IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 30 of 1978

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BETWEEN:

VIJENDRA KUMAR SHARMA s/o S.R. Sharma — Appellant

-and-

R E G I N A M — Respondent

Mr. K.N. Govind, Counsel for the Appellant
Mr. D. Williams, Counsel for the Respondent

JUDGMENT

The appellant was convicted for driving without due care and attention and was fined $20.00.

The evidence revealed that the appellant's motor vehicle was involved.

On 8/8/77 about 2 a.m., RAM UDIT, a night watchman in Ba, heard a thud or crash which brought him out into the King's Road where he saw the appellant's car had mounted the pavement and struck a lampost. Other prosecution evidence showed that the car was facing the direction of Tavua from Lautoka. Ram Udit saw the appellant and another person standing near the car.

When the police arrived on the scene the accused had departed and he was interviewed about 5 weeks later. He informed the police that he had driven from Lautoka and explained that 5 or 6 dogs had run across his path causing him to swerve and he had travelled across to the wrong side of the road and hit the lampost,

The appellant's explanation to the police was exculpatory in nature but it was also in the nature of an admission and since it was tendered in evidence by

the prosecution it would need to be considered as a whole. At the close of the prosecution case the appellant offered no eivdence but merely made an unsworn statement in which he confirmed what he had said to the police.

In a short judgment the learned magistrate observed that a reasonably prudent driver would not have swerved so violently in order to avoid dogs and he could have used his brakes and concluded that the appellant was going too quickly or was not keeping a proper lookout.

The defence state, and I accept, that the learned magistrate remarked that the doctrine of res ipsa loquitur has application in criminal cases.

There are 2 grounds of appeal.

The first is that the prosecution adduced no evidence of negligence and the second is that the magistrate erred in holding that a finding of res loquitur sufficient to support a civil action for negligence would be sufficient to support a finding of careless driving.

Clearly the magistrate's finding of a case to answer turned on the fact that at 2 a.m. on a broad main street devoid of traffic the accused drove his car over to the wrong side of the road, mounted the causeway and hit a lampost. He was not impressed by the appellant's explanation to the police.

Mr. Govind, for the appellant, submitted that by relying upon the doctrine of res loquitur the magistrate had placed a burden upon the appellant of disproving careless driving on his part. He also submitted that the appellant's explanation about dogs running across his path had been disregarded.

He also referred to the appellant's unsworn

statement in court adopting the explanation to the police and intimated that it thereby became evidence. I pointed out to Mr. Govind that an unsworn statement was not evidence and that to adopt by way of unsworn statement an explanation made to the police cannot give that explanation the force of sworn testimony. It has not the weight of an oath behind it and has not been tested by cross-examination. That does not mean to say that because it is an exculpatory statement it is to be entirely ignored. The prosecution put it in evidence and therefore it would carry weight as the magistrate felt it was worth in all the circumstances, as was lucidly pointed out by Harry J. in Donaldson v. Police, 1963 N.Z.L.R. 750 to which Mr. Govind referred.

Turning now to the so called doctrine of res ipsa loquitur I see no reason why it should not be applied in trials of dangerous and careless driving but of course its application is bound to be restricted. It depends upon what one means by the expression "res loquitur". Charlesworth, On Negligence, 6th Edn. p.168 (264) quotes Megaw L.J. as saying:

> "I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a commsense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."

The learned author also states that Lord Denning M.R. in Truner v. Mansfiled Corp. The Times, May 15 1975 observed that res loquitur was only a rule as to the weight of evidence from which negligence could be inferred and could not accurately be described as a doctrine.

The maxim comes into operation when some occurance which is unexplained would not ordinarily

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have happened without negligence on someone's part and the circumstances point to a particular individual. In Civil Actions it is sufficient to put the plaintiff's case on to a strong enough basis to initiate proceedings and gives the defendant something to explain. It is not, as Mr. Govind's argument suggests, a presumption of negligence which someone has to rebut; there is not a presumption of negligence casting an onus on the appellant to prove an absence of negligence. There is no suggestion of this in the magistrate's judgment. The facts, i.e. the occurence, speak for themselves and in the absence of any evidence from the appellant they still have to be considered by the Court. As was pointed out by Henry J. (supra) at p. 753 where a motor lorry travelling at 15 m.p.h. mounted the nearside pavement and struck a telegraph pole before regaining the roadway those factors alone would be sufficient to establish the charge of careless driving, and he said,

> "They are sufficient in the ordinary course of events to call for an explanation."

The learned judge then went on to consider the explanation given to the police by the accused who did not give evidence upon oath. For reasons which he set out the judge found that the explanation given to the police that a cat had run across the path of lorry causing the driver to swerve was acceptable. The learned magistrate had not considered the explanation at all on the ground that it was exculpatory. The learned judge held that he should not have excluded it.

In Doreen Rose Gosney v. R (1971) 55 Cr.App.R. the Court of Appeal at p. 508 stated what in that court's view constituted dangerous or careless driving. They said,

> "It is not an absolute offence. In order to justify a conviction there must be, not only a situation which viewed objectively, was dangerous, but there must also have been some

> fault on the part of the driver, causing that situation ——————————————————————————————— The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation."

Pausing at that stage, it is perfectly clear that the Court of Appeal is saying that the situation speaks for itself and can point towards careless or dangerous driving. In Gosney's case the driver was proceeding at a fairly fast speed, at night, down the wrong side of a dual cause-way. The driver showed that she had joined the road from a country lane and there was nothing to show that this was a dual causeway or that she should not turn right when she entered it. The Court Of Appeal further stated,

> " But if the driver seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense he may not be precluded from seeking to do so."

They then went on to indicate by reference to Spurge's Case (1961) 45 CR.APP.R. 191, that the burden of proof still remained on the prosecution. In the latter case the Court stated that although the burden rested on the prosecution this did not mean that the prosecution had to anticipate and meet every possible defence which the defence may put forward, and that their failure so to do would entitle an accused with some special defence e.g. mechanical defect, to say that there was no case to answer because the prosecution had not given evidence of the absence of any mechanical defect. The accused, if he relied upon such a special defence should according to Spurge's case put it forward in evidence and then it would be considered with the rest of the evidence. It then depends upon the jury as to whether or not the special defence raises any doubt in their minds.

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It is to my mind clear that when the learned magistrate used the expression "res loquitur" he was merely echoing what superior tribunals in New Zealand and England had already said, namely the situation often speaks for itself. His use of those words was not a way of imposing any peculiar onus or liability upon the accused to prove his innocence. They merely meant that there was a situation which in itself and without any further explanation shows that someone was careless enough to drive from the nearside to the offside of the road and hit a lampost on the offside cause-way.

The appellant in the instant case told the police that some dogs had run across his path causing him to swerve. His explanation was part of the evidence presented by the prosecution. The magistrate did not exclude it but, on the contrary, took it into consideration when he decided that there was a case for the accused to answer. Therefore when the accused in his unsworn statement simply said he relied upon what he had already said to the police he was adding nothing to the general picture which was before the learned magistrate.

In his judgment he found the appellant's explanation unacceptable. It was not supported by evidence tested by cross-examination. One cannot say that he dismissed it out of hand. He did not. He refused to it. He gave to it the weight which he thought it deserved and in so doing he adhered strictly to the approach recommended by Henry J. in Donaldson's case.

Mr. Govind for the appellant submits that the instant case is on all fours with Donaldson's case but that is not so. In Donaldson's case the learned magistrate refused to consider the explanation tendered by the driver to the police because it was not supported by sworn evidence during the trial from the driver. In the instant case the learned magistrate did not dismiss the appellant's explanation to the police; he gave it the weight he considered it was worthy of. After

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considering the appellant's explanation he found him guilty and gave his reasons.

The magistrate in question was by no means inexperienced. I cannot say in the circumstances of the case and in the light of the accused's unsworn explanation that the magistrate came to a conclusion which was not consistent with the evidence before him.

The appeal is dismissed.

LAUTOKA,
26th May, 1978.

(sgd.) J.T. Williams,
JUDGE.

Messrs. Govind & Co., Counsel for the Appellant
Director of Public Prosecutions for the Respondent.

Date of Hearing: 28th April, 1978