

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Traffic Case No: 226 - 2014

STATE

-v-

PENI NAGATA No. 3

Before : RM Fotofili L.
For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Mr. Samy A. [Legal Aid Commission]
Trial Date : 11th August 2020
Date of Judgment : 16th February 2020

JUDGMENT

BACKGROUND

1. The Defendant denies the following charge which was preferred against him by the prosecution:

Statement of Offence

CARELESS DRIVING: Contrary to section 99 (1) and 114 of the Land Transport Act Number 35 of 1998.

Particulars of Offence

PENI NAGATA No. 3 on the 21st day of September 2013 at Tavua in the Western Division drove a private motor vehicle registration number RSL146 on Market Road Tavua Town without due care and attention.

2. The charge or the complaint was laid within the one year statutory time period pursuant to section 187 of the **Criminal Procedure Act 2009**.
3. The defendant first appeared on the 18th of August 2014 pursuant to a charging summons.

4. The defendant was granted bail and the matter was adjourned for disclosures and for the defendant to sort out his legal representation.
5. Having secured legal representation, the defendant pleaded not guilty to the charge on the 13th of April 2015.
6. Subsequent dates fixed for trial were vacated due to bad weather and on the application of defence counsel who had to attend a workshop.
7. On the 27th of June 2017, a trial was held before my brother Magistrate where the prosecution called 3 witnesses who gave oral evidence and tendered the sketch of the scene.
8. A case to answer was found and thereafter, the defendant elected to and did give oral evidence.
9. The matter was adjourned for judgment but that was not delivered.
10. When presiding over the case, I ordered a retrial since credibility was also in issue and I needed to hear from the witnesses directly rather than relying on the records of my predecessor.
11. Subsequent dates fixed for trial were vacated as the prosecutor was not feeling well, that their witness was not available and that the defendant was not present as he was in Labasa.
12. The trial was successfully held on the 11th of August 2020.
13. On that trial date, the parties agreed to have documents tendered by consent. There was also no application made for any of the authors of the documents to be called to be cross-examined for instance.
14. The following documents are tendered by consent and which I have considered in the course of preparing this judgment. They are:

PROSECUTION EXHIBIT NUMBER	DESCRIPTION
1 (A)	Itaukei Police Caution Interview of the defendant
1 (B)	Translated - English Police Caution Interview of the defendant
2 (A)	Rough Sketch Plan

2 (B)	Fair Sketch Plan
2 (C)	Key To Sketch

- 15.** The police record of interview of the defendant is dated the 7th of October 2013. The allegation upon which police questioned the defendant is related to the 21st of September 2013 a Saturday at around 4.30pm where the defendant was driving a motor vehicle with registration number RSL 146 at the market circular road in Tavua town in which the defendant's vehicle impacted another vehicle with registration number HA 434 resulting in damages to both vehicles. The defendant admitted that he was asked to drive vehicle registration number RSL 416 into Tavua town to pick someone who is waiting behind the market. When the defendant reached the market circular road, he put on his left signal and went in. There was a vehicle blocking the market circular road. When he entered, the other vehicle started moving without giving a signal or pressing the horn. The defendant pressed his brake but the other vehicle did not stop and then bumped his vehicle. Then they waited for the police. The defendant said that he has been driving for about 20 years. He has a valid driving license and holds group 2, 6, 8 and 9 license class. The defendant said that his speed when entering the market circular road was about 20 kmph.
- 16.** The sketch reflects that the width of the market road is 5.5 meters but at the entrance it is 6.5 meters. Both the vehicles are positioned at the mouth or entrance into the market road. Vehicle HA 434 is in front of vehicle RSL 146. The point of impact is on the right side of vehicle HA 434 near or around the driver's door and on the front left curved portion of vehicle RSL 146.
- 17.** As for the oral evidence adduced during the trial, the prosecution called 2 witnesses and closed their case.
- 18.** I found that there was a case to answer.
- 19.** After providing and explaining the options available to the defendant, the defendant elected to and did give oral evidence. There was no other defence witness.
- 20.** I summarise the oral evidence of the witnesses below.

PW1

21. Prosecution witness 1 [PW1] is Ms Shelly Chand, school teacher, 44 years old.
22. In 2013 she had a motor vehicle with registration HA 434, a Toyota Fielder.
23. She has been driving since 1998.
24. On the 21st of September 2013 at around 4.30pm she was in town doing some shopping.
25. She drove to Tavua Market to pick up her daughter who was waiting there.
26. PW1 drove into the market road and parked behind another vehicle.
27. Her daughter got into the car.
28. Then PW1 put on her indicator to move onto the middle of the road.
29. The other vehicle which was in front by that time had moved already.
30. PW1's indicator turned off automatically when manoeuvring her vehicle.
31. PW1 described that 'all of a sudden this vehicle came and bumped my vehicle'.
32. The other vehicle hit her driver's side door causing a complete dent to that door.
33. The vehicle that bumped her was a Hilux and had bull bars.
34. The defendant was identified as the person driving the vehicle that bumped her.
35. When cross-examined, PW1 accepts that the intersection is busy.
36. PW1 repeated that she had put on her indicator.
37. She checked her mirror and saw that no car was behind her. It was safe for her to move.
38. PW1 said that the defendant told her that he did not see her indicator.
39. PW1 accepts that she too should take precaution.

40. PW1 had to replace the driver's side door. It cost \$1,500 with an additional \$200 for labour. Her new door had to be painted to match the colour of her vehicle. Her car is not insured.

PW2

41. PW2 is Mr. Anand K. Reddy, bus driver, 35 years old.

42. In 2013 he was driving a taxi and his base was opposite the market.

43. His base is about 10 meters away from the market.

44. On the 21st of September 2013 at around 4.30pm he was in town sitting at the taxi base.

45. PW2 saw a lady turn into the market and stopped.

46. The lady picked up someone which PW2 assumed is the daughter.

47. The lady put on her indicator and then the car 'took off'.

48. Another vehicle or 4x4 carrier also entered the market road and by that time, the lady's vehicle had pulled out and that is when the carrier bumped the side of the other vehicle.

49. The lady's vehicle was bumped on the driver's side door.

50. Nothing obstructed his view.

51. There was damage to her door and scratch to the body of the vehicle.

52. PW2 went to help the lady from the vehicle.

53. When cross-examined, PW2 said that he was sitting at the taxi stand opposite the market.

54. For a small town, the market area is busy.

55. PW2 repeated that he saw the lady had signalled before she pulled out.

DW1

56. Defence Witness [DW] 1 is the defendant Mr. Peni Nagata, currently unemployed, 50 years old.
57. In 2013 he worked at Monasavu as a driver.
58. He has been driving for over 20 years.
59. He is aware of the road rules and courtesy.
60. He has a group 2 to group 9 license.
61. On that day, he came into town.
62. He drove into town and signalled to turn left into the market road.
63. He did not see the vehicle ahead signalling.
64. He says that the right hand rule should be applied.
65. The defendant says that he was taking past when the lady's vehicle moved her vehicle which resulted in her vehicle hitting his vehicle.
66. The vehicle's bull bar hit the driver's side of the lady's vehicle.
67. The defendant said that his vehicle 'parked and the lady's vehicle came out and bumped him'.
68. When the defendant came into the road, the lady had not pulled out yet.
69. When the 'accident' happened, his signal was still on.
70. He took precautions and even drove close to the footpath.
71. When cross-examined, the defendant denied that he was in a hurry at the time.
72. The defendant accepts that the market road is narrow.
73. It is a one way street.
74. He was travelling at 20 kmph.

75. He was using gear 1.
76. He did not expect that the vehicle in front would move.
77. The defendant accepts that he signed on the sketch plan.

BURDEN AND STANDARD OF PROOF

78. I remind myself that the defendant is presumed innocent until proven guilty [section 14 (2) (a) of the **2013 Constitution**; **Woolmington v DPP** [1935] A.C 462].
79. The prosecution carries the burden of rebutting this presumption.
80. The prosecution can rebut the presumption, when the prosecution prove their case beyond a reasonable doubt or make the court sure that the defendant committed the offence [section 58 (1) of the **Crimes Act 2009**].
81. Even if I reject the evidence adduced by or on behalf of the defendant, it does not necessarily mean that he is guilty.

ELEMENTS

82. The elements of the offence for which, all, I must be satisfied of beyond a reasonable doubt are:
- a. **The defendant;**
 - b. **Drove a motor vehicle;**
 - c. **On a public street;**
 - d. **Without due care and attention.**
83. Driver is defined in section 2 of the **Land Transport Act 1998** to mean a driver of a vehicle, and includes the rider in control of a motorcycle, powered cycle or bicycle, or a person in control of a motor vehicle which is being towed, and where a separate person acts as steerman of a motor vehicle includes that person as well as any other person engaged in the driving of the vehicle; and drive as the corresponding meaning.

84. A person can still be found to be driving even if they are sleeping behind the wheel while the vehicle is moving [Director of Public Prosecutions v Raj [1973] FJLawRp 17; [1973] 19 FLR 81 (11 October 1973)].
85. What amounts to driving will also depend on the facts of each case.
86. Section 2 of the Land Transport Act 1998 defines a motor vehicle to mean 'any automobile, motor car, motor carriage, motorcycle, traction engine, tractor, or other carriage or vehicle propelled or capable of being propelled by means of an engine powered wholly or partly by any volatile spirit, steam, oil, gas, or electricity, or by any means other than human or animal power, but does not include – a bicycle propelled or capable of being propelled by means of an internal combustion engine that is fitted to but detachable from the bicycle, being an engine the generating capacity of which does not exceed 20 watts or a wheelchair to be driven by an invalid.'
87. Element **d.**, that is, whether the defendant drove without due care and attention, refers to the standard of driving of the defendant at the material time.
88. This standard is not the same as negligence or recklessness or some other fault element which has its specific definition in the Crimes Act 2009.
89. Without due care and attention means whether the defendant was exercising the degree of care that a reasonable prudent and experienced driver would exercise in that circumstance [Khan v The State [1994] FJHC 155; HAA0001j.1994b (21 October 1994)]. There must also be some fault on the part of the defendant.
90. It is inevitable that there would be circumstantial evidence in any case.
91. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v. The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.
92. I bear these principles in mind when preparing this decision.

ANALYSIS

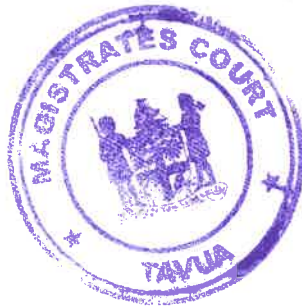
93. Elements **a**, **b** and **c** are not disputed and there is overwhelming evidence establishing these elements beyond a reasonable doubt.

94. These emanates from the defendant's own evidence, his answers in his police caution interview [relating to these elements] which I accept to be given voluntarily and to be true and the evidence particularly of PW1.
95. I also take judicial notice of the market road which is a public access road. It is a one way street.
96. The remaining element for determination is element d which relates to the standard of driving shown by the defendant at the material time.
97. I have perused the defendant's police caution interview carefully. He was interviewed about 2 weeks after the incident by police.
98. I have listened and observed the defendant give evidence.
99. I find that it is not in his favour that he did not stop when seeing PW1's vehicle parked at the mouth or entrance into the market road.
100. The sketch which I accept as being reliable, shows that the width of the market road at its widest which is at the entrance is 6.5 meters and the normal width is about 5.5 meters.
101. The defendant in his own evidence accepts that the road is narrow.
102. The defendant in his own evidence also accepts that there was another vehicle in front of PW1's vehicle.
103. This was a Saturday afternoon and it is undisputed that that area is usually busy.
104. PW1 should not have parked her vehicle there, even temporarily. She contributed to the impact between both vehicles.
105. However, faced with that situation, I predict that a reasonable prudent and experienced driver would have stopped first to assess the situation before trying to overtake PW1's vehicle.
106. Further to that, I believe PW1 and PW2 that PW1 had put on her indicator before moving her vehicle from where she had parked.
107. Both PW1 and PW2 were compelling and persuasive in their evidence.
108. I also accept PW2's evidence that he witnessed this from about 10 meters away with his view unobstructed.

109. This means that I reject the defendant's denial that PW1 did not have her indicator on when pulling out.
110. I also reject the defendant's denial that it was PW1 who bumped his vehicle.
111. I however believe the defendant that he entered the market road with the speed of about 20 kmph.
112. As I have said earlier, this is not enough. The defendant should have stopped first when seeing PW1 and the other vehicle in front of him in light of the width of the road. Instead the defendant tried to take past without stopping first.
113. The position of the vehicles on the sketch shows that PW1's vehicle is ahead of the defendant's vehicle. This is strong circumstantial evidence supporting PW1 and PW2's account that PW1 pulled out first and then the defendant's vehicle bumped her vehicle.
114. There is fault on the part of the defendant.

CONCLUSION

115. For the reasons explained above, all the elements of the offence are proven beyond a reasonable doubt.
116. I find the defendant guilty and I convict him of the charge of careless driving.
117. I will take mitigation and other information hereafter before I pass sentence.
118. For clarity, I accept PW1's evidence that it cost her approximately \$1,700 to get her vehicle door replaced. As I have found, she too had contributed to the impact as she was not supposed to be parked at the mouth or entrance of the market road. This may be factored in during sentence.




LISIATE T.V FOTOFILI
Resident Magistrate

At Tavua this 16th day of February, 2021