**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO. HAA 023 OF 2023**

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| **BETWEEN:** | **STATE** | **APPELLANT** |
| **A N D:** | **WAISEA DIRABICI** | **RESPONDENT** |

**Counsel:** Mr. T. Naimila for Appellant
Ms. R. Nabainivalu for Respondent

**Date of Hearing:** 05th October 2023

**Date of Judgment:** 15th February 2024

# JUDGMENT

1. The Respondent was charged in the Magistrate's Court at Suva with one count of Careless Driving, contrary to Section 99 (1) of the Land Transport Act. The particulars of the offence are;

***Statement of Offence [a]***

***CARELESS DRIVING;*** *Contrary to Section 99(1) and 114 of Land Transport Act Number 35 of 1998*

***Particulars of Offence [b]***

***Waisea Dirabici*** *the 25th day of June, 2020 at Nabua in the Central Division, drove a motor vehicle registration number EQ.024 along Ratu Mara Road without due care and attention.*

2. The Respondent/Accused pleaded not guilty to the offence. Hence, the matter went on for the hearing. During the hearing, the Appellant/Prosecution presented the evidence of two witnesses. The Respondent was not represented by a Lawyer and appeared in person during the hearing. After the Appellant's case, the learned Magistrate explained to the Respondent the procedure of making an application for no case to answer. Accordingly, the Respondent made an application for no case to answer. The learned Magistrate only heard the submissions of the Respondent and then proceeded to deliver his ruling. In his ruling, the learned Magistrate found the first Prosecution witness was not credible and accepted the Defence's case. Accordingly, the learned Magistrate found that the Prosecution had failed to prove beyond reasonable doubt that the Respondent was driving without care and attention as charged. Having concluded such, the learned Magistrate acquitted the Respondent. He then issued an Ex-Tempore ruling on no case to answer on the same day.

3. Aggrieved with the said ruling, the Appellant filed this appeal on the following two grounds;

***Ground No. 1:***

*Set aside the said acquittal by the learned Magistrate and order a re-trial against the Respondent pursuant to section 256 of the Criminal Procedure Decree 2009; and*

***Ground No. 2:***

*Any other Orders that this Honourable Court deems fit.*

4. I shall first draw my attention to the first ground of appeal, which is founded on the contention that the learned Magistrate erred in law and fact when he concluded that there was no case to answer. It is prudent to examine the applicable law regarding the no-case-to-answer application briefly.

5. Section 178 of the Criminal Procedure Act deals with the procedure of no case to answer in the Magistrate's Court, where it states;

*"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."*

6. Lord Parker CJ in **Practice Note (Justices: Submission of no case to answer) [1962] 1 All ER 448** outline the applicable test that the Magistrates should adopt in respect of no case to answer submissions. Lord Parker said,

*"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.*

7. Lord Lane CJ in **R v Galbraith [1981] 2 All ER 1060** stipulated a two-stage test, which was fundamentally based on the principles enunciated by Lord Parker CJ in the above-stated Practice Direction. Lord Lane CJ said that;

*"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.*

*It follows that we think the second of the two schools of thought is to be preferred"*

8. The two-stage test expounded by Lord Parker CJ in the Practice Directions and Galbraith test has been adopted and applied in the Magistrate's Court of Fiji. Shameem J in **Sahib v The State [2005] FJHC 95; HAA0022J.2005S (28 April 2005)** held that the Magistrate Court should apply both steps of the Galbraith test, while the High Court is required to adopt the first part of the Galbraith test. Shameem J held that;

*"The test at no case stage in the Magistrates' Courts, is different from the test at no case stage in the High Court. The test in **R v. Galbraith** (1971) 73 Cr. App. R. 124 is two-pronged, first whether there is no evidence that the accused committed the offence, and second if there is evidence, whether it is so discredited that no reasonable tribunal could convict on it. In the High Court, only the first test applies because of the specific wording of section 293 of the Criminal Procedure Code (**Sisa Kalisoqo v. R** Crim. App. 52 of 1984; **State v. Mosese Tuisawau** Cr. App. 14 of 1990). In the latter case, the Court of Appeal said that in assessing whether there was "no evidence", the court was entitled to ask whether the evidence was relevant, admissible and inculpatory of the accused.*

*In the Magistrates' Courts, both tests apply. So the Magistrate must ask himself or herself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether on the prosecution case, taken at its highest, a reasonable tribunal could convict. In considering the prosecution case at its highest, there can be no doubt at all that where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a submission of no case. However, where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case.*

9. Accordingly, the learned Magistrate must apply both steps of the test with respect to an application for no case to answer made under Section 178 of the Criminal Procedure Act.

10. I shall now examine the scope of the second stage of the test. Lord Parker CJ said in the Practice Direction that;

> *Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer. (emphasis added)*

11. In assessing whether a reasonable tribunal could convict the Accused, it is necessary to make an assessment of the evidence as a whole and not to evaluate the credibility of individual witnesses or evidential inconsistencies between the witnesses. (***vide Archbold Ed 2023 4-365 pg 481***).

12. Lawton LJ in **R v Mansfield [1978] 1 All ER 134** had discussed the limits of the second part of the test and held that;

> *"Unfortunately since this practice started in the criminal courts there has, it seems, been a tendency for some judges to take the view that if they think that the main witnesses for the prosecution are not telling the truth then that by itself justifies them in withdrawing the case from the jury. Lord Widgery CJ in his judgment in R v Barker pointed out that this was wrong and he did so in the following passage:*
>
> > *'It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness*

*is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case.'"*

13. In view of the above judicial precedents, the Magistrate must approach an objective test, from the eyes of a reasonable tribunal, in assessing the evidence as a whole. The Magistrate is not required to adopt a subjective evaluation of the testimonial trustworthiness of the witnesses based on the credibility and reliability at this stage of the proceedings.

14. The jurisdiction of the Magistrate, as stated under Section 183 of the Criminal Procedure Act, to find whether the Accused is guilty or not can only be exercised after hearing the respective witnesses of the Prosecution and the Defence. Section 183 of the Criminal Procedure Act states that;

*The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either—*

*i) find the accused guilty and pass sentence or make an order according to law; or*

*ii) acquit the accused; or*

*iii) make an order under the provisions of Part 9 of the Sentencing and Penalties Act 2009 and their*

15. Section 183 of the Criminal Procedure Act is founded on one of the two elementary principles of natural justice: "*Audi Alteram Partem*". The principle of *Audi Alteram Partem* means that no person should be judged without a fair hearing in which each party is offered the opportunity to present their evidence and respond to the evidence against them. On the other hand, the test of no case to answer is based on the principle that no person should be called upon to put forward a defence if there is no evidence sufficient to make out a case against that person.

16. Hence, the Magistrate must determine the testimonial trustworthiness based on the credibility and reliability of the witnesses to decide the accused's guilt after giving the Prosecution and the Defence the opportunity to present their respective evidence and respond to the evidence against them. That task should not be exercised at the no-case-to-answer stage.

17. In this matter, the allegation was that the Respondent had allegedly driven a motor vehicle, EQ 024, without due care and attention and collided with the vehicle driven by the PW1. In his ruling, the learned Magistrate found no evidence from PW1 to substantiate the allegation against the Respondent. Having pursued the record of the proceedings in the Magistrate Court, I find it otherwise. I am not substituting the views of the learned Magistrate with mine, but the evidence adduced by the PW1 does not support the view expressed by the learned Magistrate. The PW1 had explained in his evidence how the Respondent's vehicle came from behind and collided with his vehicle on the back when he stopped at the traffic light. Therefore, the learned Magistrate's finding that there was no evidence regarding the alleged incident is untenable.

18. The learned Magistrate had placed a significant emphasis on the manner in which the PW1 drove his vehicle along the road before he reached the traffic lights. However, the dispute is not about how PW1 drove his vehicle before he reached the traffic light but how the Respondent drove his vehicle and collided with the vehicle of PW1 when it stopped at the traffic light. The PW1 had testified that he saw no vehicle coming from behind when he changed lanes and stopped at the traffic light. Therefore, the learned Magistrate had ventured beyond the applicable test, which I explained above, and proceeded to evaluate the probative value of how the PW1 drove his vehicle and its effect on the credibility and reliability of the evidence given by PW1.

19. Having concluded that the PW1 was not a credible witness, the learned Magistrate then found the Prosecution had failed to prove beyond reasonable doubt that the Respondent drove his vehicle without due care and attention, which is not in conformity with the applicable test of no case to answer. (*The official transcript of the audio recording of the proceedings states that the learned Magistrate concluded, "On the basis that the element*

*of charging particular that the accused was driving without care and attention has not been proven beyond reasonable doubt". However, the copy of the written Ex- Tempore Ruling dated 19th of June 2023 of the learned Magistrate states that "On the basis that the elements of charge in particular that Accused was driving without care and attention has not been proven*)

20. I accordingly conclude that the learned Magistrate erred in law and fact in determining that there was no case to answer; hence, I allow the first ground of appeal.

21. The second ground of appeal is based on the contention that the learned Magistrate denied the opportunity to the Appellant to make the reply submissions to the no case to answer submissions made by the Respondent.

22. The record of the proceedings in the Magistrate's Court indicates that the learned Magistrate had proceeded to deliver his ruling subsequent to the submissions made by the Respondent. I do not wish to discuss this issue in detail as it is clear that the learned Magistrate had deviated from one of the cardinal rules of our common law justice systems, which is to hear both parties before making a decision affecting the parties. Therefore, I find merits in the second ground of appeal.

23. Considering the learned Magistrate's comments about the evidential trustworthiness of the Prosecution witnesses, I find it prudent to order a retrial before another Resident Magistrate.

24. I accordingly make the following orders;

    i) The Appeal is allowed,

    ii) The ruling dated 19th of June 2023 is set aside,

    iii) A re-trial is ordered before another Resident Magistrate,

25. Thirty (30) days to appeal to the Fiji Court of Appeal.

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**Hon. Mr. Justice R. D. R. T. Rajasinghe**

**At Suva**

15th February 2024

**Solicitors**.

Office of the Director of Public Prosecutions for the Appellant.

Office of the Director of Legal Aid Commission for Respondent.