

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NOs. HAA 104/105 of 2017

BETWEEN : **VINAY VIKASH CHAND trading as VINAY
VIKASH HIRE TRUCK SERVICES**

APPELLANT

A N D : **LAND TRANSPORT AUTHORITY**

RESPONDENT

Counsel : Mr. A. Dayal for the Appellant.
: Ms. E. M. Dauvere for the Respondent.

Date of Hearing : 18 October, 2018
Date of Judgment : 19 October, 2018

JUDGMENT

BACKGROUND INFORMATION

1. This appeal has been pending in this court for sometime now. The appellant's counsel had initially filed the consolidated Petition of Appeal

under the name of Vinay Vikash Hire Truck & Concrete Block Supplies having its registered office at Nadi Back Road, Nadi.

2. On 23 May, 2018 when the above appeal was for hearing this court brought it to the attention of counsel that the charges mentioned the name Vinay Vikash Hire Truck Services whereas the Petition of Appeal mentioned Vinay Vikash Hire Truck & Concrete Block Supplies. The appellant as mentioned did not have any locus standi to proceed with the appeal as per section 246 (1) of the Criminal Procedure Act.
3. Counsel for the appellant conceded his mistake and applied to amend the pleadings. By formal application counsel sought leave to amend pleadings and also sought leave to appeal out of time under the entity Vinay Vikash Hire Truck Services (the accused as per the charges). The respondent did not have any objections hence order in terms of the application was granted.

PRELIMINARY

4. When this matter proceeded to hearing it became obvious that Vinay Vikash Hire Truck Services was not a limited liability company as asserted by counsel in his submissions. The Petition of Appeal further mentions that the entity Vinay Vikash Hire Truck Services has its "registered office at 25 Solovi Road, Nadi but now operating from Nadi Back Road". The Notice of Motion dated 5th June, 2018 filed by the appellant supported by the affidavit of Ronil Riteshwar Jeet sworn on 5th June, 2018 seeking leave to amend the pleadings has exhibited as annexures the certificate of registration of Vinay Vikash Hire Truck Services and application for registration by an individual.

5. The annexures suggest that the entity in question is a sole trader and not a limited liability company as suggested by the intitulement of the consolidated Petition of Appeal. The Petition of Appeal filed in its current form is misleading, counsel ought to be cautious in drafting their pleadings.
6. The learned counsel for the appellant concedes the above, in the circumstances the intitulement has been corrected to read as:

*“Vinay Vikash Chand trading as Vinay Vikash Hire Truck Services”
(Appellant)*

7. On 5 September, 2016 the Land Transport Authority had issued two traffic infringement notices (TINS) being 3006479 and 3006480 respectively. The notices alleged the following:

Statement of Offence (TIN 3006479)

Permitting another person to drive motor vehicle with non-conforming mass plus load contrary to Regulation 80(a) (d), 87 (1) (a) and 122 of Land Transport (Vehicle Registration and Construction) Regulation 2000.

Particulars of Offence

VINAY VIKASH HIRE TRUCK SERVICES, on the 5th day of September, 2016 at Lautoka in the Western Division being the owner of motor vehicle registration number HF 334 at Saweni, Lautoka permitted Selva Menon Kumar to carry sand with a weight of 31.06 tonnes when the vehicle permissible gross weight is 21.40 tonnes. The excess weight of the vehicle is 9.66 tonnes.

Statement of Offence (TIN 3006480)

Permitting another person to drive motor vehicle with non-conforming mass plus load contrary to Regulation 80(a) (d), 87 (1) (a) and 122 of Land Transport (Vehicle Registration and Construction) Regulation 2000.

Particulars of Offence

VINAY VIKASH HIRE TRUCK SERVICES, on the 5th day of September, 2016 at Lautoka in the Western Division being the owner of vehicle registration number IC 617 at Saweni, Lautoka permitted Salandar Kumar Deo to carry sand with a weight of 31.16 tonnes when the vehicle permissible gross weight is 21.40 tonnes. The excess weight of the vehicle is 9.76 tonnes.

8. The notices stated if the fixed penalty was not paid within 21 days, the appellant was required to attend Magistrate's Court on 1 November, 2016 to answer to the charges.
9. After the 21 days had lapsed, the fixed penalty was not paid and the appellant did not appear in the Magistrate's Court on 1 November, 2016.
10. On 14 February, 2017 the Magistrate's Court proceeded with the formal proof of the charges and imposed a fine of \$9,000.00 and costs of \$100.00 for each offence. The total fine being \$18,000.00.
11. On 11 July, 2018 the appellant was granted leave to appeal out of time. The appellant promptly filed a consolidated Petition of Appeal.
12. Both counsel have filed written submissions and also made oral submissions during the hearing for which this court is grateful.

13. The appellant advances the following grounds of appeal in respect of conviction namely:

GROUND ONE

The learned Magistrate erred in fact and in principle when he failed to enquire whether the Traffic Infringement Notices had been properly served on the appellant so as to inform the appellant of the alleged offence which led to the infringement of the appellant's Constitutional Rights.

14. The learned counsel for the appellant submits that the appellant was never served with any Traffic Infringement Notices issued by the Land Transport Authority hence the appellant was not present in court to defend the allegations.
15. The procedure for the service of Traffic Infringement Notices under Regulation 5(2) of the Land Transport (Traffic Infringement Notice) Regulations 2017 states:-

"(2) Pursuant to sub regulation (1), a police officer or authorised officer must dispatch a Traffic Infringement Notice in respect of the alleged commission of a fixed penalty offence under the Act or the subsidiary laws made under the Act-

(a) By serving the Traffic Infringement Notice personally upon the person alleged to have committed the offence, acting in his or her own capacity or as an agent..."

16. The affidavit of service filed in court states that on the 5th day of September, 2016 the notices were served on the accused. The accused

mentioned in the notices is Vinay Vikash Hire Truck Services which was a sole trader. The question is was the appellant served?

17. The notices specifically state that the appellant permitted another person to drive a motor vehicle with non-conforming mass plus load. There is no dispute that the appellant was the owner of both vehicles and by virtue of being the owner of the vehicle the allegations are leveled against the appellant.
18. A careful reading of Regulation 5(2) of the Land Transport (Traffic Infringement Notice) Regulation 2017 states that it is a mandatory provision of the law that personal service be effected upon the person alleged to have committed the offence or his or her agent.
19. When the matter proceeded to formal proof in respect of the TIN No. 3006479 prosecution witness two (2) Amitesh Mani testified in court as follows:

“5 September 2016, 7.30am was with PW1 doing our weight check at Saweni, Lautoka. Came across HF 334, was carrying load of sand. Weight by PW1 found to be carrying excess load of 9.66 – excess gross weight had. The driver was Selva Menon Kumar. The driver was working for Vinay Vikash Hire Truck Service. Issue a TIN on the company for the offence of Permitting Another Person to drive motor vehicle with not conforming mass plus load. Later served the TIN on the company. Proceeded as vicarious liability as the driver works for the company.”

20. The prosecution witness did say that the company was later served but did not specifically state when. The affidavit of service filed in court states:

“I, Amitesh Mani the authorised officer whose signature appears at the foot of the Traffic Infringement Notice above, make oath and say that, on the 5th day of September, 2016 at Lautoka I did – serve upon the accused person specified herein...”

21. In respect of TIN No. 3006480 the prosecution witness Amitesh Mani when testifying in court did not mention anything about service on the appellant or the driver, however, the affidavit of service filed in court states that the appellant had been served. The evidence of this prosecution witness is reproduced herewith:

“5 September 2016, 9.45am at Saweni, Lautoka booked vehicle registration number IC 617 driven by Salandar Kumar Deo. The vehicle is owned by Vinay Vikash Hire Truck Service. Booked the company of the accused vehicle for carrying excess load of 9.76 tonnes. Warned for prosecution. Driver was working for the accused and under vicarious liability the accused was booked.”

22. This witness did not say he had served the TIN on anyone yet the affidavit of service filed in court suggests as follows:

“I, Amitesh Mani the authorised officer whose signature appears at the foot of the Traffic Infringement Notice above, make oath and say that, on the 5th day of September, 2016 at Lautoka I did – serve upon the accused person specified herein...”

23. Counsel for the respondent submits that the drivers were served with the Traffic Infringement Notices since they were the agents of the appellant by virtue of being permitted by the appellant to drive. This submission is misconceived in view of the fact that the affidavit of service mentions nothing about service of the TIN's on the drivers as agents of the

appellant and the evidence given during formal proof also does not confirm service on the drivers as well.

24. This court also notes that there was no inquiry by the learned Magistrate in respect of how service was effected when the witness stated in court he had later served the company in respect of TIN No. 3006479. In respect of TIN 3006480 the service of the TIN on the owner of the vehicle or the driver was never mentioned by the prosecution witness in his evidence. Furthermore, the learned Magistrate should have scrutinized the affidavit in view of the evidence given by the witness.
25. It is quite obvious that the Magistrate's Court was misled into believing that the appellant had been served when this was far from the truth. There is no truth in the assertion by the authorised officer Amitesh Mani of the Land Transport Authority in the two affidavits of service filed in court which were not tendered as part of his evidence that the appellant had been served on 5th September, 2016. The affidavit of service filed is false and misleading. If the drivers were served then the affidavit of service for each charge fails to mention this aspect as well.
26. This court is satisfied that the appellant or his agents were never served with the Traffic Infringement Notices. The convictions entered against the appellant are unsafe this ground of appeal is allowed.

GROUND TWO

"The learned Magistrate erred in fact and law when he failed to appreciate that the proceedings under the Traffic Infringement Notices were still live proceedings hence were caught by section 93(2) of the Land Transport Amendment Act 2017 therefore ought to have been withdrawn.

27. The learned counsel for the appellant submits that the proceedings were deemed to have been withdrawn under section 93(2) of the Land Transport Amendment Act 2017.
28. Section 93(2) states:
“(2) All proceedings instituted in relation to Traffic Infringement Notices in any court prior to the commencement of the Land Transport (Amendment) Act 2017 are deemed to be withdrawn”
29. Counsel further submits that the words “all proceedings instituted” before the commencement of the Amendment Act includes all those proceedings where the accused persons have been convicted but their fines are yet to be collected because the committal warrants had not been issued. Counsel also states that TIN 3006480 has not reached its finality because no committal warrant has been issued yet.
30. There are two schools of thought in relation to the interpretation of statutes the literal and the purposive rules. Cooke J. said in *Reid v Reid* [1979] 1 NZ LR 572 at 594 that the literal rule of interpretation was defined and explained by Higgins J. in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at p. 161-162 as follows:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”

31. The other method of interpretation applied by the courts is known as the purposive approach, which is an approach to statutory interpretation in which the courts interpret legislation in the light of the purpose for which it was enacted and which promotes the purpose of the legislation. The purposive approach was explained by Kirby J in *FC of T v Ryan*, (2000) 42 ATR 694, 715-716, in the following manner:-

"In this last decade, there have been numerous cases in which members of this court ... have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature ... even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose ... This court should not return to the dark days of literalism."

32. In between the strictly literal method of interpretation and the purposive approach to interpretation lies the "golden rule", which was clarified by Viscount Simon LC in his judgment in *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] 3 All ER 549 at 553 as follows:-

"The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation that which will reverse the previous law, for the purpose of a large number of our statute law is to make lawful that would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow.... At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of legislation, we should avoid a construction that would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

33. Before going any further it is important to examine the language used in section 93(2) of the Land Transport Amendment Act 2017. The language used is unambiguous therefore under the literal rule of interpretation the ordinary and natural meaning of the words apply
34. This court is unable to accept the submissions of the appellant. The words used in section 93(2) of the Land Transport Amendment Act 2017 are unambiguous and therefore should be given its ordinary and natural meaning.
35. The phrase “all proceedings instituted” in the context of this section refers to all those proceedings that have been filed in court and are yet to be dealt with by the court. After a Traffic Infringement Notice has been filed in court which goes through a judicial process such as formal proof or a hearing and a sentence is pronounced a litigant cannot rely on section 93 (2) for relief because the guilt of the accused has been finally determined.
36. It is against the spirit or intent of the entire section 93(2) to withdraw proceedings that had received a judicial pronouncement where a party to the proceedings is entitled to the fruits of litigation.
37. Furthermore, the Court of Appeal in *Leone K. Veresa vs. The State, criminal appeal no. AAU 101 of 2013* at paragraph 8 confirms the above in the following words:

“Since the language of the two sections is devoid of any ambiguity, there is no difficulty to understand the conceptual notions contained in them (see Albert Fellows Stephen Arnold in (1997) 1 Cr. App. R. 244) on contemporary interpretation theory ...The Court’s primary task is to ascertain the meaning of the words of the statute itself, and it is only in

this sense that what was or may be inferred to have been the intention of Parliament.

Whilst the Court's decision in a particular case may indicate and be described as a 'purposive' as distinct from a 'literal' approach, it would be wrong in our view to say that one or the other of these two methods should be pre-determined as correct.

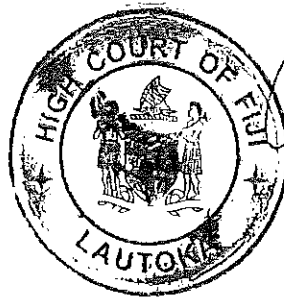
That may become relevant if some ambiguity is found to exist, but the first inquiries should be what the words themselves mean. (emphasis added). In another word the efficacy of the legal provisions should be understood with having reference to their respective tone and texture."

38. In this case both proceedings were instituted correctly they had gone through a judicial process of formal proof, a conviction was entered and a sentence given accordingly section 93(2) of the Land Transport (Amendment) Act 2017 does not apply. This ground of appeal is dismissed due to lack of merits.

ORDERS

1. The appeal against conviction is partly allowed.
2. The convictions entered against the appellant in respect of Traffic Infringement Notices 3006479 and 3006480 dated 5th September, 2016 are quashed and set aside.
3. Any fines paid by the appellant to the respondent are to be reimbursed to the appellant within 14 days from today.

4. This matter is remitted back to the Magistrate's Court at Lautoka to be tried by another Magistrate and is to be called for mention on 24 October, 2018.
5. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
19 October, 2018

Solicitors

Messrs. Dayal Lawyers, Ba for the Appellant.

Land Transport Authority, Legal Department, Nasinu for the Respondent.