

IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 22 OF 2016

IN THE MATTER of an Appeal from the
Magistrate's Court of Nausori in Criminal Case
No. 1992 of 2012.

BETWEEN : THE STATE

APPELLANT

AND PHILIP SATYAVAN VISHWAMITRA MADHAVAN

RESPONDENT

Counsel : Mr. S. Vodokisolomone for the Appellant
Mr. Ravi Singh for the Respondent

Date of Hearing : 5 September 2017

Judgment : 7 December 2017

JUDGMENT

[1] This is an Appeal made by the State against the Judgment of acquittal of the Magistrate's Court of Nausori.

- [2] On 31 May 2012, the Respondent was charged before the Magistrates Court of Nausori in Criminal Case No. 1992 of 2012, with one count of Dangerous Driving, contrary to Section 98 (1) and 114 of the Land Transport Act No. 35 of 1998 ("Land Transport Act"), as follows:

CHARGE

Statement of Offence

DANGEROUS DRIVING: Contrary to Section 98(1) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

PHILIP SATYAVAN VISHWAMITRA MADHAVAN on the 2nd day of November 2011, at Nausori in the Central Division, drove a vehicle registration number **FO 174** on Kings Road, Koronivia in a manner which was dangerous to the public having regards to all the circumstances of the case.

- [3] During the course of the proceedings in the Magistrates Court of Nausori, the Respondent waived his right to counsel and undertook his own defence.
- [4] The trial in this case was held on 9 June 2014. During the course of the trial, the prosecution led the evidence of four witnesses to prove the charge against the Respondent. At the close of the case for the prosecution, the defence was called for. The Respondent chose to give evidence on oath.
- [5] On 11 August 2014, the Learned Magistrate delivered his Judgment. He held that having heard both accounts (the case for the prosecution and the defence), he puts weight on the Respondent's version. Accordingly, he held that the Respondent was not driving dangerously contrary to Section 98(1) of the Land Transport Act.

- [6] Aggrieved by this Order (which effectively acquitted the Respondent), on 8 September 2014, the Appellant (in this case the Director of Public Prosecutions), filed a Petition of Appeal against the Judgment of Acquittal.
- [7] In the Petition of Appeal filed, the Appellant took up the following grounds of appeal:
- (1) *The learned trial Magistrate erred in fact and in law when holding that the Respondent did not drive dangerously when this finding was inconsistent with the direct and circumstantial evidence adduced in the case namely that:*
 - *Vehicle registration number CC 613 driven by PW2 Hansraj Singh had a working indicator as evidenced namely by PW2 and PW1 Vilimaina Toga;*
 - *Vehicle registration number CC 613 driven by PW2 Hansraj Singh was driving in the same direction as the Respondent before the accident but was in front of the Respondent's vehicle which showed that the Respondent was not paying attention.*
 - *The Respondent admitted in evidence that he purposely drove onto the oncoming lane to avoid the accident.*
 - *The Respondent's vehicle had no mechanical defect.*
 - (2) *The learned trial Magistrate erred in law and in fact in finding that vehicle CC 613 was faulty.*
 - (3) *The learned trial Magistrate erred in law in failing to apply the correct law in relation to dangerous driving.*
- [8] During the hearing of this appeal, the Learned Counsel for the State submitted that he is no longer relying on the Second Ground of Appeal above. Therefore, the State is only relying on the First and Third Grounds of Appeal, which in the opinion of this Court are inter related.
- [9] Both parties filed written submissions, and also referred to case authorities, which I have had the benefit of perusing.

The Law

[10] Section 246 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”) deals with Appeals to the High Court (from the Magistrate’s Courts). The provisions relevant to this appeal are re-produced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption. [Emphasis is mine].

(3)

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) provides:

The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Ground One

[12] Is that the learned trial Magistrate erred in fact and in law when holding that the Respondent did not drive dangerously when this finding was inconsistent with the direct and circumstantial evidence adduced in the case. Under this ground of appeal, there are four sub-grounds listed.

[13] The Respondent was charged in the Magistrate's Court with one count of Dangerous Driving, contrary to Section 98 (1) of the Land Transport Act. The relevant subsection states:

"Any person who drives a motor vehicle on a public street recklessly, or at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the public street and the amount of traffic which is actually at the time or which might reasonably be expected to be on the public street, commits an offence and, subject to subsections (2) and (3), is liable upon conviction to the prescribed penalty."

[14] The charge against the Respondent is that on 2 November 2011, at Nausori in the Central Division, he drove a vehicle registration number FO 174 on Kings Road, Koronivia in a manner which was dangerous to the public having regards to all the circumstances of the case.

[15] Therefore, in this case, the prosecution had to establish beyond reasonable doubt the following elements to prove the charge against the Respondent:

1. That the Respondent;
2. On 2 November 2011;
3. At Nausori, in the Central Division;
4. Drove a vehicle registration number FO 174;
5. On Kings Road, Koronivia (a public road);
6. In a manner which was dangerous to the public having regards to all the circumstances of the case.

[16] In his Judgment the Learned Magistrate has clearly identified the above as the elements the prosecution had to prove to find the Respondent guilty of the charge.

[17] In terms of Section 98 (1) of the Land Transport Act, it is stated that the 'circumstances of the case' includes the nature, condition and use of the public street and the amount of traffic which is actually at the time or which might reasonably be expected to be on the public street. Therefore, it is apparent that as per the wording of the Section, this is not an exhaustive list. There could be other factors too which could be included under the expression 'circumstances of the case'.

[18] During the course of the trial in the Magistrate's Court, the prosecution led the evidence of four witnesses:

1. Ms. Vilimaina Toga-a passer-by who witnessed the accident;
2. Mr. Hansraj Singh- the driver of vehicle bearing registration number CC 613;
3. Mr. Ravinesh Prasad- the driver of vehicle bearing registration number LR 2220; and
4. PC 3751 Isoa- Police Officer attached to the Nausori Police Station.

[19] Vilimaina Toga testified that on 2 November 2011, she was dropped off opposite the car wash along the Kings Road, Koronivia. Whilst she was there, she witnessed an accident. The accident had occurred directly in front of the car wash, opposite to where she was standing. She had wanted to cross the street. However, since there were vehicles passing on the road, she had waited until the vehicles had passed.

- [20] There was a vehicle which indicated that it wanted to turn to the car wash and stopped on the left hand side of the road (presumably she is referring to vehicle registration number CC 613, although in the transcript of the evidence, it has been recorded as FO 174). As this vehicle stopped, the car behind (reference to registration number FO 174) wanted to overtake. Whilst vehicle FO 174 was overtaking, another vehicle which was travelling from the opposite side of the road (reference to vehicle registration number LR 2220) collided with the said vehicle.
- [21] Hansraj Singh, who was driving vehicle bearing registration number CC 613 at the time, stated in his evidence that around 10.45 a.m., on 2 November 2011, he was going to the car wash near 10 miles. He had been driving towards Nausori. Before turning to the car wash, he signalled and stopped his vehicle. He had been waiting for about 2 minutes. He had seen one vehicle come from behind. The vehicle overtook from the right side, and collided with another vehicle which was travelling on the opposite side of the road. At the point where he had signalled and stopped, there were double lines on the road, which meant "no overtaking". Soon after the accident, he had driven away (without going into the car wash). He testified that he had not waited after the accident as he was scared.
- [22] Ravinesh Prasad, who was the driver of vehicle bearing registration number LR 2220 at the time, testified that he was on his way to Suva. It had been around 10.50 a.m., on 2 November 2011. There was a vehicle which had stopped and signalled that it was wanting to turn towards the car wash. Vehicle number FO 174, overtook this vehicle and came towards the right side (right lane) of the road. The witness, who had been travelling at about 50 kmph at the time, had collided with FO 174.
- [23] PC 3751 Isoa, a Police Officer attached to the Nausori Police Station, conducted the investigations at the scene of the accident. He had drawn a sketch plan and taken measurement. The witness confirmed that there were two solid lines (double lines) on the road which indicated that you cannot overtake at that point.
- [24] The Respondent testified in Court. The transcript of his evidence is not found in the copy record of the Magistrate's Court of Nausori, which was originally tendered to Court. However, with the consent of both parties, a Supplementary Record of the

Magistrate's Court of Nausori was tendered to Court. Therein, the Respondent's testimony can be found.

- [25] The Respondent testified that approximately 10.50 a.m., on 2 November 2011, he had been on his way to Nausori. He had been driving vehicle registration number FO 174. He was passing the LDS Church. The car wash was on the right side just after the LDS Church. He had been travelling at a speed of around 50-55 kmph at the time. As he approached the cash wash, the vehicle ahead of him (CC 613) stopped at the junction without giving any signal. There was no brake lights to indicate that he was stopping. This car had stopped on a slope, where one cannot stop without using the brakes. And if the brakes had been applied, and the brake lights were working, he would have seen the lights.
- [26] He further testified that everything happened very quickly. By the time he realised that the car ahead of him had actually stopped, he could not apply his brakes as he would have hit the car in front. There were other cars coming from behind. Thus, he had swerved his vehicle to the right to avoid colliding with CC 613 and to avoid other cars behind him from colliding with his own vehicle. It was an instinctive action which he took to avoid a collision. It was at that moment that he saw the vehicle registration number LR 2220 coming at a high speed towards him. To avoid a head on collision, the Respondent had swerved to the left and stopped. He testified, that at the time of the collision his vehicle had stopped. LR 2220 hit his stationery vehicle on the right fender. The driver of LR 2220 went out of control and tumbled and stopped the vehicle approximately 21.5 meters away.
- [27] Soon after the accident, he had got out of his vehicle and called to the driver of CC 613 not to move from there. However, the vehicle had taken off.
- [28] Considering the totality of the evidence led at this trial, and having regards to all the circumstances of the case, it is my opinion that the prosecution has failed to establish beyond reasonable doubt that, at the time of this accident, the Respondent was driving vehicle registration number FO 174 in a manner which was dangerous to the public.
- [29] Therefore, the first ground of appeal is without merit.

Ground Three

- [30] That the learned trial Magistrate erred in law in failing to apply the correct law in relation to dangerous driving. As I have indicated earlier, it is my opinion that this ground of appeal is inter related to Ground One above.
- [31] In his Judgment the Learned Magistrate has referred to the case of *Lasike v. State* [2002] FJHC 159; HAA0058J of 2002S (13 September 2002).
- [32] In the said case the Appellant Semisi Lasike was charged, inter alia, for causing death by dangerous driving, contrary to Section 238 (1) of the Penal Code (Chapter 17). The said Section of the Penal Code reads as follows:

“Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, is guilty of a misdemeanour and is liable on conviction to imprisonment for a term not exceeding five years.”

- [33] Her Ladyship Madam Justice Shameem held:

*“This section creates three separate offences. One is causing death by reckless driving. The second is causing death by driving at a speed dangerous to the public. The third is (causing death by) driving in a manner dangerous to the public. The prosecution in each case, must choose which offence is being alleged. The test for reckless driving, according to the common law definition of recklessness, is partially subjective. Did the accused know there was a risk, and went on to take that risk? The test for causing death by driving at a speed dangerous to the public is an objective one. Similarly, the test for causing death by dangerous driving is an objective one. The offence is proved when the driver drives in a way which falls below the standard expected of a competent and prudent driver, and thereby causes a situation, which viewed objectively, is dangerous **R -v-***

Gosney (1971) 3 ALL ER 220, *Sambhu Lal -v- Regina* Criminal Appeal 49/1986)."

[34] Therefore, as per Justice Shameem the test for dangerous driving is an objective one. *"The offence is proved when the driver drives in a way which falls below the standard expected of a competent and prudent driver, and thereby causes a situation, which viewed objectively, is dangerous."*

[35] In coming to her finding Justice Shameem relies on the case of *R v. Gosney* [1971] 3 ALL ER 220; which was followed by the Fiji Court of Appeal in *Sambhu Lal v. Regina* (unreported), Criminal Appeal No. 49 of 1986.

[36] In *Gosney's* case (*supra*) it was held (at page 224);

"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."

[37] In *State v. Ganesh* [2009] FJHC 207; HAM 030 of 2008 (17 September 2009); His Lordship Justice Daniel Gounder said *"The High Court has not changed what has been the longstanding law on dangerous driving causing death in Fiji."* His Lordship made reference to the case of *Ajnesh Kumar v. State* Criminal Appeal No. AAU 0014 of 20025; where The Fiji Court of Appeal reiterated that:

*"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."

[38] Therefore, it is clear from these authorities that the proper test to determine “dangerous driving” is as formulated above.

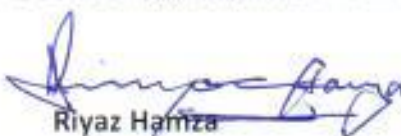
[39] In the instant case the Learned Magistrate has only referred to part of this test in his Judgment as follows: “*dangerous driving is the causing of a dangerous situation by a manner of driving which falls below the standard expected of a prudent driver.*” He has not referred to the portion that there must also have been some fault on the part of the driver causing the dangerous situation.

[40] Therefore, it is clear that the Learned Magistrate erred in law in failing to apply the correct law in relation to dangerous driving in his Judgment. However, considering the totality of the evidence led at this trial, it is my opinion that the prosecution has failed to establish beyond reasonable doubt that the Respondent was driving vehicle registration number FO 174 in a manner which fell below the standard expected of a prudent driver; and further that there was some fault on the part of the Respondent which caused the accident.

[41] Therefore, this ground of appeal fails.

Conclusion

[42] In light of the above, the decision of the Learned Magistrate is affirmed and this appeal is dismissed. For the sake of clarity, I make order that the Respondent is not guilty of the charge against him and he is accordingly acquitted from these proceedings.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitor for the Appellant :
Solicitor for the Respondent :

Office of the Director of Public Prosecution, Suva.
Parshotam Lawyers, Suva.