

IN THE MAGISTRATE'S COURT OF THE REPUBLIC OF FIJI
AT SUVA

CRIMINAL JURISDICTION

MISCELLANEOUS CASE No: 07 of 2018

BETWEEN

**ATISH KUMAR SEN trading as
SENSONS TRANSPORT SERVICES**

APPLICANT / ACCUSED

AND

LAND TRANSPORT AUTHORITY

RESPONDENT / PROSECUTION

BEFORE : Mr. Lakshitha Jayawardhana, Resident Magistrate

HEARING ON : 08th February 2023

SUBMISSIONS

FOR ACCUSED : 01st March 2023

FOR PROSECUTION : 05th May 2023

COUNSEL : Ms. Prasad, M. for the Prosecution
Mr. Sharma, V. for the Accused

RULING ON NO CASE TO ANSWER APPLICATION

A. INTRODUCTION

1. The above-named applicant / accused ("the Accused") is issued with a Traffic Infringement Notice no. 3285998 ("TIN") and the said TIN reads as:

Statement of Offence

Permitting Another person to drive motor vehicle with non- conforming mass plus load.

Particulars of Offence

Mr. Atish Kumar Sen T/A Sensons Transport Services on 02nd day of March 2018 at Nukuato Road in the Central Division, being the owner of the motor vehicle registration number HT 765 at Nukuato Road Permitted Vikash Dutt Sharma to carry container (Rice) with a weight of 35.14 Tonnes when the vehicle permissible gross weight 26.8 Tonnes. The excess weight of the vehicle is 8.34 Tonnes.

Contrary To : Regulation 80(9)(d), 87(1) (a)and 122 of the Land Transport (Vehicle Registration and Construction) Regulations 2000.

2. The Accused elected to dispute the TIN pleaded not guilty to the charge. Accordingly, the hearing proceeded before this court on the 08th February 2023.
3. Respondent/Prosecution ("Prosecution") called two witnesses for their case. RW 01 Mr. Mishaal Atish Prasad (Booking Officer-LTA) and RW02 Mr. Joeli Kini (Inspector for Weights and Messures.)
4. Prosecution submits the following documents as exhibits.
 - i. REx01 - Photocopy of the official Identity Card of witness Mishaal Atish Prasad
 - ii. REx02 - Copy of the TIN No. 3285998
 - iii. REx03 - Weighing Certificate of vehicle HT 765 dated 02-03-2018- Original.
 - iv. REx04 - Vehicle Information Extracts -Original
 - v. REx05- Photocopy Verification Certificate for PAT SAW Axle 10C Weighher Serial No 85-7245, dated 18-12--2017.
5. At the conclusion of the prosecution's case, counsel for the accused made an application for No Case to Answer. The court granted him time to file written submissions and prosecution was allowed to file written submissions in reply. Both parties complied with. The forgoing is the ruling on whether to call the defense case or not in pursuant to section 178 and 179 of the Criminal Procedure Act 2009. In making this ruling the Court considered the evidence for the prosecution's case and the submissions made on behalf of both parties.

B. THE LAW

6. Section 178 of the Criminal Procedure Act reads as follows: "178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."
7. Prior to the Criminal Procedure Act coming into existence, the relevant section of the law in this regard was section 210 of the old Criminal Procedure Code which was an identical section to section 178 of the Criminal Procedure Act 2009.

8. After the conclusion of the prosecution's case, in determining whether 'a case is not made out against the accused person sufficiently to require him or her to make a defence'; as per section 178 of the Criminal Procedure Act, there are certain legal principles laid down by the superior courts of Fiji for this court to follow.
9. In **Regina v Chand** [1972] 18 FLR 101 (17 July 1972) Grants J., cited Lord Reid as follows: When so eminent a jurist as Lord Reid, then senior Lord of Appeal in Ordinary, has stated: "I do not know what 'prima facie' means" (**Armah v. Government of Ghana and Anr.** House of Lords (1966) The Times July 13), it will be apparent that the determination of whether or not a prima facie case has been made out is not without difficulty. However I propose to be guided by the pronouncements of the Court of Appeal for Eastern Africa in **Ramanlal Trambaklal Bhatt v. Reg.** [1957] E.A. 332, and by the Practice Note of the former Chief Justice of England Lord Parker at [1962] 1 All E.R. 448; from which it seems clear that the decision as to whether or not there is a case to answer should depend not so much on whether the adjudicating tribunal would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal properly directing its mind to the law and the evidence could or might convict on the evidence so far laid before it. In other words, at the close of the prosecution case the Court should adopt an objective test as distinct from the ultimate subjective test to be adopted at the close of the trial. But the question does not depend solely on whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence."
10. In the case of **State v Latchan** [1996] FJHC 205; HAA0032].96S (23 August 1996), Sir Timoci Tuivaqa; CJ stated that: "The law relating to a submission of no case to answer has been conveniently summarised as follows:

A submission that there is no case to answer may properly be made and upheld:

(a) when there has been no evidence to prove an essential element in the alleged offence;

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer; Practice Note [1962] 1 All ER 448. "

11. These principles was also adopted in **State v Aiyaz** [2009] FJHC 186; HAC033.2008 (31 August 2009) by Gounder J as:

“[5] The test for no case to answer in the Magistrates’ Court under section 210 is adopted from the Practice Direction, issued by the Queen’s Bench Division in England, and reported in [1962] 1 All E.R 448 (**Moiden v R** (1976) 27 FLR 206). There are two limbs to the test under section 210:

[i] Whether there is no evidence to prove an essential element of the charged offence;

[ii] Whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict.

[6] An accused can rely on either limb of the test under section 210 to make an application for no case to answer in the Magistrates’ Court.”

12. His Lordship Tuivaqa CJ in **Latchan** (Supra) case determined the test that the adjudicating tribunal should adopt to ascertain whether there is a case for the accused to answer is an objective test on the evidence for the prosecution. “It is clear from the authorities cited that the test to be adopted by the adjudicating tribunal is an objective one and that is whether at that stage of the trial a reasonable tribunal properly directing its mind to the law and the evidence could or might convict on the evidence so far laid before it. This is distinct from the ultimate subjective test to be adopted at the close of the trial.”

13. Regulation 87(1)(a) of the Land Transport (Vehicle Registration and Construction) Regulations 2000 is as follows:

{LTA 11,845} - Offence of Access Load

87 (1) it is an offence to drive, use or cause or permit to be driven or used in a public street any vehicle having a wheel load, axle load or aggregate axle load in excess of the limits prescribed by-

(a) regulation 80.

14. Regulation 80 (9) (d) of the Land Transport (Vehicle Registration and Construction) Regulations 2000 is:

[LTA 11,810] Maximum Loads

80 (9) - The maximum permissible aggregate mass, expressed as GVM or GCM of the vehicle, in respect of all axles of a motor vehicle, a trailer, articulated vehicle or combination vehicle is -

(d) the manufacturer’s gross vehicle mass or gross combination mass as the case may be.

15. Regulation 122 of the Land Transport (Vehicle Registration and Construction) Regulations 2000 is the penal section of the regulation.
16. As mentioned in the TIN, the elements of the offence permitting another person to drive a motor vehicle with non-confirming MASS plus load, according to the regulation 87(1)(a), can be identified as follows:
 - a) A person (the accused),
 - b) permit to be driven,
 - c) in a public street,
 - d) any vehicle having a wheel lord, axle lord or aggregate axle lord in excess of the limits prescribed by regulation 80, commits an offence.
17. Section 13 of the Crimes Act of 2009 defines the composition of elements of an offence as thus:

“13. – (1) An offence consists of physical elements and fault elements.
(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
(3) The law that creates the offence may provide different fault elements for different physical elements.”
18. Sections, 18 to 22 of the Crimes Act 2009 deals with the fault element of a criminal charge. As per section 18, ‘fault element for a particular physical element maybe intention, knowledge, recklessness or negligence’. Sections, 19 to 22 makes the definition of intention, knowledge, recklessness, and negligence.
19. Section 23 of the Crimes Act 2009 deals with the offences that do not specify the fault element. Accordingly, if the law creating the offence does not specify a faults element for a physical element that consists only of conduct, the fault element is intention while the physical element that consist of circumstances or result, then the fault element shall be recklessness.
20. In the instance case, the charge in the TIN comprises of circumstances or results as its physical element, Recklessness can be considered as fault element of the offence.
21. In the UK House of Lords case of **Vehicle Inspectorate v. Nuttall** [1999] UKHL 14; [1999] 3 ALL ER 833; [1999] 1 WLR 629 (18th March 1999) it was held as thus: “The mental element of the offence must now be considered. It is not an offence of strict or absolute liability. Nothing less than wilfulness or recklessness will be sufficient. In practice, recklessness will be the relevant *mens rea*.”

C. EVIDENCE

22. Prosecution called two witnesses in their case and their evidence is summarised below.
23. The first witness for the prosecution (RW01) was Mr. Mishaal Atish Prasad. He was a Weighbridge Officer who worked for the LTA.s. He possessed a public weighman licence. A copy of it was marked in evidence as "REx01." On 02nd of March 2018 he issued a TIN to Atish Sen trading as Senson Transport Service. Copy of the TIN was marked as "REx02." The company was booked for overloading booking. Is permitting another person to drive motor vehicle with non-confirming mass plus load. Mr. Vikash Dutt Sharma was the driver of the motor vehicle. Company was booked in Nukuwatu, Lami. The vehicle was a Twelve-wheeler truck with registration number HT 765. Nukuwatu road is a public road. They used portable scales to weigh the vehicle. The vehicle carried a container of rice. It was a 20-foot container. Total weight of the truck was 35.14 Tonnes. It was supposed to carry, the actual gross weight is 26.8 Tonnes. The truck was in excess wight of 8.34 Tonnes. On the date of the incident, they were carrying overloading operation along Suva, Nassori, Lami side. Weighing of the vehicles was done by using the portable weigh scales. Truck HT 765 which carried a container of rice found overloaded. A TIN was issued to it, which the weigh slip was attached to the TIN. The weigh slip has the truck number, the weight, the driver details, and the drivers licence number. It has his signature and his licence number also. Driver's signature is also there. Weigh sip marked as "REx03." Vehicle extracts of vehicle is marked as "REx04." In that the laden mass is shown as 26.4 Tonnes. But at the time they issued the TIN they obtained vehicle extract and according to it laden mass was 26.8 Tonnes. There were deference of 0.4 tonnes. But what ever the difference, the truck was still in excess of 8 tonnes.
24. In cross-examination RW01 stated that the TIN was issued to the driver and not served to Atish Sen. Some of the twelve wheelers were given laden weight of 26.8 while some of them was given 26.4. It depends on the time that the Vehicle Extract was printed. Vehicle Extract REx04 was printed on 06-04-2022 and it stated the laden mass as 26.4 tonnes. But at the time of making the TIN the vehicle's gross weight should be 26.8 tonnes. When they carried out overload checking, they check the vehicle sticker given by the examiners who are at LTA to verify the weight. He doesn't have the vehicle registration label with him. It was suggested to him that the TIN was made in an error, of which he refused to accept.
25. In re-examination witness stated that the TIN was served to the driver and the driver is acting as an agent of the company. The LTA soft, where he got the vehicle extract at the time of the booking reflects the old values. They can cross

- check the weights from LTA soft. The vehicle examiners update. At the time of the booking, he cross checked the data, and it was 26.8 tonnes.
26. The Second witness for the prosecution (RW02) was Mr. Joeli Kini He was an Inspector of Weight and Measures. His experience is 30 years. His duties are to carry out verification and certification on measuring and weighing instruments used for trade. He had tested portable scale PAT SAW Axie 10C Weigher Serial No. 85 -7245 for LTA in 2017. His signature there in the Certificate of Verification as the Verifying officer. Date of the test was 18-12-2017. Certificate is valid for 01 year and expires in 18-12-2018. Machine can be used for one year. The portable scale was in good conditions by 02-03-2018. After they did the calibration, they put a seal where they normally did the adjustments. If that seal was removed the scale was not valid. If the seal had been tampered with then the certificate would not be valid. If the seal is tampered or damaged the LTA would bring the scale back to their office for re-verification. If the seal was broken the weighing slip is not valid. Certificate of Verification is marked as "REX05."
27. In cross examination RW 02 stated that seal on the scale could be damaged because they use it on the road. Everyone who operates an equipment should possess an operators licence issued by the department. If it is tampered, it would give an incorrect reading. The equipment was tested in 2017. It was not checked in March 2018. He retired from the job in 2018. The certificate for 2018 would be I office. He left the job in 2018, he did the test in 2017.
28. In re-examination RW02 stated that as per Verification Certificate calibration was done in December 2017 and it was valid for 01 year. The certificate valid from December 2017 to December 2018. He left the job before March 2018.
29. By leading the above evidence, prosecution closed their case.

D. ANALYSIS AND FINDINGS

30. I now have to objectively ascertain the above evidence to consider:
- [i] Whether there is no evidence to prove an essential element of the charged offences; OR,
 - [ii] Whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict.
31. As described early in this ruling, the elements of the offense in the TIN is:
- a) A person (Atish Kumar Sen T/ A Sensons Transport Services),
 - b) permit to be driven, (to the driver of the vehicle HT 765 Vikash Dutt Sharma)
 - c) in a public street,

- d) any vehicle (Vehicle No. HT 765) having a wheel load, axle load or aggregate axle load in excess of the limits prescribed by regulation 80, commits an offence.
32. By the evidence of the booking officer Mr. Mishaal Atish Prasad (RW01) it was established that on 02-03-2018 the vehicle HT 765 a twelve-wheeler truck (the Truck) was transporting a container of rice through Nukuwatu, Lami in a public Road. Booking officer stopped the truck and measured its weight by a portable scale. This evidence was not discredited by the cross-examinations of the accused. According to RW01 the load in excess after the truck was measured scale is 8.34 Tonnes. The accused in his cross examination as well as in his submission tried to demonstrate the irregularity and challenged the trustworthiness of the measurements of weight taken by the portable scale on the Truck on that time. However, at this stage the Court is to evaluate those evidence subjectively. As provided by **Latchan** (Supra) case, this court has to consider objectively at this stage whether there are sufficient evidence for the elements of the offence. Accordingly, I hold that the prosecution submitted sufficient evidence to the elements comprising that the Truck HT 765 on 02-03-2018 driven on a public road with an excess load contrary to as prescribed by Regulation 80.
33. Regarding the remaining elements, the Court has to ascertain that whether there are evidence that submitted to the court to the effect that the accused (Atish Kumar Sen T/ A Sensons Transport Services) permitted the driver of the truck to drive that vehicle on the date of the incident with an excess of load. In other words, prosecution has to submit evidence that the Sensons Transport Service had permitted the driver of the truck HT 765 Vikash Dutt Sharma to carry an excess load to the destination on 02-03-2018. As described previously in this ruling, the fault element of the offence that is recklessness, should be included in the said evidence. Permission granted to the driver to drive this truck should be distinguished from the permission granted to drive this truck with excess load.
34. In considering the evidence lead before me and the documents marked as evidence, there is no evidence whatsoever to the effect that the accused company had granted permission to the driver of the truck to drive it with excess load to the destination on the date of the offence. Prosecution lead evidence of the Booking Officer and Inspector of Weight and Measures, but the driver of the vehicle was not called to give evidence. No document was submitted as admissible evidence to prove that the accused had permitted the driver. Therefore, the prosecution has not adduced any evidence on the aforesaid elements, including the fault element of this offence as well.
35. In **Land Transport Authority v Nasoqo Investment Ltd** [2021] FJHC 129; HAA029.2019 (26 February 2021), His Lordship Goundar J. stated:

“[27] For a company to be guilty of permitting a person to drive a motor vehicle with an excess load, the LTA is required to prove that the owner or the director of the company allowed the driver to drive the vehicle with an excess load.

[32] In this case, it was the driver of the vehicle who allegedly committed the traffic infringement acting as an agent of the company that owned the vehicle. A company is liable for an alleged traffic infringement by an employee if the employee was acting under the instructions of his employer at the time the alleged infringement occurred. Service of a TIN on an agent, is therefore, service on the principal under Regulation 5(2)(a).” (Emphasis added)

36. According to the above analysis, I hold that the prosecution has not submitted evidence to prove the essential elements of the charged offence.

E. CONCLUSION

37. Having considered all the evidence that was adduced on behalf of the Prosecution’s case, this court is of the view that the prosecution has failed to submit cogent and admissible evidence on essential element of the offence. As such a reasonable tribunal may not safely convict the accused on the count as charged.

F. ODERS OF THE COURT

38. Accordingly, I find that there is no case for the Accused to answer. Thus, this court acts under section 178 of the Criminal Procedure Act 2009 and dismiss the TIN and the charge.
39. Accused is acquitted accordingly.
40. Land Transport Authority is hereby ordered to refund the Accused forthwith the fine paid under the above TIN, if any.

G. RIGHT TO APPEAL

41. 28 days to appeal to the High Court by or with the sanctions of the DPP.

At Suva, on this 06th day of July 2023.



Lakshitha Jayawardhana
Resident Magistrate