**SUNIL DUTT SHARMA**

A

*v.*

**REGINAM**

[COURT OF APPEAL, 1978 (Gould V. P., Marsack J. A., Spring J. A.)
23rd, 30th November]

B

Criminal Jurisdiction

*Criminal Law—Principles of sentencing—Traffic Offences—causing death by dangerous driving—Penal Code (Cap.* 11*) S.* 269(1).

The appellant was sentenced to nine months imprisonment for causing death by dangerous driving. On appeal against sentence: C

*Held* : Dismissing the appeal, the appellant had driven in reckless disregard for the safety of other road users and the sentence was appropriate.

Cases referred to:

*R.v. Guilfoyle* [1937] 2 All E.R. 844

*Govind Swamy Naidu v. R.* Fiji Cr. App. 29/72 (Unrep.) D

*R.v. Abdul Razak* Fiji Cr. App. 47/69 (Unrep.)

*R.v. Hazell* (1965) Crim. L.R. 120

*R.v. Boe & Saunders* (1968) Crim. L.R. 171

*R.v. Kashyap* (1972) Crim. L.R. 257 E

*R.v. Dutton* (1972) Crim. L.R. 321

*Davendra Kumar v. R.* Fiji Cr. App. 172/78 (Unrep.)

*Mohammed Abdul Razak v. R.* Fiji Crim. App. 80/72 (Unrep.)

*Edward Sheikh Faruk Ali v. R.* Fiji Crim. App. 62/73 (Unrep.) F

Appeal against sentence from the Supreme Court.

*A. Singh* for the appellant.

*D. V. Fatiaki* for the respondent.

Judgement of the Court (read by GOULD V.P.):

This appeal, originally brought against conviction and sentence, is now limited to sentence only. The appellant was tried in the Supreme Court before a judge and assessors on four counts. They were, causing death by dangerous driving, failing to stop after an accident, driving a motor vehicle without a valid licence, and operating a motor vehicle with defective brakes. The assessors were unanimous in their opinion that the appellant was guilty on all four counts and he was convicted by the learned judge and sentenced to nine months' imprisonment on the first count, a fine of $50 (in default three months' imprisonment) on the second count, a fine of $20 (or four weeks' imprisonment) on the third count and a fine of $20 (or fours weeks' imprisonment) on the fourth count. The appeal was pressed only in relation to the sentence on the first count. G H

The essence of the offence committed by the appellant was that after dark on the day in question he drove his motor vehicle No. AC 620, a small Datsun, along a crowded street at Navua at a high rate of speed and struck and killed a crippled old man; the car then continued further and struck another pedestrian. The appellant did not stop the car but drove on.

Counsel for the appellant, in a persuasive argument, submitted that the sentence of nine months' imprisonment passed on the first count was excessive when compared with other sentences passed in Fiji in like cases. As part of his argument he accepted that the case of *R.v. Guilfoyle* [1973] 2 All E.R. 844, decided in 1973 was an appropriate guide and had been acted upon in Fiji in cases of causing death by dangerous driving. Before referring to it we will mention one or two other Fijian decisions. One, which was not quoted in argument, is the case of *Govind Swamy Naidu v. Reginam* (Crim. App. No. 29 of 1972) decided by this court on the 30th October, 1972, which was of course prior to the *Guilfoyle* case. In it, however, we considered a number of authorities from England and Fiji and think it appropriate to quote a passage from our judgment dealing with a number of these:

> "There have apparently been a number of cases of dangerous driving causing death, in the magisterial courts of Fiji—this is referred to in the judgment of Thompson J. in *Regina v. Abdul Razak* (Criminal Appeal No. 47 of 1969) in which he said that it was no doubt correct that in the majority of such cases only fines had been imposed. He went on to say, however, that even where there was no grossly aggravating feature it was not wrong to impose a sentence of imprisonment. In the case before him (in which the person concerned attempted to overtake just below the brow of a hill) he referred to the prevalence of the offence in Fiji, but reduced a sentence of fifteen months' to one of six months' imprisonment.
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> Mr. Reddy, for the appellant, referred us to English cases. In *Regina v. Hazell* (1965) Crim. L.R. 120 a sentence of three months' was upheld where the appellant had been racing, attempting to overtake at a speed of seventy miles per hour; the driver had only a provisional licence. *Regina v. Boe and Saunders* (1968) Crim. L.R. 171, was another case of racing in a built up area—the sentence, which was upheld, was two years. In both those cases and notably the latter, there were previous convictions for road traffic offences.
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> In *Regina v. Kashyap* (1972) Crim. L.R. 257 the appellant drove very erratically and killed a cyclist coming the other way. The appellant was heavily under the influence of liquor. A sentence of nine months' was upheld. In *Regina v. Dutton* (1972) Crim. L.R. 321 the appellant had tried, at seventy miles per hour, to overtake a line of cars approaching a shallow bend. His sentence of nine months' was also upheld. In neither of the last two cases was there any previous conviction. It should be mentioned though, that in the judgment in *Regina v. Dutton,* the Criminal Division of the Court of Appeal said that, while in the great majority of cases courts did not find it necessary to impose a sentence of imprisonment, any notion that imprisonment was never imposed, or only in outstandingly bad cases, was wrong. Cases in which a deliberate risk had been taken differed from those in which there had been an error of judgment.
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> The English cases, though decided in different setting from Fiji, provide a useful background. Deliberate acts which are known to involve danger are

seriously regarded; racing at high speed, driving while drunk, overtaking at high speed without proper visibility are such acts, and in some cases of course, a relevant criminal record features.

In the *Govind Swamy Naidu* case, which was a serious one, a sentence of two years' imprisonment and a disqualification of seven years' had been imposed. This court considered that the penalty as a whole was more severe than the circumstances necessitated or the requirement of consistency with the sentences of other courts rendered desirable. The disqualification period was maintained but the sentence of two years' imprisonment was reduced to one year.

On the present appeal counsel for the appellant referred us to *Ram Lal v. Reginam*, a decision of the learned Chief Justice on an appeal from a Magistrate's Court. We quote a sentence from his judgment which could have relevance in the present case, and endorse fully the principle it embodies. The sentence reads:

"For the purposes of sentence the callous disregard shewn by the appellant for the welfare of the seriously injured pedestrian and his deliberate failure to stop and to subsequently report the accident should not be treated as part of the offence of causing death by dangerous driving but should be dealt with on its merits."

In that case the appellant had no previous convictions and there was no finding that the appellant's driving had shown a selfish disregard for the safety of others or a degree of recklessness. This being one of the tests laid down in the *Guilfoyle* case the learned Chief Justice took a lenient view of the case, quashed the nine months' sentence imposed and substituted a fine of $100 (in default three months' imprisonment). That was in 1976.

Similarly in November 1978 Williams J. found that a conclusion that the appellant had proceeded recklessly or that he had ignored warnings or that he was so extremely negligent that he failed to see them was unjustified. He also set aside a term of imprisonment and imposed a fine of $300 or six months' imprisonment. That was the case of *Davendra Kumar v. Reginam* (Crim. App. 172 of 1978).

In *Mohammed Abdul Razak v. Reginam* (Crim. App. 80 of 1972), a much earlier case, the appellant had been sentenced to six months' imprisonment and disqualified for three years. On appeal the learned Chief Justice held that there was clearly an element of deliberate risk, a reckless disregard for the safety of the passengers concerned and that the sentence of six months' imprisonment was not excessive. A sentence of eighteen months' imprisonment was upheld by this court in the case of *Edward Sheikh Faruk Ali v. Regina* (Crim. App. No. 62 of 1973) in a particularly bad case but a disqualification of fifteen years was reduced to seven years.

We come now to the case of *R. v. Guilfoyle* (supra) and it will be sufficient to quote the headnote, which reads:—

"Where a driver is convicted of causing death by dangerous driving and the accident was due to momentary inattention or misjudgment on the part of a driver who has a good driving record, he should normally be fined or disqualified for driving or obtaining a licence for the minimum statutory period, or a period not greatly exceeding it, unless there are special reasons for not dis-

qualifying. If his driving record is indifferent, the disqualification should be
A longer, perhaps two to four years, and if it is bad he should be put off the road for a long time. For those who have shown a selfish disregard for the safety of other road users or of their passengers or a degree of recklessness, a custodial sentence with a long period of disqualification may well be appropriate, and if the driver has a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time."

B In his argument for the appellant in this court counsel submitted that his conduct was not such as to bring it within the category mentioned in the headnote of those who have shown a selfish disregard for the safety of other road users, or a degree of recklessness. Having examined the record and considered counsel's submissions we are unable to conclude that the driving of the appellant was anything but reckless and we are satisfied that it did show a complete disregard for the safety
C of other road users. At the trial the appellant adopted a defence that before the impact with the deceased a stone had been thrown at the car and shattered the windscreen. This defence was clearly rejected by the assessors and the learned judge, and the evidence more than amply supports their conclusion. The appellant was very familiar with the locality and the busy nature of the road in question; his lights were functioning and though there were no street lights he must with only ordinary observation have seen the crowd on the road ahead of him. There is no
D evidence to support a suggestion by counsel that there was a sudden failure of his brakes; they were undoubtedly not very effective but he himself said that he applied them and the car slowed. More than one person among the pedestrians were compelled to take rapid action to avoid being struck and number called out warnings to the appellant as he approached. Counsel's submission that he may not have heard the warnings does not affect his obvious failure to have regard to what was occurring
E on the road and the speed with which the evidence indicated that the car was travelling (30—35 m.p.h.) was reckless in the circumstances. The appellant had one previous conviction for careless driving.

In sentencing the appellant the learned trial judge stated that this was as bad a case of dangerous driving as had come before this court in a long time, and that the appellant was fortunate that only one death occurred. We agree, and for these reasons the appeals are dismissed.

*Appeals dismissed.*