IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 38 OF 2017

BETWEEN: SEVECI KELIKELIVULA

APPELLANT

AND:

THE STATE

RESPONDENT

Counsel : Mr. W. J.E. Rosa for Appellant
Mr. J.B. Niudamu for Respondent

Date of Hearing : 11th October, 2016
Date of Judgment : 13th November, 2017

JUDGMENT

INTRODUCTION

1. The Appellant was charged in the Magistrates Court at Rakiraki with one count of Dangerous Driving Occasioning Death contrary to Section 97 (2) (c) (5) (b) (8) and 114 of the Land Transport Act No. 35 of 1998 (LTA).

2. The Appellant voluntarily pleaded guilty to the above charge and, in the presence of his Counsel Mr. Rosa, agreed the summary of facts filed by the State. On the 15th of February, 2017, the Appellant was convicted on his own plea.

3. On the 15th of March 2017, the Appellant was sentenced to 2 years and 6 months' imprisonment without a non-parole period.

4. Being dissatisfied with the sentence of the Magistrates Court, the Appellant filed his appeal within time on 28th of March 2017.

5. Both Counsel filed useful written submissions which I appreciate.

GROUNDS OF APPEAL

6. The Appellant filed following grounds of appeal against sentence:

(i) That the Learned Magistrate erred in law and in fact when he failed to record relevant consideration.

(ii) That the Learned Magistrate erred in law and fact when he allowed extraneous or irrelevant matters to affect him.

(iii) That the Learned Magistrate's sentence is manifestly harsh and excessive in all the circumstances of the case.

(iv) That the Learned Magistrate erred in principle when he disallowed adequate discount on the early guilty plea and good character.

(v) That the Learned Magistrate erred in law when he mistook the facts.

(vi) The disparity in sentence compared to other similar cases some of which are more serious in nature and or fault.

THE LAW

7. This Court will approach an appeal against sentence using principles set out in ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499 and adopted by the Court of Appeal in ***Kim Nam Bae v The State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999).

8. In ***Bae v State*** (supra), the Fiji Court of Appeal observed:

> *"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 relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".

9. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** (supra):

> *"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.*

THE FACTS

10. The Appellant admitted the following summary of facts in the Magistrates Court:

> *On the 29th day of January, 2016, at about 05.30 am at Kings Road, Savusavu, Nalawa, Ra, Seveci Kelikelivula (Accused) 55 years Supervisor of Vatukoula Goldmine, Tavua, drove a motor vehicle Registration Number LR 2077 in a dangerous manner occasioning death of Virisila Sukaleca (Deceased) 55 years, Retired School Teacher of Vatukoula Goldmine, Tavua.*
>
> *Accused and deceased were husband and wife.*
>
> *On the above mentioned date, time and place, Accused was driving the motor vehicle and the deceased was sitting in the front passenger seat and they were heading towards Suva for vacation. Accused slept on the way and he did not know at what speed he was driving. All of a sudden when the Accused opened his eyes he saw that the vehicle was getting off the road on the left side and he then overturned the steering wheel causing the vehicle to travel at a very high speed across the road tar seal on the right hand side and head-on (sic) on the coconut*

tree on the front left side and tumble over a steep slope. Locking speed after the accident was 150km/ph. Deceased was rushed to Nanukuloa Health Centre by nearby villagers where she was pronounced dead. On the 31st day of January, 2016 post mortem was conducted on deceased by Doctor James at Lautoka Hospital and cause of death was:

- *Excessive Blood Loss*
- *Haemo-peritoneum*
- *Fracture Pelvic Bone*
- *Severe Traumatic Pelvic injuries*
- *Multiple Traumatic injuries*

Later on the day, accused was questioned under caution, subsequently arrested and charged for the offence of occasioning death by dangerous driving.

ANALYSIS

Ground (i) That the Learned Magistrate erred in law and in fact when he failed to record relevant consideration
Ground (iv) That the Learned Magistrate erred in principle when he disallowed adequate discount on the early guilty plea and good character

11. The Appellant has submitted that the learned Magistrate fell into error when he failed to give proper regard and/or to direct his mind on the principle of *"Momentary Inattention"*.

12. It appears from the summary of facts that the Appellant had fallen asleep whilst driving around 5.30 a.m. The falling asleep while driving has not been considered in Fiji as an instance of "momentary inattention". Even if the Court is satisfied that driver did lose control of the motor vehicle because he lost consciousness by falling asleep, it is dangerous to drive in a condition where the driver is liable at any time to be overcome by tiredness and fall asleep, however momentarily, while at the wheel of the vehicle. In ***State v Waitui*** [2014] FJHC 536; HAA015.2014 (23 July 2014) Madigan J stated:

> *"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. ... 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".*

13. Even if summary of facts had revealed a "momentary inattention" on the part of the Appellant, this factor is no longer regarded as a mitigating factor in Fiji. The 'momentary inattention' mitigation factor is not available under the harsher penalty prescribed by the LTA and the new tariff imposed by Shameem J in ***Iowane Waqairatavo*** HAA 127 of 2004S has subsequently been followed by the High Court in ***Kumar*** CA 172 of 2014, and in ***Bulivorovoro*** HAA 11 of 2014. Madigan J in ***Kumar*** CA 172 of 2014 (Ltk) observed:

> *"there is no doubt that the tariff is still now 2-4 years and the "momentary inattention" mitigating factor is not available under the harsher penalty on the LTA Act. Irresponsible and dangerous driving that causes loss of life should no longer receive lenient sentences no matter who the accused is or what his status in the community might be. There is no room for suspended sentences for this offence."*

14. The Counsel for Appellant further contends that the learned Magistrate failed to consider mitigating factors that Appellant was a first offender, his expression of remorse and early guilty plea in line with ***Marau v State*** [1990] 36 FLR 242 (14 February 1990) where Fatiaki J, referring to ***Boswell and Ors*** (1984) 6 Cr. App. R 257, identified the following 5 mitigating factors:

> *(a) a 'one off' piece of reckless driving momentary reckless error of judgment, briefly dozing at the wheel or failing to notice a pedestrian at a crossing; (b) a good driving record; (c) good character generally; (d) a plea of guilty would be taken into account in favour of the defendant; and (e) the effect of the offence on the defendant, shocked or generally remorseful, particularly where the victim or a close friend or relation and the consequent emotional shock was likely to have been great."*

15. I have already discussed the sentencing approach that has been adopted in Fiji after coming into force the new LTA legal regime which considers this offence as a serious offence.

16. The Counsel for Appellant submits that he was denied and deprived of the mercy and leniency after pleading guilty on the first available opportunity thus saving the court's time and resources.

17. The learned Magistrate in fact considered the Appellant's expression of remorse, early guilty plea and that he was a first offender.

18. The learned Magistrate at paragraph 11 of his sentencing Ruling considered the fact that the Appellant was a first offender and deducted 6 months from the sentence and further deducted 1 year separately for his guilty plea.

19. It should be accepted that there is well established practice (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea of guilt willingly made at the earliest opportunity. However, this is not a fixed formula applicable to all cases. The amount of deduction will depend on the circumstances and the overall sentence of each case and to be decided on a case by case basis. Specially, when the final sentence falls within tariff and not for a longer period, this practice may be dispensed with.

20. The Learned Magistrate had taken a starting point of 2 years and added 2 years for aggravating factors. He then deducted 18 months for above mentioned mitigating factors. The learned Magistrate had considered the Appellant's guilty plea and has given 1 year deduction. This is a separate deduction from the other mitigating factors which is correct in principle. Deduction of 1 year does not tantamount to one third deduction. However, as noted above, there is no strict mathematical formula for the one third deductions.

21. The deceased in the instant case is the wife of the Appellant and the effect and shock of the offence on him is quite understandable. The learned Magistrate at paragraph 5 correctly recorded this as a mitigating factor. However, he has not given any discount for the loss caused to him by the demise of his wife. Therefore, I will consider this mitigating factor in the latter part of my judgment.

22. The Counsel for Appellant drew the attention of this Court to the decision in *Marau* (supra) where a suspended sentence had been imposed. Even though a suspended sentence was imposed in that case under special circumstances, it is opportune to highlight the observation made by Fatiaki J at a time when the old Penal Code legal regime was in force. His Lordship said:

> *"Causing Death by Dangerous Driving is an offence for which the legislature has provided a maximum penalty of imprisonment for 5 years and although there are reported decisions of the Courts in this country where sentences of imprisonment have been upheld on drivers found guilty of the offence (see: [1967] 13 FLR 174; [1970] 16 FLR 1, [1972] 18 FLR 167; [1973] 19 FLR 1 and [1974] 20 FLR 350), experience and statistics indicate that a custodial sentence is the exception rather than the rule.*

If I may say so there appears to be a serious misconception amongst drivers perhaps reinforced by sentences passed by the Courts, that persons convicted of traffic offences are not really a danger to society or "criminals" in the popular sense of the word. Last year alone there were as many as 86 deaths on our roads and if the existing trend continues unabated this year the road death toll will exceed 100. No other area of human activity has given rise to such appalling fatality figures, human suffering and disability yet the attitude continues.

It is trite to say that a motor vehicle is a potentially lethal instrument and any driver who fails to realise that what he is doing at the wheel does create a risk when such a risk would be obvious to any ordinary bystander and kills in the process, is prima facie deserving of severe punishment involving in many cases an immediate loss of liberty".

23. Even under the old legal regime, Fatiaki J in ***Marau*** said that offenders should not assume that they would automatically receive a non-custodial term. Since the maximum penalty for Dangerous Driving Causing Death has now been doubled (10 years' imprisonment) under the LTA, it is clearly time that our Courts treated such offences and offenders with the seriousness that the legislature intended them to be regarded and also to reflect the concern of the general public about these matters.

24. Save as for my reservation at paragraph 21, these grounds have no merits and should therefore fail.

Ground (II) That the Learned Magistrate erred in law when he allowed extraneous or irrelevant matters to affect him

25. The Appellant submits that the learned Magistrate erred when he considered these two aggravating factors to increase the sentence by 2 years: (i) damage done to the vehicle which was a rental car and (ii) extent of the injuries sustained.

26. In ***Boswell and Ors***. (supra) the court considered the following aggravating factors:

- The consumption of alcohol or drugs. This may range from a couple of drinks to a 'motorised pub-crawl';
- A driver who races; competitive driving against another vehicle; grossly excessive speed; showing off;
- The driver who disregards warnings from his passengers;

- A prolonged, persistent and deliberate course of very bad driving;
- Other related offences committed at the same time, i.e. driving without ever having held a licence, driving whilst disqualified, driving while a learner while unsupervised and so on;
- Previous motoring convictions, particularly offences involving bad driving or excessive consumption of alcohol, i.e. a man who shows that he is determined to continue to drive badly despite past experience;
- Where several people have been killed as a result of the offence;
- Bad behaviour at the time of the offence, e.g. failing to stop, or worse, trying to throw the victim from his car bonnet in order to escape; and
- Causing death in the course of reckless driving in an attempt to avoid detection or apprehension;"

27. The Tasmanian Court of Criminal Appeal has applied the principles for sentencing for dangerous driving causing death or grievous bodily harm as set out by the New South Wales Court of Criminal Appeal in ***Jurisic v R*** (1998) 45 NSWLR 209 and ***R v Whyte*** (2002) 55 NSWLR 252. In sentencing, the courts have identified the following features as important considerations:

- extent and nature of the injuries inflicted;
- number of people put at risk;
- degree of speed;
- degree of intoxication and/or of substance abuse;
- erratic driving;
- competitive driving or showing off;
- length of the journey during which others were exposed to risk;
- ignoring of warnings;
- escaping police pursuit;
- degree of sleep deprivation;
- failing to stop.

28. The learned Magistrate had correctly considered the extent of injuries sustained by the deceased as an aggravating factor. This aggravating factor cannot be considered as an element of the offence. However, the damage done to the vehicle which was a rental car did not form part of the summary of facts read to

the Appellant. Therefore, when the learned Magistrate considered the damage done to the vehicle as an aggravating factor, he mistook the facts and fell into error.

Ground iii-That the Learned Magistrate sentence is manifestly harsh and excessive in all the circumstances of the case
Ground vi- The disparity in sentence compared to other similar cases some of which are more serious in nature and or fault

29. It is convenient to deal with these two appeal grounds together as they are similar.

30. The maximum penalty for Dangerous Driving Causing Death is imprisonment for 10 years and a fine of up to $10,000.00 with the minimum being $1,000.00 and a disqualification of license from 6 months to life. A sentence of 2 years and 6 months is within the tariff.

31. In ***Sharma v The State*** [2005] FJHC 464: HAA 0097J.2005S Shameem J said:

> *"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 Iowane Waqairatavo that the tariff for such offences must increase to 2 to 4 years imprisonment".*

32. In ***Kumar v State*** [2014] FJHC 775; Criminal Appeal 172.2014 (27 October 2014) Madigan J observed:

> *"There is no doubt then that the tariff is still now 2-4 years and the "momentary inattention" mitigating factor is not available under the harsher penalty of the Land Transport Act."*

33. A suspended sentences will only be passed in truly exceptional circumstances for the LTA offence. Shameem J in ***Waqairatavo*** HAA 127 of 2004S said:

> *"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 and 4 years imprisonment depending on the gravity of the offending. The gravity of the offending is to be assessed on circumstances such as the numbers of death and the seriousness of the fault, which led to the offending".*

34. In ***State v Bulivorovoro*** [2014] FJHC 930; HAA 11.2014 (18 December 2014) the accused was sentenced to 12 months' imprisonment suspend for two years on his own plea of guilty on one count of Dangerous Driving Causing Death and one count of Dangerous Driving Causing Grievous Bodily Harm. On appeal by the State, the High Court, stating that the sentence was extremely lenient, sentenced the appellant afresh to two years' imprisonment.

35. Sentencing is not a mechanical or mathematical exercise in which magistrates and judges could be expected to apply a 100% uniform criterion when confronted with varying factual circumstances. In ***Guilfoyle*** (1973) 57 Cr. App. R. 549 Lawton L.J. in delivering the judgment of the Court said at pp. 551 and 552:

> *"The experience of this Court has been that there have been many variations in penalties. Some variations are inevitable because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this Court indicates what they are"*

36. The learned Magistrate has not deviated from the accepted sentencing practice when he reached his final sentence. Both these grounds have no merits and should be dismissed.

Ground (v) that the Learned Magistrate erred in law when he mistook the facts

37. The Counsel for Appellant further submits that the State had failed to corroborate the fact that the Appellant's vehicle was over speeding. The Appellant had admitted the summary of facts which states that he was travelling at a high speed and the locking speed after the accident was 150km/hr. It was correct for the Learned Magistrate to rely on the facts admitted by the Appellant.

38. The Appellant's plea was unequivocal and there is no evidence to suggest that he was under duress or any kind of force to plead guilty. He was given sufficient time to mitigate through his Counsel although the Counsel had not filed any mitigation submission. The Appellant had in fact recorded his mitigation which the learned Magistrate properly took into account.

39. This ground has no merit and should be dismissed.

40. The current tariff for Dangerous Driving Causing Death is between 2 and 4 years and all judicial officers should follow the current sentencing tariff. When considered the established sentencing tariff, the Appellant in this case has received quite a lenient sentence closer to the bottom end of the tariff.

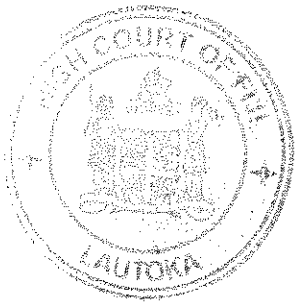
41. Having said that, I must consider the fact that Appellant unfortunately lost his wife in the accident. The effect of the offence on the Appellant, and consequent emotional shock caused by the accident would have been great. The learned Magistrate did not give any discount on this factor although he recorded it as a mitigating factor. He also aggravated the sentence having considered the damage caused to the vehicle which was not included in the summary of facts.

42. It is therefore appropriate in terms of Section 256 (3) of the Criminal Procedure Act to quash the sentence passed by the learned Magistrate and substitute another sentence which is appropriate to the gravity and circumstances of the offending.

43. The sentence of the learned Magistrate is quashed. I reduce the sentence by six months to arrive at a sentence of two years' imprisonment. The Appellant is sentenced afresh to 2 years' imprisonment. I do not wish to interfere with the learned Magistrate's decision not to impose a non- parole period.

CONCLUSION

44. The Appellant is sentenced to two years imprisonment with effect from 15th of March 2017. No non- parole period is prescribed. Appeal succeeds to that extent.



Aruna Aluthge
Judge

At Lautoka
13th November, 2017

Counsel: **Zodiac Law for Appellant**
Office of the Director of Public Prosecution for the Respondent