

STATE v ISAIA SAUKOVA

High Court Criminal Appellate Jurisdiction

Gates, J

a
6 July, 2000
HAA0013/001

Causing death by dangerous driving – appeal against conviction and sentence - unrepresented accused – whether guilty plea unequivocal - whether solely fault of respondent or whether defence that child crossed at last moment not allowing time for respondent to apply brakes – guideline for judge to consider in accepting guilty plea – Criminal Procedure Code ss206, 325

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c
The respondent was convicted on plea of causing death of a 12 year old boy on main highway from Nadi to Sigatoka by dangerous driving, using a private motor vehicle as a taxi and driving a motor vehicle in contravention of third party policy risks, and sentenced to fine of \$200 in default 6 moths imprisonment and disqualified from holding or obtaining a driving licence for 12 months. The respondent appealed. In exercise of its revisional powers the Court set aside the conviction and quashed the sentence.

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Held – (1) Where ambiguity in magistrate's notes as to whether facts amount to dangerous driving or uncertainty as to whether respondent was abandoning an earlier defence, proceedings were a nullity.

(2) The Magistrate erred in not checking with the prosecutor whether there was any support for the respondent's allegation that the deceased crossed suddenly without looking and there was nothing respondent could do to prevent accident and therefore no fault on respondent's part.

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(3) If a magistrate was not satisfied that an unrepresented accused is admitting facts which amount to all of the legal elements that go to prove a charge, or makes a statement in mitigation which indicates innocence or lack of fault, the magistrate should enter a plea of not guilty.

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(4) Magistrate should ensure that the accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result - appl *Michael Iro v R* (1966) 12 FLR 104;

Convictions on all 3 counts set aside, sentences quashed and case be remitted for re-trial de novo before a different magistrate. appellant bailed on own recognizance to appear at Magistrates' Court.

Other cases referred to in judgment

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appl *Abdul Aziz Khan v R* (1967) 13 FLR 79;

appl *DPP v Jolame Pita* (1974) 20 FLR 5.

ref *R v Griffiths* (1933) 23 Cr. App. R 153.

ref *R v Blandford JJ, ex p. G* (an infant) [1967] 1 QB 82 D.C.

appl *R v Golathan* (1915) 11 Cr. App. R 79

appl *R. v Le Comte* [1952] NZLR 564.

appl *R v Durham Quarter Sessions; ex parte Virgo* [1952] 2 QB 1.

appl *P. Foster (Haulage) Ltd. v Roberts* [1978] 2 All ER 751

[Note: cons in *Timoci Kurivola & Paula Kunauwa v State* [2001] HAA052/00L; *Eliki Raloka v State* [2001] HAA 048 of 2000L Judgment of 9th November 2001; *Saula Lalagavesi and Kitone Matakali v State* [2000] HAA059, HAA060, HAA061, HAA062, HAA063 and HAA064/00L Judgment of 26th October, 2000; appl in *Jone Koro Sekinabou v State* [2001] HAA 0013/01 of 20th April 2001]

*K Tunidau for the appellant
respondent in person*

6 July 2000.

JUDGMENT

Gates, J

On 9th August 1999 the Respondent was convicted before the Resident Magistrate at Sigatoka on his plea of guilty to three traffic charges. One of the counts was a charge of causing death by dangerous driving contrary to section 238 of the Penal Code [count 1]. He was sentenced on this count to a fine of \$200 in default 6 months imprisonment and disqualified, from holding or obtaining a driving licence for a period of 12 months. The Director of Public Prosecutions appeals to this court against the sentence on count 1 on the sole ground that it was too lenient.

Having read the court record, I have formed the view that the learned Magistrate should not have accepted the plea of guilty. At the hearing of the appeal on 9 June 2000 I stated that I should set aside the conviction and quash the sentence, exercising revisional powers pursuant to Section 325 of the Criminal Procedure Code Cap. 21 and that I should give my reasons later. Accordingly the appeal lapsed. I give my reasons now.

Before I do, it must be said that the Appellant's ground is insufficiently particularised. Appeal grounds should be framed as succinctly as possible. The failure of the court below should be indicated and the principle not followed referred to e.g. "The learned Magistrate failed to impose a custodial sentence, the Respondent's driving falling into the second category for sentencing purposes [Guilfoyle (1973) 57 Cr. App. R 549 and Boswell and Others (1984) 6 Cr. App. R (SS) 257]."

The Respondent was driving a passenger van on the day in question, 7th August 1999. He was driving from Nadi to Sigatoka on the main highway. At the Batiri Road junction his van collided with a 12 year old school boy who was on the road in the Respondent's lane. The boy was thrown some distance. He was found to be dead on arrival at Sigatoka Hospital from injuries to his head. The accident occurred (in daylight) at 4.15pm. The Magistrate heard the facts, and noted that the Respondent admitted them. She proceeded to enter a conviction. However the facts she has recorded bear either an ambiguity as to whether the facts amount to dangerous driving or uncertainty as to whether the Respondent

a was abandoning an earlier defence stated. The Respondent appeared before the Magistrate unrepresented. In her sentencing remarks, the Magistrate said, "Although death has been caused by the dangerous driving" (emphasis added) and "the deceased somewhat contributed to the fatal accident as he was standing on the road" (emphasis added). The facts and the mitigating remarks of the Respondent appeared to challenge the assertion that the deceased was "standing" on the road.

b In the facts, the Magistrate has recorded that the Police Prosecutor told her that the deceased and his mother arrived at the junction by a Paradise bus. They alighted and would have been on the right hand side of the road (from the Respondent's viewpoint). They hailed a nearby carrier to take them to go to their home at Togovula off the highway. The carrier came to the junction and parked at the left hand side of the road facing towards Sigatoka.

c The carrier was said to be parked "off the road" i.e.: off the main highway. Leaving aside that it may only have been possible at that point for a vehicle to have been partially parked off the road, the deceased came across the road to engage the carrier driver. I am told by Mr. Tunidau, the mother remained on the other side of the road whilst this was done. There is then recorded: "place deceased standing would be 1 metre away from shoulder of road on main highway. Deceased holding bonnet of carrier." Besides alleging speed on the Respondent's part the prosecutor said that the Respondent "failed to change gear and failed to apply the brakes."

e The Magistrate was told that in his police interview the Respondent had said "deceased in process of crossing when (I) hit him." If the deceased had indeed started to cross (back towards the mother), at the last moment, (hence no braking by Respondent), there would have "been nothing the Respondent could have done to prevent the accident, and therefore no fault on the part of the Respondent leading to and causing the death of the deceased. The fault would have been entirely that of the young deceased, who crossed suddenly without looking.

f The Magistrate should have checked with the Prosecutor whether there was any support for the Respondent's allegation. In addition prior to asking whether the Respondent accepted the prosecution's facts the Magistrate needed to put this defence to the Respondent and ask him whether he was still persisting with it, or whether he accepted the accident was nonetheless his fault.

g In mitigation, the Respondent said "I did not know what to do when boy tried to cross."

This suggests a last minute hazard confronting the Respondent.

It used to be the practice in the early 1980s following a memorandum issued to all police prosecutors and Resident Magistrates by the DPP that the police prosecutor in cases where an unrepresented Accused pleaded guilty, would tender to the court a copy of both the Accused's caution interview statement and

his charge statement. In cases such as this, where there is a defence raised both in the facts outlined, and which is maintained in the mitigation of the Accused, the Magistrate could examine the Accused's statements to police. If the Magistrate, upon tackling the Accused concerning the defence, was satisfied that the Accused did not wish to persist further with the defence, the Magistrate could with safety accept a guilty plea. If not, the only proper course was for a not guilty plea to be entered, so that the issue raised by the defence could be resolved at trial. It is strongly recommended in the interests of fairness accuracy and justice, that the practice of handing out to the Magistrate the unrepresented Accused's statements to Police on a guilty plea, be resumed.

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Mr. Tunidau, commendably aware of his duties as a prosecutor to be fair and to assist the court, was kind enough to provide the court with a copy of the Respondent's caution interview with the police investigators. It was illuminating. In explaining how the accident happened the Respondent said:

"A 20: I was coming down upon arrival at Batiri Junction. I saw a van parked off the side of the road opposite Batiri Junction and there was no tarpaulin at the back.

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I passed the vehicle when about to reach the front part when suddenly a boy ran across in front of me from left to the right and it was so close and I could do anything to save him so I hit him and he was thrown to the side of the road and I went on and parked the vehicle a few metres in front, from where the boy was laying down."

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"Q 25 Can you tell me as where the boy was standing before you bumped him?

A. He was standing beside the driver.

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Q 26 How far were you when you saw him?

A. I was approaching the back of the vehicle when I saw the boy standing beside the driver's door.

Q 27 At the time you saw the vehicle parked and some people beside it talking what precaution did you take?

A. I drop the speed a bit low but continued driving on.

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Q 29 Why didn't you applied the brake there and then after hit the boy?

A. Because I was not expecting the boy to cross at that time and I was shock (sic) to see him near." (emphasis added)

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Clearly there were triable issues here which needed to be raised with the unrepresented and unguided Respondent before a plea of guilty could safely be entered. More so since causing death by dangerous driving remains a very serious charge, a conviction for which is likely to result in a custodial sentence.

Section 206 of the Criminal Procedure Code is relevant:

"206 (1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

a (2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.

b (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) "

c It is essential that a Magistrate be satisfied that an Accused is admitting facts which amount to all of the legal elements that go to prove the charge in question. Where the Accused is represented by counsel, the Magistrate's task is easier. Where the Accused is unrepresented a more onerous burden is cast on the court. But the Magistrate should ensure that the Accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result. In **Michael Iro v. Reginam** [1966] 12 FLR 104 at 106 the Court of Appeal said:

e "In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves".

See **R. v. Griffiths** (1933) 23 Cr. App. R 153; **R. v. Blandford JJ, ex p. G** (an infant) [1967] 1 QB 82 D.C.

f The Iro case referred to 10 Halsbury 3rd Edit. p. 408 para. 242:

"In the case of an undefended prisoner care must be taken that he fully understands the elements of the crime to which he is pleading guilty, especially if a good defence is disclosed in the depositions."
(emphasis added)

g It is essential that there be no equivocation in the Accused's admission of the truth of the facts relied upon by the prosecutor in support of the charge see **Abdul Aziz Khan v. Reginam** [1967] 13 FLR 79 at 81G. The plea should be in clear, unambiguous, and unmistakable terms **R. v. Golathan** (1915) 11 Cr. App. R 79; **R. v. Le Comte** [1952] NZLR 564.

Where, as here, an Accused after pleading guilty makes a statement in mitigation indicating innocence or lack of fault, a plea of not guilty should be

entered otherwise the conviction may be a nullity as in **R. v. Durham Quarter Sessions; Ex parte Virgo** [1952] 2 QB 1. If the Accused adds to his plea of guilty a qualification which, if true, might indicate he is not guilty of the charge, his plea of guilty is to be held equivocal and the court should enter a not guilty plea and proceed to hear the evidence at trial : **P. Foster (Haulage) Ltd. v. Roberts** [1978] 2 All ER 751; **DPP v. Jolame Pita** [1974] 20 FLR 5 at 6E.

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The Respondent was charged with 2 other traffic charges. They were, using a private motor vehicle as a taxi (count 2) and driving a motor vehicle in contravention of third party policy risks (count 3). There are no facts recorded dealing with the prosecution case on these 2 matters and therefore nothing adduced in support of the charges. Nor was the Respondent taxed with such allegations in his police interviews. Proceedings relating to these two counts are therefore a nullity. Facts outlined to the court need to cover all charges, albeit at times summarised depending on the relevant circumstances.

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It should be observed also that on the facts presented, the prosecutor should have dealt with the road conditions that day including visibility. Presumably it was sunny and the road surface was dry. Point of impact if known should also have been brought to the court's attention.

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In the result, I find the proceedings to have been a nullity. I order that the convictions on all 3 counts be set aside, the sentences quashed, and that the case be remitted for a re-trial de novo before a different Magistrate. The Licensing Authority has already been informed and the Respondent bailed in the sum of \$300 on his own recognizance to attend the Sigatoka Magistrates Court on 13th July 2000 at 9.15am for mention of his case.

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Revision allowed.

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Marie Chan

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