IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

SAILESH PRASAD SHANDIL

Appellant

CASE NO: HAA. 29 of 2019
[MC, Nausori, Traffic. Case No. 4290 of 2016]

Vs.

STATE

Respondent

Counsel	**:**	Mr. I. Khan for the Appellant Mr. Y. Prasad & Ms. S. Swastika for the Respondent
Hearing on	**:**	28 November, 2019
Judgment on	**:**	06 March, 2020

JUDGMENT

1. The above named appellant was charged before the Magistrate Court at Nausori with one count of dangerous driving occasioning death contrary to section 97(2)(b) of the Land Transport Act No. 35 of 1988.

2. He was convicted as charged after trial on 17/07/19 and was sentenced to 02 years' imprisonment with a non-parole period of 1 year on 23/08/19.

3. The charge reads as follows;

> ***Statement of Offence***
>
> **DANGEROUS DRIVING OCASSIONING DEATH:** Contrary to section 97(2)(b) and 114 of the Land Transport Act 35 of 1988.
>
> ***Particulars of Offence***
>
> **SAILESH PRASAD SHANDIL,** on the 07th day of October, 2016 at Nausori I the Central Division drove a Motor Vehicle with registration No. EY 206 along Wainibokasi Road, Vunimono, and the said **SAILESH PRASAD SHANDIL** was driving at a dangerous speed and thereby caused death of **SOSICENI PENIJAMINI TAMANI.**

4. Being aggrieved, the appellant has filed a timely appeal assailing his conviction and the sentence. The grounds of appeal are as follows;

APPEAL AGAINST CONVICTION

1. **THAT** the Appellant's Trial Counsel erred in conducting the trial to the extent those errors affected the outcome of the trial and contributed to a miscarriage of justice. Such errors or omissions were:
   (i) That the Appellant's Trial Counsel's did not object to the prosecution witnesses giving opinion/evidence as to the speed of the vehicle.
   (ii) Failing to cross examine Prosecution witness PW 4 regarding the brake marks of the motor vehicles which was not of the Appellant.
   (iii) That requesting to visit the scene of the allege incident did not take into consideration that the scene of the incident had changed since 7th October, 2016.

2. **THAT** the Learned Trial Magistrate erred in law in fact in not taking into consideration that there was no other independent evidence against the Appellant to prove the case against appellant beyond all reasonable doubt.

3. **THAT** the Learned Trial Magistrate erred in law and in fact in taking into consideration inadmissible/hearsay evidence in finding that the appellant was guilty of the offence he was charged with and as such there has been a substantial miscarriage of justice.

4. **THAT** the Learned Trial Magistrate erred in law and in fact in not directing himself the possible defence on evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

5. **THAT** the Learned Trial Magistrate erred in law and in not directing himself adequately and/or taking into consideration to the ingredients of the offence the Appellant was charged with.

6. **THAT** the Learned Trial Magistrate erred in law and in fact in rejecting the evidence adduced by the Appellant without giving any cogent/adequate reason and thus a substantial miscarriage of justice had occurred.

7. **THAT** the Learned Trial Magistrate erred in law and in fact when he shifted the burden of proof when he stated that "**PW1 and PW2 have given consistent evidence and the cross-examination has failed to raise doubt about their testimonies."**

APPEAL AGAINST SENTENCE

1. **THAT** the Learned Trial Magistrate erred in law and in fact in ordering a sentence of 2 years imprisonment with a non-parole period of 01 year which he failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.

2. **THAT** the Learned Trial Magistrate erred in law and in fact in considering legal authorities which were not applicable/relevant to the charges before the Court and /or could have been distinguished to the facts before the Court and hence misdirected himself in taking into consideration the said legal authorities.

3. **THAT** the Learned Trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant considerations.

4. **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into Adequate consideration the provisions of the **Sentencing and Penalties Decree 2009** when he passed the sentence against the Appellant.

5. **THAT** the Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the Court records in this matter.

5. In brief, on 07/10/16, the deceased who was a seven-year-old child was hit by the

vehicle the appellant was driving near Vunimono Bus Stand along Wainibokasi Road. According to the evidence of one of the witnesses, the deceased had jumped onto the road.

Discussion – appeal against the conviction

Ground 1 - Appellant's Trial Counsel erred in conducting the trial to the extent those errors affected the outcome of the trial and contributed to a miscarriage of justice.

6. Lawyers representing the prosecution and the defence in a criminal trial play a vital role in an adversarial legal system. One can argue that an accused would be deprived of a fair trial if his/ her counsel does not perform the role of a defence counsel with competence. This begs the question whether the competency of a defence counsel should be regarded as a valid ground of appeal.

7. In England, ***R v Irwin*** ([1987] 2 All ER 1085; [1987] 1 WLR 902) was the first case for a conviction to be overturned based on the barrister's performance. The appellant's (Irwin) first trial for damaging two automobiles ended after the jury could not come to a conclusion. The appellant, his wife and the daughter testified during this trial. However, without discussing with the appellant, his trial counsel who was also the trial counsel in the previous trial, decided not to call the wife and the daughter as witnesses in the retrial. This decision of the counsel which could be termed as a 'tactical choice' which did not in fact change the appellant's defence but only changed the way of presenting the defence, was challenged in the appeal. In ***Irwin*** (supra) the court noted that though the trial counsel for the appellant was entitled to give "very strong advice" against calling the wife and the daughter, the issue must have been discussed with the appellant.[1]

8. In the case of ***R. v. Gautam*** ([1988] Crim. LR 109), ***Irwin*** (supra) was distinguished. Dismissing the appeal against the conviction the court held that if the defence counsel made a decision which turned out to have been mistaken or unwise, that

[1] 12 King's College Law Journal (2001), page 138

did not afford a valid ground of appeal. In this case the trial counsel for the appellant decided, with the agreement of the appellant who was charged with theft from a bookshop, not to call medical evidence that the appellant had been confused or unclear at the material time because, it became clear to the trial counsel that the defence to the relevant charge should be that the shop security officer's evidence against the appellant was a pack of lies and the appellant's recollection was quite clear. The court further noted that, if counsel had properly discussed the case with an accused, the court would not permit the accused to have another opportunity to run a defence which had been initially discussed but not run at the trial.

9. Subsequently, in the case of ***R v. Swain*** ([1988] Crim. LR 109) the court applied ***Gautam*** (supra) in dismissing an appeal against conviction where it was contended, *inter alia*, that the appellant's trial counsel had damaged his defence case while cross-examining a prosecution witness. However, O'Connor L.J. added that if the court had had a lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate, it would have quashed the conviction.

10. In the case of ***Qalovaki v State*** [2008] FJHC 399; HAA0111.2007 (4 April 2008), Shameem J cited with approval the above dictum of O'Connor L.J. in ***Swain*** (supra) and dismissed the appeal against the conviction preferred on the single ground of appeal challenging the competency of the trial counsel. Shameem J held in ***Qalovaki*** (supra) that in the absence of prejudice or clear injustice; incompetency of the trial counsel is not a valid ground of appeal. I couldn't agree more.

11. In ***R v MacNamara*** [1998] QCA 155 (19 June 1998) the substantial complaint raised before the Supreme Court of Queensland by the appellant was that his trial counsel should have called evidence on his behalf. The appellant in that case had informed the court that after a dispute regarding this issue, he ultimately agreed 'under duress' to the course advised by the trial counsel, which was that no evidence should be called. Dismissing the appeal in ***MacNamara*** (supra) Muir J had said thus;

"An accused's representation and the way in which a trial has been conducted is relevant to a consideration of whether or not there has been a miscarriage of justice connected with the failure to call evidence. In *R v Birks* (1990) 19 NSWLR 677 at 685 Gleeson CJ said -

> "(1) A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
>
> (2) As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
>
> (3) However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of `flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognized as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention."

The principles so expressed were approved by the Court of Criminal Appeal in *R v Oliverio* (1993) 61 SASR at 354 and again in *R v Scott* (1996) 137 ALR 347.

. . .

The principles expressed by Gleeson CJ in *R v Birks*, which is set out above, are relevant to the grounds now under discussion. In *Nazif Al* (1990) 49 A Crim R 258 Crockett J, with whom the other members of the court agreed, in discussing a ground of appeal based on failure on the part of the defence counsel to have his client give evidence said at 262:

> "The decision as to what course the defence should take was one peculiarly for counsel, and such a decision when made, presumably after weighing the advantages and the disadvantages attaching to either possible course, is one which this Court would not lightly treat as affording ground for its intervention.
>
> The relevant law is to be found summarised in a decision of this Court in *Re Knowles* [1984] VicRp 67; [1984] VR 751 at 767 where the Court in a joint judgment, after referring to what was said by Smith J in *Re Ratten* [1974] VicRp 26; [1974] VR 201 at 214, said:

> `In *Sarek* [1982] VicRp 99; [1982] VR 971 at 982-983: ... McInerney J, in a judgment in which Kaye J agreed, said: "It is obviously dangerous to embark on a course of determining whether a new trial should be mounted on a basis of the inexperience or remissness or defect of judgment or neglect of duty on the part of the legal practitioner appearing at the trial.
>
> Such factors will not in themselves induce a Court of Criminal Appeal to quash a conviction and order a new trial unless the Court is satisfied that in the result a miscarriage of justice has occurred: see *McCall* [1920] NSWStRp 49; (1920) 20 SR (NSW) 467 at 472, per Cullen CJ.
>
> Where an accused person has at his trial been defended by a legal practitioner, a Court of Criminal Appeal will attach great significance to the deliberate decision of that practitioner as to the conduct of the trial and the defences taken at the trial and it will be very reluctant to substitute its judgment for that of the practitioner who appeared for the accused at the trial ... In most cases the appellant tribunal will not seek to go behind a deliberate decision taken at the trial by a solicitor or counsel for the accused or even by the accused himself. Nevertheless the fundamental question must always be whether the conviction involves or has brought about a miscarriage of justice: see *Maric* (1978) 52 ALJR 631 at 634-635, per Gibbs J.
>
> The position is that, provided the case is seen to be an appropriate one, this Court may `interfere to protect an accused man from his own counsel (*Young and Robinson* [1978] Crim LR 163 at 164) and from the result of bad management or misconduct of his case at the trial ...".”

12. Coming back to the case at hand, the appellant asserts that his trial counsel was incompetent based on the following allegations;

    (i) That the Appellant's Trial Counsel's did not object to the prosecution witnesses giving opinion/evidence as to the speed of the vehicle.

    (ii) Failing to cross examine Prosecution witness PW 4 regarding the brake marks of the motor vehicles which was not of the Appellant.

    (iii) That requesting to visit the scene of the allege incident did not take into consideration that the scene of the incident had changed since 7th October, 2016.

13. The first allegation above is about the failure to object to 'opinion evidence'. According to Black's Law Dictionary (6th edition), 'opinion evidence' means;

    "Evidence of what the witness thinks, believes, or infers in regard to facts in

> dispute, as distinguished from his personal knowledge of the facts themselves. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion."

14. With regard to the said first allegation, the appellant has highlighted three instances referring to the case record. The first is where, during cross-examination of the first prosecution witness (PW1), the witness had given the answer; "*It could be 70*". The relevant question put to the witness was; "*It could have been 50 – 60 kmp[h]*". The appellant submits that the trial counsel should have objected to the above answer given by the witness. It is pertinent to note that it was the appellant's trial counsel himself who had asked the above question. On the other hand, having examined the line of questioning I find that the above question was part of a series of questions aimed at demonstrating that the witness was unable to provide a clear opinion about the speed. Therefore, I do not find any merit in this allegation.

15. The second example highlighted by the appellant is where the second prosecution witness (PW2) had given the answer; "*over-speeding he could not even see the boy who was about to cross the road*". The relevant question was; "*You said you saw the car was coming at a speed – what speed was the car moving*". This question was asked by the prosecutor to clarify the witness' previous answer where she had stated that "*. . . car was coming in a speed*". Given the relevant circumstances, it is clear that the witness was not in a position to say whether or not the appellant could see the deceased when the deceased was about to cross the road. This is a fact which was only within the knowledge of the appellant and as far as PW2 is concerned, it amounts to an inference he drew and therefore an opinion. On the other hand the witness was not asked to explain what she meant by 'over speeding' as the said expression is not a conclusive statement in relation to the speed at which the appellant was driving. The witness might have thought that the appellant was driving at an excessive speed simply because of the accident. Ultimately it was for the Learned Magistrate to

assess the evidence led in the case including that of PW2 in the light of the applicable legal principles and decide what evidence to accept and what weight to be given to the evidence so accepted.

16. Even under an adversarial legal system, in a criminal trial, the magistrate or the judge is expected to ensure that the trial is fair and that an accused is (if at all) convicted only on admissible evidence, irrespective of whether the defence counsel had raised relevant legal objections/ submissions or not. Provided of course that a conscious decision made by the counsel not to object to the admissibility with the agreement of the accused could be regarded as a waiver. (An example would be where the counsel for the defence in consultation with the accused decides not to object for secondary evidence in relation to a document.) Therefore, I hold the view that the trial magistrate or the judge is expected to spot relevant legal points in a criminal trial which are in the accused's favour especially on the admissibility of evidence and the failure of the defence counsel to raise objections would not absolve that obligation.

17. The third example highlighted by the appellant to support the claim that the trial counsel was not competent, is in relation to the third prosecution witness (PW3). It is submitted that PW3 did not have any driving experience when he had given evidence and the trial counsel failed to point this out. The fact that PW3 only had driving experience of two years at the time he gave evidence (more than two and a half years after the accident) was revealed during his examination in chief and it is clearly recorded in the court record at page 25. Thus, I cannot accept the argument that the trial counsel not highlighting that fact amounts to incompetence.

18. Therefore, the first claim on incompetency of the trial counsel is not made out.

19. The appellant has not properly elaborated on the other two claims. That is, the failure to cross-examine on brake marks of other vehicles and requesting for a scene visit during the trial.

20. All in all, I find that the appellant had failed to demonstrate that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his trial counsel. Ground one should therefore fail.

Ground 2 – ***THAT*** *the Learned Trial Magistrate erred in law in fact in not taking into consideration that there was no other independent evidence against the Appellant to prove the case against appellant beyond all reasonable doubt.*

Ground 3 – ***THAT*** *the Learned Trial Magistrate erred in law and in fact in taking into consideration inadmissible/hearsay evidence in finding that the appellant was guilty of the offence he was charged with and as such there has been a substantial miscarriage of justice.*

Ground 5 - ***THAT*** *the Learned Trial Magistrate erred in law and in not directing himself adequately and/or taking into consideration to the ingredients of the offence the Appellant was charged with.*

21. The issue raised in the fifth ground of appeal concerns the elements of the offence. Grounds two and three are interrelated and also connected to the said fifth ground. Therefore these three grounds would be discussed together.

22. The elements of the offence relevant to the charge against the appellant are as follows;

    a) the accused;
    b) drove a vehicle;
    c) that vehicle got involved with an impact occasioning a death of another person; and
    d) at the time of the impact, the accused was driving the vehicle at a speed dangerous to another person or persons.

23. In the case at hand, the only disputed element was the fourth element stated above where the prosecution was required to prove that the appellant drove the vehicle at a speed dangerous to another person or persons at the time of the impact.

24. In the case of ***Pal v Reginam*** [1974] FJLawRp 1; [1974] 20 FLR 1 (17 January 1974), Grant ACJ succinctly explained what is expected of the prosecution to bring home a charge of causing death by dangerous driving. His Lordship said;

> "Where death has resulted from a traffic accident it is necessary for the prosecution, on a charge of causing death by dangerous driving, to show that the accused's dangerous driving was a real cause of the accident and something more than de minimis (*R v Hennigan* [1971] 3 All ER 134) and to establish the accused's dangerous driving it is necessary for the prosecution to show that there was some fault on his part causing a situation which viewed objectively, was dangerous (*R v Gosney* [1971] 3 All ER 220)."

25. The offence considered in ***Pal*** (supra) was, causing death by reckless or dangerous driving of a motor vehicle under section 238(1) of the Penal Code. There is a slight difference between the language in section 238(1) of the Penal Code and that of section 97(2) of the Land Transport Act. Section 238(1) of the Penal Code reads thus;

> *238(1) 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.*

26. However, in my view, the manner in which 'dangerous driving' should be established according to ***Pal*** (supra) is still applicable in proving a charge under section 97(2) of the Land Transport Act.

27. It follows that in the case at hand the prosecution was required to establish that there was some fault on the part of the appellant in relation to the speed at which he was driving the vehicle at the time of the impact and that fault caused a situation which viewed objectively, was dangerous to another person.

28. In my view, the following dictum of Lord Hewart, L.C.J. in the case of ***Rex v. Bateman*** 19 Cr App R 8 is also relevant in this regard;

> "In order to establish criminal liability the facts must be such that in the

opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the state and conduct deserving punishment."

29. It is pertinent to note that speeding or driving at a high speed is not dangerous per se. That is, driving at a high speed would not necessarily amount to driving at a speed dangerous to others. On the contrary, given the circumstances, the speed can still be dangerous to others even when a vehicle is not driven at a very high speed.

30. At paragraph 26 of the impugned judgment the Learned Magistrate says thus;

"If this evidence [of the appellant] is accepted that means the [appellant] was driving within the speed limit of that area (50km[ph]) and was not committing an offence on that day."

31. The above statement clearly shows that the Learned Magistrate was of the view that the charge against the accused would either stand or fall on proving that the accused exceeded the speed limit of 50kmph at the time of the impact. Given the evidence led by the prosecution, it appears that the prosecution case was also presented along the same line.

32. On the other hand, it appears that the fault of the appellant according to the prosecution was exceeding the speed limit and nothing else. Therefore, if the appellant had not exceeded the speed limit, the speed he was driving the vehicle at the time was not dangerous.

33. Having assessed the evidence the Learned Magistrate had reached the following conclusions;

"*41. From these 2 civil witnesses (PW1 and PW2) I find the accused was driving his vehicle in high speed on that day before the accident.*

42. I also accept the testimony of expert witnesses (PW3, PW4 and PW5) as credible.

43. *From the distance it took him to stop the vehicle after the impact I also find the accused was driving his vehicle exceeding the stipulated speed limit (50km) in that area. As I said earlier this is further confirmed from the damaged to the vehicle, injuries on the deceased body and the place the body landed after the impact.*
44. *The area this accident happened appears to be densely populated (100-200 houses) and also location to some schools. As an experienced driver the accused should have been aware the small children would be crossing the roads suddenly without the adult supervision. The accused was driving his vehicle in this area exceeding the speed limit which directly caused the death of the victim."*

34. Accordingly, the Learned Magistrate had concluded that the appellant was driving at a 'high speed' based on the evidence of PW1 and PW2 who claimed to be eye witnesses. Then he had concluded that the appellant had exceeded the speed limit stating that the said conclusion is reached mainly based on the distance it took the appellant to stop the vehicle after the impact. This particular evidence on the deduction to be made on the speed based on the distance travelled, was given by PW3.

35. I would agree that exceeding the speed limit of a given area can in fact be construed as dangerous driving (or driving at a dangerous speed). That is because the speed limit imposed by the relevant authorities in a particular area can be construed as the maximum speed at which a vehicle could be driven safely in that area. Therefore, exceeding that speed invariably creates a dangerous situation. However, to prove beyond reasonable doubt that an accused exceeded the speed limit applicable to the relevant area, the exact speed at which the accused was driving at the time of the impact should be established. The speed at which a person was driving cannot be established from the evidence of a lay witness for the reason that such witness could only provide an estimate or an opinion regarding the speed of a vehicle, based on that witness' previous experience with motor vehicles. Such estimate cannot be regarded as admissible where the fact in issue is the speed at which a vehicle was driven at a given time.

36. Speed of a vehicle at the time of the impact for the purpose of ascertaining whether

the driver exceeded the speed limit relevant to the area could only be established through the evidence of an expert. That is, either forensic experts or those who have acquired the necessary skills in traffic accident reconstruction. I can only think of two exceptions where expert evidence could be dispensed with. First is the remote possibility of the speed of the vehicle at the material time being captured by a speed camera. The second situation is, when there was another driver/ person who was driving or travelling in a vehicle which was travelling at the maximum speed within the speed limit at the time of the impact and in the same direction as the vehicle driven by the accused, who is in a position to give credible and reliable evidence to the effect that he/ she was travelling at the maximum speed within the speed limit at the material time and the vehicle driven by the accused was travelling faster than the vehicle he/ she was travelling.

37. In relation to the fifth ground of appeal the appellant argues that there was no evidence before the Learned Magistrate to establish that the appellant was driving at a speed dangerous to another person. Appellant further submits that the evidence of PW1 to PW4 was unreliable and ought to be rejected.

38. The appellant had in fact challenged the evidence given by the witnesses with more particulars under appeal grounds 2 and 3.

39. PW1 and PW2 were lay witnesses. They were not in a position to say whether the appellant exceeded the speed limit at the time of the accident. Therefore, their evidence does not establish the fact that the appellant exceeded the speed limit, beyond reasonable doubt.

40. The Learned Magistrate had considered PW3 as an expert witness. PW3 was a police constable who had served the police for 12 years. He had stated that he had handled 50 traffic cases and he had been driving for 2 years. Whether a particular witness is an expert witness is a matter the trier should first decide before accepting that witness as an expert witness.

41. Archbold [2010], page 1424, paragraph 10-65 expounds on the issue of deciding whether a witness is competent to give evidence as an expert as follows;

10- 65

Whether a witness is competent to give evidence as an expert is for the judge to determine: *R v Silverlock*, ante; if he does have the necessary competence, it is not open to a judge to direct that he should not act as an expert witness; the fact that a witness may have been discredited will go to the weight of the evidence, not to its admissibility: *Bates v. Chief Constable of Avon and Somerset Police and Bristol Magistrates' Court*, 173 J.P. 313, DC.
In R.v. Bonython (1984) 38 S.A.S.R. 45, King C.J, giving the principal judgment of the South Australia Supreme Court, said that there were **two questions for the judge to decide**.

"**The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible.** This…… may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge of human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion form a part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render this opinion of assistance to the court. **The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.**

An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions. If the witness has made use of new or unfamiliar techniques or technology the court may require to be satisfied that such techniques or technology have a sufficient scientific basis to render results arrived at by that means parts of a field of knowledge which is a proper subject of expert evidence…… Where the witness possesses the relevant formal qualifications to express an opinion on the subject, an investigation on the voir dire of his methods will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualifications depend upon experience or informal studies…..Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to be competence of the witness to express an opinion …."

[Emphasis added]

42. On the face of it, PW3 does not appear to have the necessary skills, qualifications or the experience to be considered as an expert in order to provide an opinion about the speed at which the vehicle driven by the appellant was travelling, at the time of the impact. It is clearly noted from the answers PW3 had given in relation to what is termed as the 'stopping distance' that PW3 was not an expert in the subject and that the purported opinion he had given is not sound.

43. First of all, what is 'stopping distance'?

44. The following information can be found on the Land Transport Authority of Fiji website[2];

> ***How Long does it take to stop your car***
> *The time it take to stop a car depends on three things:*
>
> - ***Reaction Distance*** *- the distance travelled from the time you realise you need to stop until you apply the brakes.*
> - ***Braking Distance*** *- the distance travelled from the time you apply the brakes until the vehicle stops. Braking hard on a wet road may cause the car to skid. The braking distance will also increase if tyres and / or brakes are not in good condition; and*
> - ***Stopping Distance*** *- the total reaction distance plus braking distance. It is the distance travelled once you react to an emergency, apply the brakes, and come to a stop.*
>
> *And this will affect your stopping distance*
>
> - ***Road Condition*** *- drive carefully over road surfaces that are covered with loose material or that are in poor condition.*
> - ***Weather Conditions*** *- Adverse conditions such as wet weather and poor road surface increases stopping distance.*
> - ***Unfit Driver*** *- drivers who are sick tired or suffering from a hangover will take longer to react. Avoid driving in these conditions.*

45. In the case of ***HKSAR v. KO CHI HANG*** [2017] HKDC 259; DCCC 707/2016 (24 February 2017) the forensic evidence given in relation to the stopping distance were summarized as follows;

> *13. Forensic Scientist conducted examinations on the CCTV footages and concluded that (i) the Vehicle was travelling at 68 km/hr (with +/- 7 km/hr margin for error)*

[2] https://lta.com.fj/docs/default-source/road-safety-publications/driver-road-safety.pdf?sfvrsn=4

when it was 60 meters away from the point of impact with the deceased; (ii) the respective stopping distances for the Vehicle travelling at 68 km/hr and 50 km/hr were estimated to be about 47 meters and 29 meters; (iii) it took about 2.08 seconds after the collision before the Vehicle came to a full stop, indicating that hard braking was not applied during the 2.08 seconds time frame. No skid marks or braking tyre marks were found at the scene.

14. Motor vehicle examination showed that the Vehicle was in good and satisfactory conditions and free from any mechanical defects. A dent of about 18 cm x 13 cm in size was found on the offside front bodywork of the Vehicle close to the offside edge.

46. The following paragraph in the case of ***HKSAR v. LI KAI HEI*** [2017] HKDC 1005; DCCC 782/2016 (18 August 2017) demonstrate how stopping distance is calculated;

STOPPING DISTANCE AND CAUSATION

105. PW13 has calculated the PLB's stopping distance on the basis that it was travelling at 65 kph when the brake was applied. Now on the court's finding that its real speed then was 64.07 kph (or 17.79 m/sec) and using the same formulae PW13 has adopted in his report (Footnote 5 and Footnote 6 of P13):-

$a = (64.07/3.6\text{-}0) \div 4 = 4.45\ m/s^2$;

$\mu = a/g = 4.45/9.81 = 0.45$;

Stopping distance at 64.07 kph (or 17.79 m/sec)

= reaction distance + braking distance

$= 17.79 \times 0.9 + 17.79^2/(2 \times 0.45 \times 9.81)$

= 16.01 m + 35.85 m

= 51.86 m

Stopping distance at 50 kph (or 13.89 m/sec)

$= 13.89 \times 0.9 + 13.89^2/(2 \times 0.45 \times 9.81)$

= 12.50 m + 21.85 m

= 34.35 m

47. The evidence given by PW3 with regard to the stopping distance in the instant case was as follows;

Q: In your 12 years of experience appropriately how many traffic cases have you handle?
A: About 50 cases.

Q: I take you back from Point B to Point C, do you agree that is the distance of 32.2metres?
A: Yes.

Q: Why should a vehicle take that distance to stop from the point of impact shown by the accused, what does that mean. What does this distance mean?
A: It shows how he was travelling – it means the speed he was travelling.

Q: What does it say about the speed?
A: It means that he was exceeding the speed limit in that zone area.

Q: From the 50 cases with that experience if a car is travelling at 50 kilometres per hour how long will it take to stop and in what distances would it be able to stop?
A: It will take 5 to 10 meters it can be stopped.

Q: In addition to that question how long would it take or what time period will a car to stop?
A: I can't answer that.

Q: Let's say in time how many minutes or seconds will it take to stop?
Defence counsel: He had already answered the question.
A: It's about 5 minutes.

Q: So you are saying if a car is travelling at 15 minutes per hour in order for a vehicle to come to a complete stop when the brakes at given would it be 5 minutes?
A: About 5 minutes or less than 5 minutes.

48. It is noted that PW3 has not provided any basis or an explanation for his purported opinion. On the other hand, his evidence that a vehicle travelling at 50kmph would travel 5 to 10 meters to come to a stop and that it takes about 5 minutes for such vehicle to come to a complete stop after applying the brakes, which means that it takes about 5 minutes for a vehicle to travel a distance of 5 to 10 meters after applying breaks is, on the face of it, far from the truth.

49. In my judgment PW3 was not a competent witness to provide an opinion on the

speed at which the appellant was driving at the time of the impact. The purported opinion he had given appear to be a mere speculation. Therefore, the evidence given by PW3 does not establish the fact that the appellant was exceeding the speed limit at the time of the impact, beyond reasonable doubt.

50. PW4 was a forensic officer attached to the Fiji Police Force. He has not given evidence on the speed at which the appellant was driving. PW4 had taken photographs of the scene and of the vehicle driven by the appellant at the material time. It is pertinent to note that as far as the vehicle was concerned the point of impact was the bottom left corner (passenger side) of the front windscreen, according to the evidence given by PW4.

51. PW5 was the doctor who conducted the postmortem report of the deceased. Her evidence also cannot establish the speed the appellant was driving the vehicle.

52. Therefore, it is clear that the evidence led by the prosecution before the Learned Magistrate does not establish that the appellant had exceeded the speed limit at the time of the impact beyond reasonable doubt. There was no other evidence led to establish that the appellant was driving at a speed dangerous to others at the material time as the prosecution was only focused on proving that the applicant exceeded the speed limit, to prove the charge.

53. Accordingly, grounds 2, 3 and 5 against the conviction should succeed and the appeal against the conviction should be allowed accordingly.

54. Since I have decided that the appeal against the conviction should be allowed having dealt with the aforementioned grounds of appeal, I will deal with the other grounds against conviction very briefly.

55. On the fourth ground of appeal, the appellant asserts that the Learned Magistrate failed to direct himself on the possible defence available on the evidence presented before the court. The appellant submits that the Learned Magistrate did not take into

account the evidence of PW1 where he had said that the deceased suddenly jumped across the road which according to the appellant constitutes a defence.

56. It is not clear whether the appellant is alleging that there was contributory negligence on the part of the deceased or whether the deceased was totally responsible for the accident. Therefore, on one hand, the appellant has not placed sufficient material before this court to fully examine the issue raised in this ground of appeal. On the other hand, in view of the fact that the evidence presented by the prosecution does not establish an essential element of the offence the appellant was charged with, and had the Learned Magistrate properly identified same after the conclusion of the prosecution case, he would have ruled that there was no case to answer. If that was the case, this issue of failing to consider a defence on the available evidence would not arise. Therefore, I find it irrelevant in this case to examine whether the aforementioned conduct of the deceased would amount to a defence in this case.

57. In the sixth ground of appeal, the appellant claims that the Learned Magistrate erred by failing to give cogent/ adequate reasons when he rejected the evidence given by the appellant. For the same reason, that is, the case at hand should not have proceeded beyond the no case to answer stage, this issue too, ought not to arise. Suffice to say, there is no requirement at law to provide cogent reasons in rejecting defence evidence. On the other hand, since the defence evidence, if adduced, would invariably be inconsistent with the evidence adduced by the prosecution in any given case, in a case where the trier of fact accepts the prosecution version to be true and provides sufficient reasons to justify that conclusion, that itself would be sufficient to reject the defence version or the evidence.

58. In the seventh ground of appeal, the appellant alleges that the Learned Magistrate shifted the burden of proof when he had stated that "PW1 and PW2 have given consistent evidence and the cross-examination has failed to raise doubt about their testimonies."

59. One objective of cross-examining a witness is to discredit the relevant witness. One way of discrediting a witness is to demonstrate that the evidence given by that witness is improbable. In my view, the Learned Magistrate by way of the above statement had simply highlighted that no improbability was raised during cross-examination of the two witnesses in relation to the evidence given by them. Therefore the aforementioned statement does not amount to a shifting of the burden. Ground seven is devoid of merit.

60. All in all, I find that the appeal against the conviction should be allowed and the conviction quashed in view of the discussion on appeal grounds 2, 3 and 5. It follows that the sentence imposed against the appellant in the case at hand should also be quashed. Therefore, it is not required to deal with the grounds of appeal against the sentence.

Orders;

a) The appeal against the conviction is allowed;
b) The conviction entered on 02/07/19 in the Magistrate Court at Nausori, Traffic. Case No. 4290 of 2016, and the ensuing sentence are hereby quashed; and
c) The appellant should accordingly be released forthwith.

Vinsent S. Perera
JUDGE

Solicitors;
Iqbal Khan & Associates for the Accused
Office of the Director of Public Prosecutions for the State