ABDUL RAZAK

*v.*

REGINAM

[COURT OF APPEAL, 1970 (Marsack V. P., Bodilly J. A., Spring J. A.), 28th January]

Criminal Jurisdiction

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 10th July, 15th, 22nd August]

Appellate Jurisdiction

*Criminal law—traffic offences—dangerous driving causing death—dangerous driving of accused a principal cause of death irrespective of question of speed of other car concerned—sentence—Court of Appeal Ordinance (Cap. 8) s. 22 (1).*
*Criminal law—sentence—dangerous driving causing death—frequently punished by fine—imprisonment not wrong even in absence of grossly aggravating features—prevalence of offence of dangerous driving.*

On a charge in the Magistrate's Court of causing death by dangerous driving the appellant was found to have driven his motor car completely onto the wrong side of the road in overtaking another vehicle as he approached the crest of a hill. He collided with a car travelling in the opposite direction and a passenger in the latter was killed. The appellant was convicted and sentenced to fifteen months' imprisonment.

*Held*: 1. (By the Supreme Court on appeal) Even if the car in which the deceased was a passenger (and which was on its correct side of the road) was being driven at a high speed the appellant's driving was dangerous and beyond all doubt one of the principal causes, if not the only principal cause of the death of the deceased. (By the Court of Appeal on second appeal) The finding that the dangerous driving of the appellant was a substantial cause of death was conclusive.

2. (By the Supreme Court on appeal against sentence) Though fines have been imposed in the majority of cases it is not wrong to impose a sentence of imprisonment upon such a conviction even where there are no grossly aggravating circumstances. Though cases of dangerous driving were stated to be prevalent, the instant case was not one of drunkenness and there were no previous convictions; a sentence of six months' imprisonment would be a sufficient deterrent.

An appeal to the Supreme Court from a conviction and sentence in the Magistrate's Court was dismissed as to the conviction, but allowed as to the sentence, which was reduced. The further appeal against conviction only to the Court of Appeal was dismissed.

*S. M. Koya* for the appellant in the Supreme Court.

*V. Parmanandam* for the appellant in the Court of Appeal.

*J. R. Reddy* for the respondent in the Supreme Court.

*D. I. Jones* for the respondent in the Court of Appeal.

The facts sufficiently appear from the judgment of Thompson Ag. P.J. in the Supreme Court.

A

THOMPSON Ag. P.J.: [22nd August 1969]

This is an appeal against the conviction of the appellant in the magistrate's court of the first class at Lautoka on a charge of causing death by dangerous driving and against the sentence of 15 months' imprisonment.

*The particulars of the charge are*:

B

> Abdul Razak son of Housil on the 19th day of December, 1968 at Saweni, Lautoka in the Western Division, caused the death of Viliame Tokolauvere by the driving of a private motor vehicle on Queen's Road in a manner which was dangerous to the public having regard to all the circumstances of the case.

The prosecution case was that at 7·45 p.m. the appellant, driving a saloon car, overtook a heavy tanker lorry just before it reached the crest of a hill on the main Lautoka–Nadi road; that in doing so his car completely crossed an unbroken white line; that it then came into head-on collision with another car which was being driven on its correct side of the road; and that Viliame Tokolauvere, as passenger in the other car, died as the result of the injuries he received in the collision.

C

The defence did not dispute that there was a head-on collision, that the car driven by the appellant was then completely on the wrong side of the unbroken white line, as shown clearly in a photograph taken at the scene, or that Viliame died as the result of injuries received in the collision. Its case was that the appellant's car veered to the right through no fault of the appellant, possibly because of a burst tyre. Mr. Koya also submitted in the lower court that the prosecution had not proved its case, in that it had failed to prove that dangerous driving by the driver of the other car was not the substantial cause of death.

D

E

There were four grounds of appeal against conviction; one of these was abandoned in the course of the hearing of the appeal.

The remaining grounds are:

(*a*) that the learned trial Magistrate erred in holding that the 5th Prosecution Witness was entitled to drive at a speed of 50 to 60 miles per hour in that area. He misdirected himself in not taking into account (*a*) that there is a tramline crossing immediately at the foot of the hill (*b*) that visibility is almost nil at the crest of the hill (*c*) that it was night time (*d*) that there was traffic on the road at the time in question (*e*) that 5th Prosecution Witness's driving might have been the substantial cause of the deceased's death. As a result there has been a substantial miscarriage of justice.

F

(*c*) that the learned trial Magistrate erred in law in holding that your Petitioner's defence was an afterthought. As a result there has been a substantial miscarriage of justice.

G

(*d*) that the quantum and quality of evidence adduced by the Prosecution against your Petitioner on a proper evaluation fell short of the proof requisite to warrant a conviction in a criminal case and your Petitioner further complains that the decision is unreasonable and cannot be supported having regard to the evidence as a whole.

H

Mr. Koya drew attention to the following paragraph from the learned magistrate's judgment:

" Counsel also submitted that the other driver was guilty for not taking precautions. It could be true that the other driver i.e. 5 P.W. was travelling at a speed of some 50 to 60 miles but he was entitled to do so because there is no speed limit in that area and he was travelling on his correct path and did not expect another vehicle to be in his path."

Mr. Koya pointed out that nowhere else in the judgment did the learned magistrate deal with the question of the manner in which the other driver was driving.

There is no doubt that, in order to prove the offence charged, the prosecution had to establish not only that the appellant's driving was dangerous but also that it was a substantial cause of Viliame's death. The only suggestion, however, that any blame at all attached to the driver of the other car was that he was driving too fast, at possibly 50 m.p.h. or 60 m.p.h. It was not disputed that he was driving along on his correct side of the road, the Queen's road, or that he slowed down to try to avoid the collision. That being so, I cannot see how the learned Magistrate could reasonably have found that whatever degree of blame might attach to him for possibly driving at 50–60 m.p.h was as great as that which attached to the appellant who, as he found, had driven his car completely onto the wrong side of the road in overtaking another vehicle as he approached the crest of the hill. The appellant's driving, on his finding, was not only dangerous but beyond all doubt one of the principal causes, if not the only principal cause, of Viliame's death. It was certainly a substantial cause of the death. As far as ground (*a*) is concerned, the appeal must fail.

With regard to ground (*b*), Mr. Koya drew attention to the evidence of the second prosecution witness, Corporal Hari Shankar, whom the appellant told in hospital next morning that " the car pulled right side and he tried to come to his left; he couldn't do it ". However, as learned Crown counsel has pointed out, the appellant did not tell the corporal that it was, or might be, because of a burst tyre. If the evidence of P.W. 3, the driver of the tanker lorry, is accepted—as it was by the learned Magistrate—the appellant's car was overtaking the lorry and his evidence that it pulled to the right and could not be brought back on to its correct side must be rejected. There is no substance to this ground of appeal.

As far as ground (*d*) is concerned, I feel obliged to echo the words of learned Crown counsel and say that the evidence in support of the prosecution case was over-whelming. P.W. 3's evidence that, when the collision occurred, the front of appellant's car was level only with the rear wheels of the lorry, is not inconsistent with his earlier evidence that it " came on my right " and was overtaking the lorry. It raises no grounds for doubting P.W. 3's veracity. The learned Magistrate accepted that witness's evidence and there was no reason at all why he should not have done so. There is no substance to ground (*d*).

Accordingly, insofar as the conviction is concerned, the appeal fails and is dismissed.

With regard to the appeal against the sentence, Mr. Koya has submitted that the sentence in this case should have conformed with the sentences imposed over the years in similar cases in the Magistrates' Courts, that is that a fine should have been imposed and not a sentence of imprisonment. He pointed out that in Suva Magistrates' Court since the beginning of 1967, a sentence of imprisonment has been imposed in only one case and that in Lautoka Magistrates' Court no sentence of imprisonment has been imposed since 1964. He submitted that the learned trial Magistrate adopted a wrong principle in relating the sentence to the prevalence of offences of dangerous driving and that the appellant was made the scapegoat for other offenders.

It is no doubt correct that in the majority of cases of causing death by dangerous driving tried by the Magistrates' Courts fines have been imposed. That is not to say, however, that it is wrong to impose a sentence of imprisonment in such cases even where there are no grossly aggravating features. The offence is of a serious nature. Further, one of the matters which must be taken into account in determining what sentence is appropriate in any particular case is the prevalence of offences of the type with which the court is dealing. If offences of dangerous driving are prevalent, it may well be necessary for a court to impose stiffer sentences, better calculated to deter offenders than the sentences which have been imposed before. There is nothing wrong in principle in a court doing this.

In this case the appellant drove most dangerously in attempting to overtake another vehicle just below the brow of a hill. The learned trial Magistrate has stated that cases of dangerous driving are prevalent; a sentence of imprisonment is clearly quite appropriate. However, the length of the sentence in the absence of aggravating circumstances such as drunkenness is, in my view, too great. The appellant has no previous convictions. In all the circumstances, I consider that a sentence of six months' imprisonment, giving the appellant an opportunity to serve the sentence extra-murally, would be adequate to deter the appellant and other potentially dangerous drivers and at the same time not be unreasonably harsh.

Accordingly, I set aside the sentence of 15 months' imprisonment and substitute for it a sentence of 6 months' imprisonment with a recommendation that the sentence be served extra-murally.

In the Court of Appeal.

Judgment of the Court (MARSACK V. P., orally): [8th January 1970.]

This appeal is, by the provisions of section 22(1) of the Court of Appeal Ordinance, limited to questions of law only. Consequently the findings of fact of the Court below must be accepted in this Court. Both in the Supreme Court and in the Magistrate's Court it was found that the appellant's driving was not only dangerous but beyond all doubt one of the principal causes, if not the only principal cause, of Viliame's death; and that it was certainly a substantial cause of the death.

At the hearing of the appeal it was contended that, although the appellant was admittedly driving dangerously, death might not have ensued but for the excessive speed of the oncoming car driven by P.W. 5. We are unable to accept this contention. There was no finding that the speed of this car was 50 or 60 miles an hour, as stated by counsel in his argument; and the finding that the dangerous driving of the appellant was a substantial cause of death is in our opinion conclusive.

On the facts as found we are satisfied that the appellant was properly convicted of the offence with which he was charged. Consequently this appeal must be dismissed.

*Appeals against conviction dismissed: appeal against sentence allowed and sentence reduced.*