

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 06 OF 2017

BETWEEN: KAMAL HUSSEIN

Appellant

A N D: STATE

Respondent

Counsel: Ms. A. Swamy for Appellant
Mr. L. Fotofili for Respondent

Judgment: 07 November 2017

JUDGMENT

Introduction

1. The appellant had been charged in the Magistrate's Court in Labasa for one count of Dangerous Driving Occasioning Death, contrary to Sections 97 (2) (c) and 114 of the Land Transport Act, and one count of Dangerous Driving Occasioning Grievous Bodily Harm, contrary to Section 97 (4) (c) of Land Transport Act. The particulars of the offences are that:

FIRST COUNT

Statement of Offence

DANGEROUS DRIVING OCCASIONING DEATH: Contrary to Sections 97 (2) (c) and 114 of Land Transport Act 1998.

Particulars of Offence

KAMAL HUSSEIN s/o Hussein on the 22nd day of January 2007 at Labasa in the Northern Division drove bus registration number AU 190 along Labasa – Wanikoro Road at Laulau Hill, Vunika, in a dangerous manner having regards to all the circumstances of the case, and thereby caused the death of **PHUL KUMAR d/o Ram Prith**.

SECOND COUNT

Statement of Offence

DANGEROUS DRIVING OCCASIONING GRIEVOUS BODILY

HARM: Contrary to Sections 94 (4) (c) and 114 of Land Transport Act 1998.

Particulars of Offence

KAMAL HUSSEIN s/o Hussein on the 22nd day of January 2007 at Labasa in the Northern Division drove bus registration number AU 190 along Labasa – Wanikoro Road at Laulau Hill, Vunika, in a dangerous manner having regards to all the circumstances of the case, and thereby occasioned grievous bodily harm to **RINAL VIKASHNI d/o Ravindra Dass**.

2. The appellant was first produced in the Magistrate's Court on the 4th of January 2009. Consequent upon the plea of not guilty entered by the appellant, the matter was then proceeded to hearing. However, the matter had been adjourned on several occasions over a period of six years due to various reasons. Eventually, the appellant, by changing the position which he initially took, pleaded guilty for these two counts on the 1st of February 2016. The learned Magistrate then convicted the appellant and sentenced him on 14th of February 2017 for a period of two (2) years imprisonment for the first count and eight (8) months imprisonment period for the second count. Both sentences to be served concurrently, with non-parole period of sixteen (16) months. The appellant was further disqualified from holding or obtaining a driving license for a period of three (3) months. Aggrieved with the said sentence, the appellant filed this appeal on the following grounds, inter alia;

- (i) **THAT** the Learned Trial Magistrate erred in law and in fact in convicting the Appellant when the summary of facts failed to disclose the elements of the offences for dangerous driving occasioning death contrary to section 97 (2) (c) and Land Transport Act 1988 and dangerous driving occasioning grievous bodily harm contrary to sections 97 (4) (c) and 114 of Land Transport Act 1998.
- (ii) **THAT** the learned Trial Magistrate erred in law and in fact in convicting the Appellant on the Appellant's guilty plea when the summary of facts did not create an offence of dangerous driving occasioning death contrary to section 97 (2) (c) and Land Transport Act 1988 and dangerous driving occasioning grievous bodily harm contrary to sections 97 (4) and 114 of Land Transport Act 1998.
- (iii) **THAT** the Learned Trial Magistrate erred in law and in fact in sentencing the Appellant to immediate imprisonment.
- (iv) **THAT** the sentence imposed by the Learned Trial Magistrate is bad in fact and in law, excessive and harsh.
- (v) **THAT** the Learned Trial Magistrate erred in law and in fact when he said aggravating to this case is death of Phul Kumari, grievous bodily harm to Rinal Vikashni, starting the bus engine when passengers still disembarking and stopping the passengers from disembarking when he started the engine [at paragraph 7 of the Sentence].
- (vi) **THAT** the Learned Trial Magistrate erred in law and in fact in failing to consider that this sentence 2 years 8 months could have been suspended given all circumstances of the case and compelling reasons outlined in the mitigation.
- (vii) **THAT** the Learned Trial Magistrate failed to take into account the sentences handed down by other courts in similar cases.

3. This appeal was called in the High Court on the 18th of May 2017, where the court directed the parties to file their respective written submissions and adjourned the matter for hearing on the 21st of September 2017. The learned counsel for the appellant and the respondent filed their respective written submissions as per the direction. On the date of the hearing, the learned counsel for the appellant and the respondent informed the court that they do not wish to make any oral submissions and would rely on the written submissions.
4. Having carefully considered the record of the proceedings in the Magistrate's Court, the grounds of appeal and the respective written submissions filed by the both parties, I now proceed to pronounce the judgment as follows.

Grounds I & II

5. I first draw my attention to consider the first and second grounds of appeal together as both of the grounds are founded on the same contention against the conviction. The appellant contents that the summary of facts did not disclose the main elements of the offences of Dangerous Driving Occasioning Death and Dangerous Driving Occasioning Grievous Bodily Harm.
6. The first and second grounds of appeal focus on the appropriateness of the conviction entered by the learned magistrate consequent to the plea of guilt entered by the appellant. The learned counsel for the appellant in her submissions argued that the appellant was not properly given an opportunity to admit the truth of the offences before he was convicted and sentenced as the summary of fact failed to disclose the main elements of the offences.
7. An appeal against conviction arising from guilty plea can be allowed in limited circumstances. The limitation of appeal on plea of guilty has stipulated by section 247 of the Criminal Procedure Decree. Section 247 states:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a

Magistrates Court, except as to the extent, appropriateness or legality of the sentence.”

8. Section 174 of the Criminal Procedure Act has stipulated the procedure of recording the plea of the accused in the Magistrate’s Court, where it states that:
 - i) *The Substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge,*
 - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Decree 2009.*
9. Accordingly, the court shall first provide the appellant the substance of the charge, including the facts pertaining to all essential elements of the offence and give him an opportunity to inform the court either he admits or denies the truth of the charge. If the court satisfies that the appellant admitted the truth of the charge, the court shall then proceed to convict the appellant and sentence him accordingly.
10. Justice Gates (as his Lordship then was) in **State v Isaia Saukova (2000) 1 FLR 135** has discussed the duty of the Magistrate in respect of recording the plea of guilt, where his Lordship held that:

“It is essential that a Magistrate be satisfied that an Accused is admitting facts which amount to all of the legal elements that go to prove the charge in question. Where the Accused is represented by counsel, the Magistrates task is easier. Where the Accused is unrepresented a more onerous burden is cast on the court. But the Magistrate should ensure that the Accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result”.

11. Accordingly, the learned Magistrate must satisfy that the summary of facts has outlined all essential elements of the offence as charged and the accused has admitted it before the accused is convicted.
12. According to the summary of facts, that has been outlined to the appellant in the Magistrate's Court, the appellant had driven the bus bearing registration number AU 190 towards Labasa along the Labasa- Wainikoro Road around 9.30 a.m. on the 22nd of January 2007. The appellant was only allowed to carry up to 54 seated passengers in the bus. However, about four passengers had to travel standing as the bus was overcrowded. On the way to Labasa, the bus had to pass across the Laulau hill, which is about 200 meters in length from the bottom to the apex. According to the statement given to the police by the appellant, there were no mechanical defects with the bus at the material time. He had used gear 2, instead of gear 1 in order to ascend the hill. After ascending about 100 meters up to the hill, the appellant had tried to change to the gear 1, but failed to do so. At that point, the bus came to a stop and the engine went off. The appellant had then requested some passengers to put a stone under the tyre of the bus, in order to stop the bus moving backward the hill. Meanwhile, the appellant had advised the passengers to disembark from the bus. While some passengers were trying to put a stone under the tyre and others were disembarking from the bus, the appellant had tried to start the bus, which he succeeded. The appellant had then told the passengers who were trying to disembark, to remain in the bus and seated. At the same time, the bus started to move backward slowly and then accelerated, landing in the drain which is about 40 to 50 meters away from the bottom of the hill.
13. The deceased Phul Kumari, who was seated behind the seat of the driver was killed as a result of this accident. Rinal Vikashni had sustained injuries to her right thigh, right joint of her eye, inner groin and a fracture to her pelvis.
14. According to the Vehicle Inspection Report, made by the Authorized Vehicle Inspector of the Land Transport Authority, there were no mechanical defects in the bus, including the hand and foot breaks. According to his opinion, the appellant should have engaged gear 1 of the bus when he begins to ascend the hill, specially when the bus was overcrowded.

15. The appellant has admitted the above summary of facts in open court after it was read over to him. The learned magistrate had then proceeded to convict the appellant.
16. The main contention of the learned counsel for the appellant in her submission is that the final impact of falling down to the drain was not due to the driving of the appellant as the bus had moved down the hill by itself.
17. Section 97 (2) (c) of the Land Transport Act states that:

“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 –

c) in a manner dangerous to another person or persons.

18. Section 97 (4) (c) of the Land Transport Act has defined the offence of Dangerous Driving Occasioning Grievous Bodily Harm, where it states that:

“A person commits the offence of dangerous driving occasioning grievous bodily harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle -

c) in a manner dangerous to another person or persons.

19. Accordingly, the main elements of the offence of Dangerous Driving Occasioning Death/Grievous Harm are that:

- i) The accused,
- ii) While driving a vehicle in a manner dangerous to another person/ persons,
- iii) Involved in an impact,

- iv) That impact had caused the death of the deceased/caused grievous harm to the victim.
20. According to the summary of facts, it is clear that the appellant had re-started the bus, while some of the passengers were trying to put a stone under the tyre and some of the passengers were disembarking from the bus. At that point of time, the bus started to move backward and eventually fell down in the drain causing the death of the deceased and injuring the victim. Hence, the summary of facts has disclosed that the appellant had driven the bus at the time of the impact.
21. Megaw LJ in **R v Gosney (1971) 3 All ER 220, pg 224** has defined the dangerous driving in an inclusive manner, where it was held that:

“We would state briefly what in our judgment the law was and is on this question of fault in the offence of driving in a dangerous manner. It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation.

22. Accordingly, **Gosney (supra)** has enunciated an objective test in order to determine dangerous driving. The court first needs to determine whether there was a dangerous situation. Then it is required to consider whether there has been some fault by the driver, causing this dangerous situation. If the conduct of the driver, that contributed to cause the dangerous situation, falls below the care or skill of a competent and experienced driver, it would constitute the element of fault.
23. The Fiji Court of Appeal in **Kumar v State [2002] FJCA 12; AAU0014U.2002S (30 August 2002)** has adopted the principle enunciated in **Gosney (supra)**, where the Fiji Court of Appeal held that:

“The distinction between the offences of dangerous driving causing death and careless driving causing death has been the subject of many decisions in various jurisdictions. In Fiji the decision in Sambhu Lal v. Regina Fiji Court of Appeal Criminal Appeal No. 49 of 1986 having analysed the law followed the English decision in R.v. Gosney [1971]3 All ER 220 (the law in England then being the same as in Fiji). At p.224 of Gosney it was stated:

“In order to justify a conviction there must be not only a situation which viewed objectively was dangerous but there must also have been some fault on the part of the driver causing the situation.”

The Court in Gosney went on to note that the fault involved may be no more than slight. These observations were accepted by the Court of Appeal in Fiji which accepted a summing up which included the direction:-

“So long as there is fault on the part of the driver which creates a dangerous situation he can be guilty of causing death by dangerous driving and it matters not whether the driving was careless dangerous or reckless.”

24. According to summary of facts, which was admitted by the appellant in the Magistrate's Court, he had only engaged gear 2, instead of gear 1 when the bus started to ascend the hill with overcrowded passengers. According to the report made by the Authorized Officer of the Land Transport Authority, the appellant should have engaged gear 1 as the bus was already overcrowded. The appellant then tried to engage gear 1 when he reached about 100 meters of the hill, which finally stopped the bus and the engine went off. The appellant then requested few passengers to put a stone under the tyre and the rest of the passengers to disembark from the bus. The appellant had not waited until they put the stone under the tyre and all the passengers to disembark. While some of the passengers were trying to put a stone under the tyre and the rest of them were disembarking from the bus, the appellant had restarted the bus. According to the report of the Authorized Officer of the Land Transport Authority, there were no technical defects of the bus and the hand and foot breaks were functioning normally. Once he started the bus, it started to move downward and gradually accelerated the speed.
25. Accordingly, the summary of facts has properly disclosed that the appellant had created this dangerous situation while driving the manner which was below the standard of competent and experienced driver. Therefore, I find the summary of facts has disclosed all the elements of the two offences as charged. The appellant had agreed and admitted the summary of facts in court, before he was convicted.
26. In view of these reasons, I find that the learned magistrate has appropriately and accurately entered the conviction against the appellant pursuant to Section 174 of the Criminal Procedure Act. Hence, I do not find any merits in the first and second grounds of appeal.

Appeal against the Sentence

Ground V

27. For the convenient of determination of this appeal, I now draw my attention to the fifth ground of appeal which is founded on the ground that the learned Magistrate has

considered the death of Phul Kumari and the grievous harm sustained by Rinal Vikashni as aggravating factors in the sentence.

28. The learned Magistrate in paragraph seven of the sentence has considered the death of Phul Kumari and the grievous bodily harm sustained by Rinal Vikashni as aggravating factors. The causing of death/grievous bodily harm is one of the main elements of the offence, hence, that cannot be considered as aggravating circumstances of the offence. The learned counsel for the respondent in his written submissions conceded that this ground has merits. I accordingly find this ground of appeal is succeeded.

Grounds III, IV, VI, and VII

29. I now turn to consider grounds three, four, six and seven together, as they are founded on the ground that the sentence imposed by the learned Magistrate is harsh and excessive and the sentence should have been suspended.
30. The maximum penalty for Dangerous Driving Occasioning Death is ten (10) years of imprisonment or fine of \$10,000. Moreover, the court could disqualify the driving license for any period up to life. The maximum penalty for Dangerous Driving Occasioning Grievous Bodily Harm is two (2) years of imprisonment or fine of \$2000 and disqualification for twelve (12) months.
31. The tariff for the offence of Dangerous Driving Occasioning Death is between 2 to 4 years. **(vide; State v Benjamin Padarath, Criminal Case No HCA 13 of 2004S, Iowane Waqairatavo v The State, Criminal Appeal No HAA 127 of 2004S, Kumar v State [2014] FJHC 775; Criminal Appeal 172.2014 (27 October 2014), State v Chand [2014] FJHC 210; HAM199.2013S (27 March 2014).**
32. The applicable tariff for the offence of Dangerous Driving Occasioning Grievous Bodily Harm as from a fine and suspended term to 12 months of imprisonment **(vide: Chand v State [2015] FJHC 192; HAA11.2015 (18 March 2015), Ali v The State [2016] FJHC 1137; HAA 51 of 2016 (29 December 2016).**

33. The learned Magistrate in paragraph six of the sentence has correctly considered the applicable tariff for both of these offences. Having considered the aggravating and mitigating circumstances of the offending, the learned Magistrate has sentenced the appellant for 2 years imprisonment for Dangerous Driving Occasioning Death and 8 months imprisonment for Dangerous Driving Occasioning Grievous Bodily Harm.
34. I am mindful of the fact, that the learned Magistrate has erroneously taken into consideration the death of the deceased and the injuries sustained by the victim as aggravating factors. Irrespective of that, the final sentence reached by the learned Magistrate in respect of the offence of Dangerous Driving Occasioning Death is still at the lower end of the tariff. Likewise, the final sentence of the Dangerous Driving Occasioning Grievous Bodily Harm is within the middle range of the tariff.
35. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, it states:

“It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.”

36. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

“In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be

imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust”.

37. According to the principles as stated in **Sharma (supra)**, the appellate court does not wish to interfere with the sentence imposed by a lower court unless the appellate court finds it unreasonable or unjust under all the circumstances of the case.
38. Justice Goundar in **State v Pio [2017] FJHC 177; HAA04.2016 (1 March 2017)** made the following observation in respect of the appropriate sentencing approach for the offence of Dangerous Driving Occasioning Death, where his Lordship held that:

“In his sentencing remarks, the learned Magistrate referred to the maximum penalty that the Parliament had prescribed for the offence of dangerous driving occasioning death – 10 years imprisonment/\$10,000.00 fine and disqualification for any period up to life. He referred to the case of State v Benjamin Padarath Cr Case No. HAC13 of 2004S and said the tariff for the offence was between 2 to 4 years’ imprisonment. He also referred to a number of local and English cases to identify the principles that applied to sentencing for dangerous driving occasioning death. Some of the principles are worth mentioning here:

- i) 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.
- ii) 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 not aggravating factors.
- iii) A starting point should be picked up from between 2 years and 4 years imprisonment, depending on the gravity of the offending, assessed on the seriousness of the fault.

39. In **Pio (supra)** Justice Goundar found that the sentence of 2 1/2 years imprisonment period is within the acceptable tariff limit for Dangerous Driving Occasioning Death. In Pio, the respondent had driven his vehicle in a high speed and hit a pedestrian, causing his death. He was under the influence of alcohol and had no valid driving license. Justice Goundar further held that such a dangerous driving that has caused the death of a person undoubtedly warrant a custodial sentence. His Lordship further found the delay of six years in concluding the matter is the only mitigating factor for the respondent.
40. Justice Perera in **Prasad v State [2016] FJHC 854; HAA014.2016 (16 September 2016)** held that:
- “That is, when a person is killed as a result of dangerous driving, no matter what the mitigating circumstances, normally, a custodial sentence should be imposed.*
41. Justice Temo in **State v Chand [2014] FJHC 210; HAM199.2013S (27 March 2014)** found the imprisonment period of two years is an appropriate sentence for an offender who had caused the death of a little girl by driving his vehicle dangerously.
42. In this case, the dangerous act of driving by the appellant does not fall in to the category of momentary inattention. He knew the danger, but without applying the due

care and attention as of a competent and experienced driver, the appellant started to ascend the hill without engaging gear 1 when the bus was overcrowded. He then tried to change to gear 2 while ascending the half of the hill. Once the bus was stopped, he tried to restart the bus while few passengers were trying to put a stone under the tyre and others were disembarking from the bus.

43. In view of the above discussed reasons and sentencing approach adopted by the courts in Fiji, I do not find the imprisonment period of two (2) years for the offence of Dangerous Driving Occasioning Death and imprisonment period of eight months for the offence of Dangerous Driving Occasioning Grievous Bodily Harm are excessive and harsh.
44. Furthermore, I find the learned Magistrate has appropriately exercised his sentencing discretion by not suspending the sentence pursuant to Section 26 of the Sentencing and Penalties Act.
45. I accordingly find no merits in grounds three, four, six and seven of this appeal and refuse them accordingly.

The Orders of the Court:

- i) The Ground five of the appeal is allowed,
 - ii) The appeal against the conviction is dismissed,
 - iii) The appeal against the sentence is dismissed.
46. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Labasa
07 November 2017

Solicitors
Patel & Sharma for the Appellant
Office of the Director of Public Prosecutions for the Respondent.