohol per 100 milligrams and PC Viliame Driu then formally charged accused for the 3 counts stated above."

[6] Learned counsel for the Appellant informed the court that the Appellant's appeal is in respect of sentence in counts one and two only.

LAW

[7] In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the Appellate Court that the sentencing court fell in error whilst exercising its sentence discretion.

[8] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State, Criminal

Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(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."

GROUNDS OF APPEAL

GROUND ONE

The learned trial Magistrate erred in law and fact in ordering a sentence of 22 months imprisonment which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.

[9] Counsel for the Appellant submitted that 22 months imprisonment was manifestly excessive considering the facts of the offending which was not so grave since nobody died as a result of the accident. According to counsel one victim had a broken leg and the other had shoulder injury which was not serious harm to the second victim, this aspect should have been taken into account by the learned Magistrate.

[10] I agree there were no deaths caused as a result of the accident, however, the summary of facts speaks of a dreadful act of drunken driving during the early hours of the morning (1:45am) with no lights on at the Nadi Back Road where not only the victims but their children were walking as

well. The Appellant had a substantial level of alcohol in his blood about 83% clearly showing an utter disregard for the other road users. From the impact both the pedestrians were thrown to the drain from the main road resulting in injuries with the Appellant's vehicle also landing on the drain.

[11] Counsel further submitted that the learned Magistrate took the following irrelevant matters into consideration at paragraphs 23 and 24 of the sentence:

> *"23.The aggravating factors were the accident caused in the presence of the 5 children who had to frantically search for their parents at dark night, the trauma and inconvenience caused to them as a result of the accident and the victims were husband and wife and the car headlights were turned off. I add 1 year imprisonment, interim sentence is 2 ½ years or 28 month imprisonment.*
>
> *24. No deduction will be made since you contested this matter."*

[12] According to counsel the factors mentioned above were not aggravating factors which were erroneously taken into consideration by the learned Magistrate in increasing the sentence of the Appellant.

[13] As for the mitigating factors counsel submits the learned Magistrate failed to give adequate weight to the previous good character of the Appellant as required by section 4 (2) (j) of the Sentencing and Penalties Act.

[14] Section 4 (2) (j) of the Sentencing and Penalties Act states:

"(2) In sentencing offenders a court must have regard to –

...

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence..."

[15] I agree with counsel that some factors the learned Magistrate took into account were not aggravating factors. From the facts of this case the following aggravating factors are obvious:

(a) Lights of the vehicle were turned off;

(b) Two pedestrians were injured;

(c) As a result of the impact the two pedestrians were thrown to the drain from the main road;

(d) Children frantically searching for their parents after the accident.

[16] The learned Magistrate did not fall in error when he increased the sentence by one year. The aggravating factors in this case justify an increase of one year.

[17] As for the mitigating factors in accordance with section 4 (2) (j) of the Sentencing and Penalties Act the learned Magistrate had taken into consideration the Appellant was a first offender hence a reduction was allowed for the good character of Appellant at paragraph 25 of the sentence as:

"For your mitigation and previous good record, I reduce further 6 months."

[18] Counsel also submitted that the learned trial Magistrate did not take as mitigation the delay factor which was that the incident happened in 2012

almost 5 years ago whereas the sentencing was done in 2017. During the past 5 years the Appellant had not breached any laws and the offences were hanging on his head which was a form of punishment in itself and therefore there should have been a further reduction as a mitigating factor. Counsel relied on *State v Sorovanalagi [2012] FJHC 1135; HAR 006 of 2012 (31 May 2012)* in particular paragraphs 36 and 37.

[19] The argument by counsel that the learned Magistrate should have given the Appellant a discount since the charges were hanging over his head for 5 years was a form of punishment is misconceived. The Appellant had pleaded not guilty and had maintained this throughout his trial. This was a right of the Appellant which he had exercised. *Sorovanalagi's* case is distinguished from what counsel submitted.

[20] The learned Magistrate had properly directed his mind to the mitigation offered by the Appellant and had given a discount as a matter of discretion which was appropriate in the circumstances. The learned trial Magistrate did not err when he allowed 6 months for the Appellant's mitigation and previous good character. I note the learned Magistrate had taken into account remorse as a mitigating factor despite the Appellant pleading not guilty.

[21] The maximum penalty for the offence of aggravated dangerous driving occasioning bodily harm is a fine of $5,000.00 or 5 years imprisonment and a disqualification from driving for 2 years.

[22] At the present time there is no tariff for the offence of aggravated dangerous driving occasioning bodily harm.

[23] The current tariff for the offence of dangerous driving occasioning death is a term of imprisonment between 2 years and 4 years. When one looks at the punishment for the offence of dangerous driving occasioning death in section 114 of the Land Transport Act it is twice as severe as the punishment for aggravated dangerous driving occasioning bodily harm.

[24] Section 114 of the Land Transport Act does not state the punishment for the offence of aggravated dangerous driving occasioning grievous bodily harm but for aggravated dangerous driving occasioning bodily harm.

[25] I note that there is no tariff yet for the offence of aggravated dangerous driving occasioning bodily harm under section 97 (3) of the Land Transport Act and the parties have not been able to provide any case authorities on the tariff for this offence.

[26] Considering the maximum penalty for the offence of aggravated dangerous driving occasioning bodily harm and the current tariff for the offence of dangerous driving occasioning death I am of the view that an acceptable tariff for the offence of aggravated dangerous driving occasioning bodily harm would be a term of imprisonment between 12 months and 24 months with disqualification from driving. Serious cases should be given a sentence in the upper range whilst less serious cases should be given a sentence at the lower end of the scale.

STARTING POINT

[27] The learned Magistrate selected a starting point of 18 months imprisonment. The Court of Appeal in *Laisiasa Koroivuki vs The State, Criminal Appeal No. AAU0018 of 2010* at paragraph 27 stated the following:

"[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[28] After taking into consideration the objective seriousness of the offences committed in counts one and two, I am satisfied that when the learned Magistrate selected the starting point of 18 months imprisonment it was from the middle range of the tariff.

[29] Furthermore Shameem J. made a pertinent comment about the selection of starting point in *State vs. Navnit Narayan, Criminal Case No. HAC 188 of 2008* at paragraph 13 interalia:

"...If a driver drove badly and with a selfish disregard for human life over a long stretch of road, he or she must expect a starting point at the higher end of the tariff. Cases of momentary carelessness will lead to lower starting point."

[30] Here the starting point selected was within the middle range of the tariff which is favourable to the Appellant and I shall not disturb this starting point.

[31] I do not accept that 22 months imprisonment was manifestly excessive considering the facts and circumstances of the offending which warranted a sentence in the higher range of the tariff.

[32] This ground of appeal is dismissed due to lack of merits.

GROUND TWO

The learned trial Magistrate erred in law and fact in considering legal authorities which were not applicable/relevant to the charges before the court and hence misdirected himself in taking into consideration the said legal authorities.

[33] Counsel for the Appellant submits that the case authorities relied upon by the learned Magistrate was not relevant to the charges. The learned Magistrate had relied on cases of dangerous driving occasioning death whereas in this case counts one and two were a different charge altogether.

[34] Counsel further submits that the learned trial Magistrate should have been lenient on the Appellant by virtue of the fact that the cases he had relied on were cases where death had occurred.

[35] The maximum sentence for the charge of dangerous driving occasioning bodily harm is $2,000.00 fine or 2 years imprisonment and 12 months disqualification from driving. For dangerous driving occasioning bodily harm a term of imprisonment was ordered with disqualification from driving in *State vs. Sakiusa Bulivorovoro, Criminal Appeal No. HAA 11 of 2014 and State vs. Jessica Jasmine Joan Hill, Criminal Case No. HAC 247 of 2013S).*

[36] In *Iowane Waqairatavo vs. The State, Criminal Appeal No. HAA 127 of 2004S* Shameem J. stated that the gravity of the offending is to be assessed on circumstances such as the number of deaths and the seriousness of the fault which led to the offending. Mr. Waqairatavo had

been convicted under section 97 (2) (c) of the Land Transport Act for dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm under section 97 (5) (a) of the Land Transport Act. In count one he was alleged to have caused the death of one person in count two he was alleged to have caused grievous harm to 8 passengers in his mini van.

[37] After pleading guilty to both counts Mr. Waqairatavo was sentenced to 18 months imprisonment on count one and 12 months imprisonment on count two to be served concurrently with two years disqualification from driving. The appeal against sentence was dismissed.

[38] The learned Magistrate did not err when he made reference to case authorities for dangerous driving occasioning death which is more serious then counts one and two with which the Appellant was charged.

[39] The final sentence of 22 months imprisonment by the learned Magistrate was below the tariff for dangerous driving occasioning death. This ground of appeal is dismissed due to lack of merits.

GROUND THREE

The learned trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration

GROUND FOUR

The learned trial Magistrate erred in law and in fact in not taking into adequate consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

[40] The above two grounds were argued together.

[41] Counsel for the Appellant submits that the learned Magistrate took into consideration irrelevant matters when he decided not to suspend the term of imprisonment of the Appellant.

[42] According to counsel the following irrelevant factors were taken into consideration by the learned Magistrate when he stated that he will not suspend the sentence at paragraph 28 of the sentence:

(a) that this was a contested case;
(b) the defence counsel elected for no case to answer;
(c) the accused elected not to give evidence;
(d) the aggravating nature of the offences.

[43] Counsel also submits that the learned Magistrate did not properly consider section 26 of the Sentencing and Penalties Act.

[44] At paragraph 28 of the sentence the learned Magistrate states:

"The question whether I should suspend the sentence of 22 months imprisonment or not. This was a contested case and at the end of the prosecution case, Defence Counsel elected for No case to answer and accused elected not to give evidence. Given aggravating nature of the offences, I will not suspend the sentence. The purpose of sentence is deterrence to you and other drivers and other road users and it is the duty of [this] Court to send a strong message that court will guard against drivers or motorists who blatantly defy road laws and codes and same time ensure that the road is safe for other road users."

[45] The final sentence for counts one and two (to be served concurrently) was 22 months imprisonment so under section 26 of the Sentencing and Penalties Act this term of sentence could have been suspended by the learned Magistrate.

[46] I note the learned Magistrate had properly directed his mind to section 26 of the Sentencing and Penalties Act but refused to exercise his discretion in suspending the sentence.

[47] In order to justify the imposition of a suspended sentence there must be special factors rendering immediate imprisonment inappropriate such as special circumstances of the offender or the circumstances of the offence.

[48] I do not agree that the following comments of the learned Magistrate at paragraph 28 of the sentence had prompted him not to suspend the sentence:

"The question whether I should suspend the sentence of 22 months imprisonment or not. This was a contested case and at the end of the prosecution case, Defence Counsel elected for No case to answer and accused elected not to give evidence."

[49] It is obvious that at this stage the learned Magistrate was considering whether to suspend the sentence or not. The reason for not suspending the sentence is mentioned in the next sentence which was the aggravating nature of the offences committed.

[50] I am satisfied the learned Magistrate did not err when he refused to exercise his discretion in suspending the term of imprisonment he had arrived at.

[51] Counsel also argues that instead of an imprisonment term a fine and a suspended sentence would have been justified. Counsel states section 15 (3) of the Sentencing and Penalties Act is very clear in respect of the range of sentencing orders:

"(3). As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as a sanction of last resort taking into account all matters stated in this Part."

[52] Considering the seriousness of the offences committed and in view of the maximum punishment stated in section 114 of Land Transport Act a fine or a suspended sentence was not justified in meeting the objectives of sentencing as stated in section 4 of the Sentencing and Penalties Act.

[53] Since the term of imprisonment was 22 months under section 26 of the Sentencing and Penalties Act the learned Magistrate had discretion to suspend the term of imprisonment. The discretion to suspend the term of imprisonment must be exercised judiciously after identifying special reasons for doing so.

[54] In order to suspend the sentence of the Appellant the court has to consider whether the punishment is justified taking into account the offences committed by the Appellant. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of

factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

[55] This court accepts that the factors in favour of the Appellant are that he is a first offender, 35 years of age and a person of good character. On the other hand the Appellant committed serious offences and his culpability is obvious.

[56] After carefully weighing the factors in favour of the Appellant and the serious nature and circumstances of the offences committed I am compelled to state that there is a need for special and general deterrence in respect of the offences committed by the Appellant. I am satisfied that the term of 22 months imprisonment and an order for disqualification from driving for 2 years for two counts of aggravated dangerous driving occasioning grievous bodily harm is an appropriate punishment to be served concurrently hence the learned Magistrate was correct when he refused to suspend the sentence of 22 months imprisonment.

[57] In view of the above a substantial fine will also not be justified in lieu of an imprisonment term. The punishment of a term of imprisonment and disqualification from driving is warranted in this situation considering the serious nature of the offences committed by the Appellant.

[58] Both grounds of appeal are dismissed due to lack of merits.

[59] As for count three I affirm the sentence of the learned Magistrate being $400.00 fine to be paid within two months after the Appellant is released from the Corrections Centre in default 40 days imprisonment and the Appellant is disqualified from driving for 2 years.

[60] Before I leave I would like to reiterate the comments made by Fatiaki J. in *Sefanaia Marau vs. The State, Criminal Appeal No. 79 of 1990 (14 February, 1991)*:

"...there appears to be a serious misconception amongst drivers perhaps reinforced by sentences passed by Courts, that persons convicted of traffic offences are not really a danger to society or "criminals" in the popular sense of the word...No other area of human activity has given rise to such appalling fatality figures, human suffering and disability yet the attitude continues."

[61] This court agrees and endorses the above comments, fortunately in this case no one was killed a dangerous situation was created by the Appellant who was drunk and driving a vehicle with lights turned off. I am satisfied that the sentence imposed by the learned Magistrate reflects the overall criminality involved. I would like to stress if drivers display a wanton disregard to the laws and create dangerous situations the court will not show any mercy.

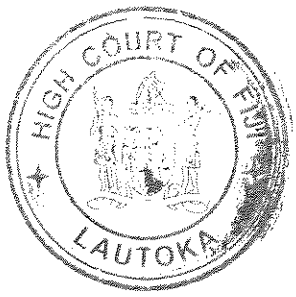
ORDERS

1. The appeal against sentence is dismissed.

2. The sentences of the Magistrate's Court are affirmed.

3. A copy of this Judgment is to be sent to the Land Transport Authority for their information.

4. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
27 July, 2017

Solicitors

Messrs. Iqbal Khan and Associates for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.