

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 218 OF 2019

STATE

V

KUSHAL DUTT

Counsel : Ms. W. Elo for State
: Mr. A.K. Singh for Defence

Date of Summing-Up : 23 November 2020

Date of Judgment : 25 November 2020

JUDGMENT

1. The accused was charged with the following information and tried before three assessors.

COUNT ONE

Statement of Offence

MANSLAUGHTER: Contrary to Section 239 of the Crimes Act 2009.

Particulars of Offence

KUSHAL DUTT on the 15th day of April 2018 at Nausori, in the Eastern Division, drove a vehicle with registration number IM: 115 along Koronivia Road in a manner that caused the death of AKASH SHARMA, and at the time of driving, the said KUSHAL DUTT was reckless as to the risk that his conduct would cause serious harm to another.

COUNT TWO

Statement of Offence

DANGEROUS DRIVING OCCASIONING GRIEVOUS BODILY HARM:

Contrary to Section 97 (4) (b) and section 114 of the *Land Transport Act 1998*.

Particulars of Offence

KUSHAL DATT on the 15th day of April 2018 at Nausori, in the Eastern Division, drove a motor vehicle with registration number IM: 115 along Koronivia Road, which was involved in an impact occasioning grievous bodily harm to BAADAL SHARMA, and at the time of the impact KUSHAL DATT was driving at a speed dangerous to another person.

2. In my Summing Up, I, in accordance with Section 162 (2) of the Crimes Act, left the offence of Dangerous Driving Occasioning Death to the assessors as a possible alternative, if they did not find Manslaughter proved. I also, in accordance with Section 160 (1) of the Crimes Act, left to them the lesser or minor offence of Dangerous Driving Occasioning Grievous Bodily Harm contrary to Section 97 (4) (b) if they found the chain of causation not proved in respect of the death of Akash Sharma, but were sure that the accused was driving dangerously thus causing grievous bodily harm to him
3. After my Summing Up, the assessors expressed an opinion on count 1 that the accused is not guilty of Manslaughter but they found the accused guilty of Dangerous Driving Occasioning Death. They also found the accused guilty on count 2.

4. There is no dispute that the accused Kushal Dutt was the driver of the motor vehicle with registration number IM: 115 at the time of the accident. It is not clear what element or elements of Manslaughter the assessors found not proved by the Prosecution. It can safely be assumed that they have basically accepted the version of events of the Prosecution's case and the credibility of its witnesses. By their opinion on Dangerous Driving Occasioning Death, it is clear, that the assessors were satisfied that the Prosecution has proved that Mr. Akash Sharma succumbed to his death as a result of the conduct of the accused.

5. The third and the fourth elements of Manslaughter (causation and recklessness) are the matters in contention at the trial. I would like to deal with recklessness, the fourth element of Manslaughter, first. This element concerns the state of mind of the accused. The Prosecution is supposed to prove beyond reasonable doubt that the accused was reckless as to a risk that his conduct will cause serious harm to the deceased.

6. In my Summing-Up, the assessors were invited to find answers to the following two questions in this regard. These questions were raised on the basis of Section 21(2) of the Crimes Act which defines "recklessness"
 - (a) Was the accused aware of a substantial risk that serious harm will occur due to his conduct?
 - (b) Having regard to the circumstances known to him, was it justifiable for him to take that risk?

7. In *R v Lawrence (Stephen)* [1982] AC 510 Lord Diplock formulated a standard direction to a jury based on reckless (motor) manslaughter:

"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and

Second, that in driving in that manner the defendant did so without

having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves.

If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference."

8. It would seem that there is a slight difference between the interpretation given in common law and that given in Crimes Act to the notion of recklessness in that, in the latter, indifference to a risk part (without having given any thought to the possibility of there being any such risk) is lacking. Therefore the assessors were required, by drawing reasonable inferences from proved conduct of the accused, to satisfy themselves that the accused was aware of a substantial risk that serious harm will occur due to his conduct.
9. On this particular element, the court received two diametrically opposed versions of the events, one from Badaal Sharma, called to give evidence on behalf of the Prosecution, and the other from the accused. The factual issue accordingly was one of credibility, that is to say, which account would be acceptable to Court.
10. Badaal Sharma was seated at the back seat of the vehicle in which the accused was the driver at the time of the accident. The deceased Akash Sharma, the brother of Badaal, was seated at the front passenger seat. Badaal's evidence is that the accused was driving very fast. When the vehicle was being driven in that manner, he and his brother told the accused to slow down and he looked at the speedometer to read 163 kmh. It was a digital speedometer.
11. The Defence disputes Badaal's evidence. In his statement made to police approximately 20 days after the accident, Badaal had not stated that he read 163 kmh on the speedometer.

Whether a baby seat, as stated by the accused, was fixed in the middle of the back seat or not Badaal should have been able and prompted to read the speedometer from where he was seated, particularly in a context when the vehicle was being driven very fast.

12. However, the testimony of Goundar, the witness from Carpenters, whose company had supplied Nissan Xtarils to the Coco-Cola Company to which the vehicle belonged, the photographs and the user manual tendered by the Defence confirm that the speedometer was not one of Digital. However that should not be a reason in my opinion for the assessors to reject the evidence of Badaal.
13. Badaal had in fact told the police that the accused drove very fast and, paying no heed to his and his brother's warnings to slow down, the vehicle was travelling at a very high speed when it entered into Koronivia Road. There is no inconsistency as far as the important issue of speed is concerned.
14. Badaal's statement to police that he had had drinks with his brother Akash at his elder brother's house was the topic of the next so-called contradiction raised by the Defence although it was not critical to the issues at hand. Badaal in his evidence denied having had drinks with his brother and clarified that he never drank 'beer' with his brother. Drinks can be anything, grog, cool drinks. It should not be forgotten that Mr. Badaal is a Legal Officer from the Attorney General's Office to be that sharp. The criticism levelled at this particular witness by Mr. Singh about his too smartness and that he was the most difficult witness he had ever confronted in his entire career is justified in light of how tactful this witness faced the questions shot to him at the cross- examination. In an urge to convince the Court about the speed of the vehicle, Badaal must have exaggerated things and digitalised the speedometer. That does not make him a liar. Sharma brothers and Kushal had been friends before the accident and there is no reason for Badaal to fabricate evidence. Considering the entirety of evidence and his demeanour, I am convinced that Badaal told the truth in Court and that the accused was driving at an excessive speed, more than that permitted or prescribed for this particular road.

15. Mr. Singh argues that, given the condition of the roads in Fiji, and particularly of this road, it is inconceivable that a vehicle could have been driven at such a high speed. I agree. But I must tell that a driving at the alleged high speed is not impossible despite the condition of the road and that is the very reason why we are at trial to investigate the death of Akash Sharma and the injuries caused to his brother Badaal. This accident would have taught a good lesson to the accused that this road is not good for speeding, particularly at night.
16. There had been no street lights and the width of the road was tapering down to 3.6 m. at the wooden bridge where the accident took place. It could afford only one vehicle at a time and the length of the bridge itself is only 6 meters.
17. The accused maintains that he was driving at a normal speed of 50-60 kmh. But the evidence presented by the Prosecution suggests otherwise. The extensive damage caused to the frontage of the vehicle as shown in the photographs (tendered by consent) speaks volumes for the speed at which it was driven. The explanation given by the accused as to how that damage was caused is hardly acceptable. He said that his vehicle slid on top of the pipe and then fell on to the ground or creek.
18. As per the undisputed sketch plan, the alleged point of impact is at the mud bank across the creek. The 10 m long tyre mark along the detract, the photographs showing the parts of the wreckage on the mud bank where, as per the sketch plan, the impact alleged to have occurred and the red marks along the pipe which bore the same colour as the vehicle, supposedly received from the vehicle, support the version of the Prosecution that the vehicle was run very fast, causing it to be flown over the creek to hit the mud bank at the opposite side. I accept that the accused, if he was driving at a normal speed, could have controlled and stopped his vehicle well in advance, no sooner the light of the oncoming vehicle was sighted at a distance.
19. It is open for the assessors to find that the accused was driving at an excessive speed and draw therefrom the inference that he was aware of the substantial risk involved in his driving that serious harm will occur.

20. I now proceed to consider if the accused was justified in taking the risk in the circumstances known to him. The accused had been a driver for ten years. The accused, being a resident of the area and as a regular user of this road, should be aware of the condition of this road and that of the bridge and the risks involved in his driving in night time. The risk was so obvious even to the two passengers travelling in his vehicle who repeatedly warned the accused to slow down. He paid no heed to the warning and maintained the same high speed when the risk was so obvious. A reasonable bystander would not find that it was justifiable for the accused to take the risk that he took in the circumstances.

21. Before coming to my final conclusion as to the issue of recklessness, I considered the explanation advanced by the accused in his evidence to justify the course of action which he said he took. The accused said that the oncoming vehicle was coming towards him at a high speed, flashing the headlights on at him. To avoid a head-on collision, he swerved the vehicle to his right. He eventually applied breaks but it did not work because of the loose gravel thus causing it to be driven on the pipe beside the bridge and it finally fell on to the creek.

22. This course of action is not justifiable in the circumstances even if his evidence were to be believed. The accused admits that he first spotted the light of the oncoming vehicle when he was at the bend which is about 50 m ahead of the bridge. He agreed that, at first sight of the light, he felt that something is coming towards the bridge but did not apply breaks. The eventual application of breaks happened only when he realised that he had misread the direction of the oncoming vehicle. By then, it was too late.

23. It appears that the accused, if he had not driven fast and applied the brakes at the appropriate time, had ample time to stop his vehicle. The vehicle was a brand new one imported after 2016 and, according to the examiner's report; the break system was in good condition. On the strength of the photographs and the sketch plans tendered in evidence, I am not convinced that the accused is telling the truth in court. If he was driving at 50-60 kmh, he should be in full control of his vehicle and able stop before it was too late.

24. The accused breached the duty of care owed to the passengers and the degree of negligence on the part of the accused is so high that it has reached the level of recklessness supposed to be proved in a motor manslaughter case. The prosecuting authorities today would only prosecute for Manslaughter “in a very grave case” R v Govonor of Holloway Ex p Jrnings [1983] R.T.R 1) and this one of such. The Prosecution proved the fourth element of Manslaughter beyond reasonable doubt.
25. Now I turn to the issue of causation which is the third element of Manslaughter. The Defence strenuously contends that the Prosecution failed to prove that the death of Akash Sharma was caused by a conduct of the accused. It took up the position that the Akash Sharma died because of medical negligence that has nothing to do with the impact.
26. In this regard, I invited the assessors to consider the evidence of the pathologist Dr. Avikali Mate called by the Prosecution as well as that of Dr. Padarath who was called by the Defence. Dr Mate, whose *curriculum vitae* and qualifications were never disputed, had done a thorough and careful examination on each part of the deceased’s body both external and internal. Her analysis and expression are quite comprehensive and rhetorical. I must thank her for that. Dr. Padarath is not a surgeon but a medical officer who has assisted in many operations in his 7 years of clinical experience. He obtained his Degree in Bachelor of Medicine, Bachelor of Surgery in 2013, Post Graduate Diploma Certificate in NCD in 2017 and Masters in Public Health in 2019 form University of Auckland. He is currently a lecturer at the Fiji National University teaching for fifth and final year medical students. Both doctors basically seemed to agree on many points as to how Akash Sharma came by his death.
27. There is no dispute that the cause of death was asphyxiation caused by lack of oxygen in the blood, which is an antecedent cause of aspiration caused by the gastric content entering into the air ways and the lungs. The air passages that form the upper air way were normal in structure and not damaged. The abnormality was that it contained large amounts of a mixture of mucus and light brown fluids or gastric contents and this was seen to be

extending into the smaller air ways leading to the lungs. The pathologist confirmed that the gastric contents had come from the abdominal cavity where the surgery was done. She got this confirmation on the basis of a comparison that showed similarities in the gastric contents she found in these two separate systems. She agreed that the excessive amount of fluid mixed with blood in the abdominal cavity would have been produced at the surgery.

28. It is not disputed that the surgery was done in the abdominal cavity where the pathologist found penetrative injuries to the digestive system which include intestines, both small and large (colon). A colostomy is a surgical introduction to redirect or divert part of the intestines so as to facilitate the cleansing process and this had been done because the intestines were damaged. She does not rule out that those penetrating injuries in the abdomen could have been caused by a blunt trauma as a result of the accident referred to in the history. It was a corrective surgery and the injuries to the intestines could be cured by a surgery in the ordinary course of healing and was not fatal.
29. The Pathologist agreed that the surgery was successful because the deceased survived two days after the operation. She agreed that there were no fatal injuries to vital organs such as the lungs, the heart, the brain or any structural damage to the respiratory system itself. She agreed that if those foreign objects (gastric contents) would not have entered the airway, Akash would not have died.
30. Doctor Padarath was called by the Defence to support its version that Akash died because proper precautions were not taken after the operation to protect the airway. Dr Padarath attributed the death to 'clear medical negligence'. He said that a collection of large amount of fluid in trachea would happen if the airway is not protected after an operation. He elaborated on his opinion and said that pain killers are given to the patients after a surgery to make them drowsy and less conscious so that the pain is away. If a patient is given these kinds of medicine, he/she is not able to cough and thereby stop foreign objects like liquid or food going into his/her airway. If something foreign like food goes to the airway of a patient under such condition, it can be blocked. To prevent this incident a tube is inserted before an

operation is done to help the patient breath; raise the head of his bed and also ensure that his/her stomach is clear before the operation is done.

31. 400ml of light brown fluid and small food particles in the stomach means that the deceased must have eaten at least 3 hours before passing away, because after the 3 hours, the stomach empties and goes to the intestine. The stomach needs to be clear before an operation and, if it is not possible in an urgent operation, the said two other precautionary measures must necessarily be taken to protect the airway.
32. Under re-examination, the doctor agreed that if the surgery was not conducted, it would have been fatal, only if there was no other way. He concluded his evidence by saying that cases of asphyxiation, if it happens in the hospital setting, is due to medical negligence.
33. The pathologists under cross-examination did not exclude these possibilities. Although she was a bit reluctant to attribute the post operation condition of the deceased to medical negligence, she did not rule out the possibilities advanced by the Defence. She was of course not in a position to say whether or not the suggested precautionary measures were taken by the surgeon and the medics. She only assumed that as medical professionals they must have discharged their duty with due diligence.
34. A careful consideration of the evidence of the doctors should create a reasonable doubt in the minds of the assessors as to the chain of causation of the death of Akash Sarma. Both the doctors are of opinion that, from the medical point of view, the death cannot be described as caused by wounds caused by the accident. The blunt trauma resulted in the accident was not fatal and was corrected by a surgery which the pathologist admitted was successful. Both the doctors agree that if the gastric contents would not have entered the airway, Akash Sharma would not have died.
35. The evidence established that the penetrative blunt trauma caused by the impact had damaged part of Akash's intestines which was successfully fixed by an operation. After the

operation, due to an intervening cause (lack of medical care), the remains of surgical waste or gastric contents in the stomach infiltrated the respiratory system thus blocking the airway and the death of Akash Sharma was caused by asphyxiation. The Prosecution failed to establish the chain of causation, a clear nexus between the wound caused by the accident and the cause of death which is asphyxiation.

36. In view of the finding above it is not open for the assessors to find the accused guilty either of Manslaughter or Dangerous Driving Occasioning Death. However, evidence is overwhelming to find the accused guilty of Dangerous Driving Occasioning Grievous Bodily Harm. In view of my finding on the issue of recklessness in respect of Manslaughter count it is open for the assessors to find that the accused by his excessive speed had created a dangerous situation and his driving, objectively viewed, fell below the standard expected of a careful and competent driver. On the strength of undisputed medical evidence of the Pathologist as to the injuries received by Akash Sharma, I find the accused guilty on Dangerous Driving Occasioning Grievous Bodily Harm Contrary to Section 97 (4) (b) and section 114 of the Land Transport Act 1998.
37. The evidence presented by Badaal Sharma about the injuries that was caused by the accident is supported by his display of the scar marks all over his body. He had undergone an operation and spent 2-3 weeks in the CWM Hospital. The accused admits that serious bodily harm was caused to Badaal Sharma as a result of the accident. In view of this evidence, the assessors can safely find the accused guilty on count 2, even in the absence of a medical report.
38. I reject the opinion of the assessors on the Dangerous Driving Occasioning Death and find the accused guilty of lesser offence of Dangerous Driving Occasioning Grievous Bodily Harm Contrary to Section 97 (4) (b) and section 114 of the Land Transport Act 1998. I accept the opinion of assessors on count 2 and find the accused guilty on count 2 of Dangerous Driving Occasioning Grievous Bodily Harm Contrary to Section 97 (4) (b) and section 114 of the Land Transport Act 1998.

39. I should make my last comment before I depart. This is the only case which I have come across in my 20 year long judicial career where a trial had to precede because of an objection raised by the Defence to a potential *nolle prosequi* from the State. The complainant was not present in court and the State was not ready for trial when it was finally taken up, that was after several trial vacations. The State Counsel sought a short adjournment to consult the DPP on *nolle prosequi* when the Defence Counsel objected, with an insistence for an acquittal in view of the possible reopening the case by the State after a dismissal. The Court re-fixed the trial for the following day and ordered the State to locate the complainant and ensure his presence at trial because it opined that public interests and justice require the cases proceed to trial and culprits punished. Finally the State managed to locate the complainant. Surprisingly, he is not from the bush far away from Court, but from the next door, Attorney General's Office. I must thank Mr. Singh and Ms Ello for saving this interesting trial for me to try at the conclusion of my six year long judicial career in this beautiful isle- Fiji.

40. That is the Judgment of the Court.

Aruna Aluthge

Judge

At Suva

25 November 2020

Solicitors: Office of Director of Public Prosecution for State

AK Singh Law for Defence