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EDWARD SHEIKH FARUK ALI

v.

REGINAM

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[COURT OF APPEAL, 1974 (Gould V. P., Marsack J.A., Haslam J.A.), 4th, 18th March]

Criminal Jurisdiction

Criminal law—traffic offences—causing death by dangerous driving—Penal Code (Cap. 11) s.269—whether evidence relating to the manner of driving before accident irrelevant and prejudicial.

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Criminal law—evidence and proof—evidence of driving prior to scene of accident—whether irrelevant and prejudicial—Penal Code (Cap. 11) s.269.

Criminal law—judgment—Supreme Court—effect of Criminal Procedure Code (Cap. 14) ss.153, 154, 155, 281(2).

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Criminal law—sentence—causing death by dangerous driving—whether imprisonment appropriate—length of disqualification.

The appellant was convicted before a judge and assessors of causing death by dangerous driving, sentenced to 18 months imprisonment and disqualified from driving for 15 years.

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The judge, after a unanimous verdict of guilty by the assessors, invoked the amendment of the Criminal Procedure Code s.281, and after stating that he agreed with the assessors' verdict, pronounced the appellant guilty and convicted him without further delay.

It was argued, on appeal, that it was incumbent upon a judge to give a fuller direction on the law in his summing up in the absence of a judgment.

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Held : 1. If the trial judge agreed with the majority of the assessors, he need give no judgment, but must write down the decision of the Court.

2. If the trial judge did not agree with the majority opinion of the assessors, he must give his reasons in writing and in open court.

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3. The summing up, the decision and the reasons were to be the judgment of the Court for the purposes of the Criminal Procedure Code s.281 (2) and s.155.

4. No rule making it incumbent upon the judge, in the absence of a judgment, to give a fuller direction on the law could be laid down.

Per curiam : It was hoped, in the interests of justice, that a trial judge would continue to give a reasoned judgment even where he agreed with the majority

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opinion of the assessors.

At the hearing, evidence was given of the appellant conducting hazardous maneouvres 4 miles from the scene of the accident and a few minutes earlier. The appellant complained that this was prejudicial and irrelevant.

Held: In this instance the evidence was admissable and relevant as showing the appellant's continued attitude of ignoring the peril to which his reckless handling of the vehicle could subject other persons, and linked his pattern of performance with his final failure to negotiate the bend. A

Held on appeal against sentence: 16 persons died and 58 were injured in the accident. The appellant flagrantly disregarded the risk to human life by his driving, and, therefore, the sentence of 18 months imprisonment was correct. However, the period of disqualification was reduced to 7 years. B

Cases referred to :

Bharat v. The Queen [1959] A.C. 533; [1959] 3 All E.R. 292.

R. v. Taylor (1927) 20 Cr. App. R. 71.

R. v. Burdon (1927) 20 Cr. App. R. 80.

Hallett v. Warren (1926) 93 J.P. 225. C

R. v. Buchanan [1965] V.R. 9.

R. v. Christie [1914] A.C. 545; 111 L.T. 220.

Appeal against conviction and sentence in the Supreme Court for causing death by dangerous driving.

R. G. Kermode for the appellant. D

D. Williams for the respondent.

Judgment of the Court (read by HASLAM J.A.) : [18th March 1974]

This is an appeal against conviction and sentence in the Supreme Court at Suva on 31 October 1973. The appellant was charged under Section 269 of the Penal Code with causing death by the driving of a motor vehicle on Kings Road in a manner which was dangerous to the public. He was tried before a Judge and three assessors, each of whom after the summing up stated his opinion that the appellant was guilty. The learned Judge invoked the amendment to Section 281 of the Criminal Procedure Code, and after stating that he could " find no ground to differ ", pronounced the appellant guilty and convicted him without further comment. Later that day he sentenced the appellant to 18 months imprisonment, and disqualified him from holding a driving licence for 15 years. E F

For the first time this Court is called upon to consider an appeal arising from criminal proceedings in the Supreme Court, conducted under the amended procedure enacted by the Criminal Procedure Code (Amendment) Act, 1973. Hitherto by the combined effect of sections 153, 154 and 281 of that Code, a judge presiding at a criminal trial in the Supreme Court has been required, after the case for both sides has closed— G

(i) to record the opinions of the assessors after summing up. The summing up was optional but universal in practice ;

(ii) to give judgment in writing—such judgment to contain the point or points for determination, the decision thereon and the reasons for the decision; the offence of which the accused was convicted or acquitted had to be specified; H

(iii) to pronounce judgment or explain the substance thereof in open court.

Section 5 of the amendment of 1973 was inserted as 154A to make ss. 153 and 154 expressly subject to Section 12, which in turn amended s. 281 (1) of the Code by providing that summing up to the assesors should henceforth by compulsory and by adding a proviso to subsection (2) thereof. This subsection as so amended now reads as follows :—

> " (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors; Provided that, notwithstanding the provisions of subsection (1) of section 154 of this code, where the judge's summing up of the evidence under the provisions of the last preceding subsection is on record, it shall not be necessary for any judgment, other then the decision of the court which shall be written down, to be given, nor for any such judgment, if given, to be written down or to follow any of the procedure laid down in section 153 of this Code or to contain or include any of the matters prescribed by section 154 of this Code, except that, when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection and of section 155 of this Code. "

The intention of the legislature appears to have been to diminish the rigidity of some provisions of the Code as to delivery and content of judgments, while preserving the necessity for the trial judge to give reasons where he differs from the majority of the assessors. This requirement, which emerged as a matter of practice following upon a number of Court decisions, notably that of the Privy Council in *Bharat v. Reg* [1959] A.C. 533, has now been embodied in the statute law. It is necessary, however, to look more closely at the details of the change.

If the trial Judge agrees with the majority of the assessors he need now give no judgment (in the former sense at least) but must write down the decision of the Court. That presumably means whether (and of what) the accused is convicted or acquitted. Possibly it includes the punishment (if any), as previously this was (by section 154 (3) required to be part of the judgment— the new proviso eliminates that section. The judge may, however, " give " a judgment but it need not be written down or pronounced or explained in open court as required formerly by s.153. It is to be hoped that it would be recorded in some form ; otherwise how would it be brought to the notice of a Court of Appeal ?

If the trial Judge does not agree with the majority opinion of the assessors he must give his reasons, in writing and pronounced in open court. That might involve writing a full " judgment " in the old sense or not, according to circumstances. A judge's reasons for disagreeing with assessors might go no further than an expression of his conclusion that they had completely failed to appropriate incontrovertible evidence. Presumably, in the absence of a majority opinion from the assessors, as, for instance, if one considered that an accused person was guilty of murder, another that he was guilty of manslaughter but the third wished to acquit, the first part of the proviso would again apply.

The final part of the proviso deems the summing up, the decision and the reasons (if any) to be the judgment of the court for the purpose of section 281 (2) and section 155 (which section provides for a copy of the judgment to be handed to the accused if he applies for it). The limited extent of this "deeming" perhaps lessens the natural feeling of unease at finding a summing up regarded as part of a judgment, but does not overcome the primary distinction in function which must be inherent in these respective forms of judicial utterance. The former will offer a final decision, if at all, only as a subsidiary aspect, whereas communication of a concluded view is the chief purpose in delivering a judgment.

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It has been necessary for us, as a Court of Appeal, to analyse this amendment with some care. Criminal appeals from the Supreme Court in its original jurisdiction may embrace questions both of fact and of law, and the latter usually depend upon particular findings of fact. However closely trials with assessors may be assimilated to trials by jury, in Fiji they remain distinct in a vital aspect. The judge, sitting with assessors, is himself the final arbiter on all questions. Certainly he must take proper advantage of having assessors with him, and give full and due consideration to their opinions, but the responsibility for the ultimate decision rests with him, and therefore, subject to review on appeal, his findings of fact will prevail.

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Obviously, then, the judgment of the trial Judge under the former practice, expressing his findings and reasons, was of the greatest assistance to this court in the discharge of its duties. The new system, as exemplified by the present case, leaves the appellate tribunal to deduce the findings of fact from the opinions of the assessors and the final result of the case, in the light of the transcript of the evidence and the summing up. This disadvantage, which must now be faced, may be similar to that confronting a Court of Appeal after a criminal trial before a Judge and jury in a Supreme Court, but under the latter procedure, the jury alone decides the facts.

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Mr Kermode, who argued this appeal on behalf of the appellant, suggested that when, under the new procedure, a judge elects not to deliver a judgment (in the old sense) it would be incumbent upon him to give a much fuller direction on the law in his summing up. We do not agree that any such rule can be laid down. The summing up is for the assistance of the assessors and to ensure their full understanding of the law so far as necessary for the purposes of the particular case. This must remain its primary object and the new legislation makes no change in this respect. We would express the view, however, that it would be regrettable if in practice it came to be regarded as a matter of course that a trial Judge who agreed with the majority opinion of the assessors should not write a judgment. In the interests of justice, we venture to hope that in many such cases the trial Judge will elect to assist us with the benefit of a reasoned judgment.

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The charge arose from a fatal accident which occured near Lagere Bridge, Nasinu, between 4.30 and 5.00 p.m. on 21 January 1973, when a Chieftain Coach driven by the appellant from Suva towards Nausori collided with a Tui Davuilevu Bedford bus travelling in the opposite direction. The wooden body work of the latter vehicle was severally shattered and there was heavy loss of life and physical injury to passengers. Both sides accepted a scaled and contoured model of the scene, which embraced a slight curve in this stretch of highway.

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There were no relevant factors of weather, of road surface or of prior mechanical defects. The road was not marked with a centre line and the prosecution was unable to establish the point of impact with precision. In particular the Crown alleged against the appellant that he lost control at the wheel by driving at an excessive speed and crossed onto his incorrect side of the road at the critical time.

There was some overlapping of the pleaded grounds of appeal, which may now be adequately summarised. The summing up was attacked for not expressly directing that in law excessive speed cannot in isolation, establish the offence, for not excluding from consideration by the assessors evidence of speed some distance from the scene, and for omitting reference to testimony tending to establish the appellant's innocence. In partial repetition, it was contended that the verdict was "against the weight of evidence". Alleged interference with witnesses for the prosecution was relied upon as denying the appellant a fair trial.

The undisputed facts would suggest at the outset that this accident must have resulted from fault on the part of at least one of the drivers involved. Any contributory negligence of the Bedford driver was legally irrelevant as a defence, and of importance only if any failure by him could afford an explanation of the collision. It appears unnecessary to discuss the abstract proposition presented in argument that speed alone cannot constitute dangerous driving, because the wording of the section (which conforms with a familiar pattern) itself emphasises the importance of taking into account the objective situation at the time. In this instance, the prosecution relied not only upon evidence of the appellant's excessive speed, but also upon other circumstances prevailing on the highway that afternoon, and on a volume of evidence indicating that the appellant's coach collided with the bus after crossing over to its incorrect side. Despite certain conflict of testimony there was ample evidence to support adverse findings on both issues.

It was to be expected that the surviving passengers in the Bedford would provide witnesses whose testimony would exonerate their own driver and be unfavourable to the accused, but the prosecution also called independent observers of the episode, and they deposed that the Chieftain coach was on its wrong side of the road at the time of the impact. There was other evidence indicating that that vehicle had been travelling too fast and had not been kept under proper control. As usual, it was for the Court with the witnesses before it, to assess credibility and to decide whether or not the defence version could prevail, or at least be regarded as raising a reasonable doubt in favour of the appellant. After making due allowance for discrepancies and errors in the various narrative before the Court the totality of evidence leaves a strong case for the prosecution.

It appears needless to inquire too closely into the driving of the Bedford bus with reference to the allegation that it was stationary, or almost at a standstill, when the collision occurred. If the appellant be given the advantage of the inconclusive effect of the jammed needle on his speedometer, and it be accepted that in approaching the scene he varied his speed at different times, his general manner of driving as disclosed by the accepted evidence, suggests a serious lack of vigilance and care, and supports the evidence of eye witnesses that he crossed over at the critical time onto the path of the other vehicle which should have been obvious to him. The situation of the glass on the highway confirms the narrative of the eye witnesses for the Crown.

The ground of appeal suggesting that the verdict is against " the weight of evidence ", could perhaps be more aptly expressed if the conviction had been described as " unsafe " or " unsatisfactory ". Even so, this Court is unable to agree with such a contention. It is unnecessary to repeat passages from the careful summing up which gave full reference to the defence evidence, or the reminder to the gentlemen assessors that, at that point in the trial, the opinion of the presiding judge on issues of fact was not to influence their conclusions. We could detect no misdirection in the summing up.

In respect of the allegation concerning interference with witnesses Mr Kermode had filed his own affidavit and at the outset offered to retire as counsel, if his so doing should be subject to objection from his opponent or from the Court. Mr Williams stated that there was no contest about the facts disclosed in Mr Kermode's affidavit. While in general this Court would follow the well-known principle that it is not permissible for an advocate also to appear in the role of witness, in this instance the facts were special and Mr Kermode was allowed to remain. In developing this contention he relied only upon the affidavit of Shiri Ram. It is sufficient to observe that each of the witnesses denied on oath that such an event had taken place. The objection was raised before the learned trial Judge and after hearing an oral explanation by the designated offender from the floor of the Court, he allowed the trial to proceed. Defence Counsel appears to have taken no further action as a result of this incident. While courts became apprehensive when suggestions are made about tampering with witnesses, there is nothing before us to indicate that anything serious or sinister occured here. It appears unnecessary to go so far as to invoke Section 22 (6) of the Court of Appeal Ordinance because the points raised cannot possibly be decided in favour of the appellant on the slender material before us. Clearly no substantial miscarriage of justice in fact occurred.

The prosecution called three witnesses to depose to having seen the appellant conducting hazardous manoeuvres along King's Road shortly before this accident—the furthest of such incidents occurring about 4 miles from the scene and only a few minutes before this collision. The appellant complained that as the crux of the alleged offence was his manner of driving at the vital moment before impact, this evidence was both prejudicial and irrelevant. He submitted that as, at least by inference, he must be regarded as having reduced his pace after each of these episodes, any earlier displays of indifference by him to the safety of other road users could have had no causative connexion with the death of Ram Dulari.

In this instance we regarded the material under attack as both admissible and relevant. It tended to show appellant's continued attitude of ignoring the peril to which his reckless handling of his vehicle could subject other persons, and links his pattern of performance with his final failure to negotiate that slight curve. There is ample precedent for such testimony being received.

R. v. Taylor (1927) 20 CAR 71 ; *R. v. Burdon* (1927) 20 CAR 80, *Hallet v. Warren* (1926) 93 JP 225 ; *R. v. Buchanan* [1965] V.R. 9).

Clearly testimony of this kind must be of diminishing cogency in proportion to the separation of time and distance from the collision under review. If a Court considered that the probative value of this class of evidence were so slight that unsafe inferences might be drawn therefrom, the inherent power to reject the prejudicial material would be exercised, even where its legal admissibility might be safe from challenge (*R. v. Christie* [1914] A.C. 545 at 559). No doubt the authorities in charge of prosecutions will be vigilant to ensure that an oppressive use of his form of proof is not invoked merely because no exclusionary rule of law precludes its being tendered. The appeal against conviction is therefore dismissed.

On the appeal against sentence it was pointed out that the appellant is 28 years of age, without any previous convictions for offences of a similar nature and his lapse was not attributable to liquor. It was contended that the term of imprisonment and the prolonged period of disqualification were both excessive.

In reply Crown counsel submitted without contradiction from Mr Kermode that in this country there is too much driving of an inferior standard, and that this particular offence showed a grave disregard of the safety of persons on the highway, for this was the very type of hazard that the appellant should have foreseen and avoided. His whole pattern of driving that afternoon suggested a reckless lack of concern for other persons in the vicinity. We accept that version of this narrative.

While it was submitted on his behalf that it was improper to allude to the fact that 16 persons were killed and 58 injured in this accident when the appellant had been found guilty in respect of only one victim, we think that the deterrent aspect of penalty in this class of case requires an examination of the full consequence of the dangerous driving. The total number of dead and injured may have resulted partly from overcrowding in the bus, but the human consequences of such an impact was the obvious risk which the appellant flagrantly disregarded. After giving the appellant the benefit of such factors as are in his favour, we have decided that the term of imprisonment should be upheld but that the period of disqualification should be reduced to seven years. To that extent we allow the appeal against sentence.

Appeal against conviction dismissed ; appeal against sentence allowed in part.