IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 122 of 1978

BETWEEN: DAVENDRA KUMAR s/o Bhagauti Prasad
Appellant

- and -

R E G I N A M: Respondent

Mr. G.P. Shankar, Counsel for the Appellant

JUDGMENT

The appellant pleaded guilty to five motoring offences as follows :-

Count I & II	Causing death by dangerous driving Contrary to Section 269(1) P.C.
Count III	Dangerous driving Contrary to Section 38(1) Traffic Ord.
Count V	Driving without valid driving licence Contrary to Section 23 and 85 Traffic Ord.
Count VI	Carrying excess passengers C/R. 55 & 125 Traffic Reg.1974.

The fourth count alleging that the appellant was under the influence of drink was withdrawn.

The appellant was driving a light van from Ba to Tavua at 7.30 p.m.

A large truck with its front wheels in a ditch was completely blocking the appellant's half of the road.

Police were directing traffic with a torch and had parked a Land Rover with head-lights on to warn approaching traffic. People had collected in the vicinity.

The appellant had 10 passengers in his goods van instead of 3 but I do not accept the Crown's contention that this was a case of over loading in the sense that the load was beyond the van's regulation weight. However with that number of passengers in a goods van I would expect the appellant to drive with especial care.

He ran into the rear of the motor lorry and his van careered into a ditch. Two of his passengers were killed and photographs show that the van was very extensively damaged on its rear side.

The learned magistrate imposed sentences of 9 months' imprisonment concurrently on counts I & II; $50 or 3 months on Count III (dangerous driving); $10 or 10 days and $20 or 1 month on Counts IV & V respectively.

The appellant appeals against his conviction for dangerous driving on Count III. He referred to the learned Chief Justice's comment, in Bail Application 6/78 when he was granted bail pending appeal against sentence, that the charge of dangerous driving could not stand as it arose from the incident which gave rise to the charges of causing death by dangerous driving, and the dangerous driving conviction merged into the more serious convictions for causing death by dangerous driving. The learned Chief Justice relied upon R v. Harris 1969, 53 Cr.App. R. 376, at 379.

Harris's case differs from the instant case in its background. He was convicted of buggery of a boy and for indecently assaulting him in the course of the buggery. The Court of Appeal pointed out that one and the same incident should not be made the subject matter of distinct charges. They stated that a single offence could give rise to a multiplicity of charges and great unfairness could ensue. Accordingly the conviction for indecent assault was quashed.

Many other illustrations of the Court of Appeal's ruling can be recounted e.g. assault with intent to main, disfigure etc. can be joined with the alternative charge of assault occasioning bodily harm, but a conviction on the major charge embraces the minor and it would be unfair to record two convictions.

A woman cannot be raped without being indecently assaulted. On a conviction for the substantive charge of rape it is unnecessary and unfair to return an additional conviction for indecent assault which merges into the more serious charge.

Nevertheless one has to examine the circumstances carefully because the offences charged may not be of the kind which merge. Thus a man may be convicted of rape and of wounding with intent to disfigure by hammering his victim's face in order to make her submit. The disfigurement was not a necessary step in the act of rape.

Again a man throws a stone at a passing bus smashing a side window and injuring a passenger with the stone and cuts from broken glass.

There are separate offences of stoning the bus and of causing Bodily harm. The offences do not merge although arising from one action.

Recently a man who set fire to a bus was also convicted for the additional charge of arson of a dwelling house which caught fire from the blazing bus which was in very close proximity. A conviction for burning the bus would not merge into the conviction for arson or vice versa because one was not bound to be committed in perpetration of the other.

In the instant case, Crown Counsel has rightly pointed out that dangerous driving is an offence arising under The Traffic Ord. Cap. 152, whereas causing death by dangerous driving arises under S.269(1) of the Penal Code. However, both offences have one thing very much in common, namely the reference to dangerous driving. The major offence cannot exist without the other.

In my opinion causing death by dangerous driving and dangerous driving are essentially alternative offences and a conviction for the greater necessarily embraces the lesser offence. Accordingly I quash the conviction for dangerous driving but allow the appellant's plea of guilty

thereto to remain on the record.

The need for imprisonment on a charge of causing death by dangerous driving depends not on the consequences i.e. the causing of death but upon the manner of the appellant's driving. It is an offence which requires no intent and therefore one cannot necessarily be guided by the disastrous consequences of the accident. The most reckless driving may involve a 'bus full of passengers in a terrifying crash without loss of life or serious injury and the very guilty driver does not face a charge of causing death by dangerous driving. On the other hand a moment's mental aberration on the part of another bus driver who had been driving with great care might result in many deaths and his less guilty conduct will give rise to the more serious charge. It will be no defence for him to say "Well there was only a slight degree of negligence" - R. v. Evans 1962; 3 AER. 1086 at 1088. However, it will be a factor in determining whether or not the driver goes to prison. If the deaths had resulted from reckless driving on the part of a selfish driver then he would most probably go to prison. One has to carefully

examine the manner of the driving which caused the accident and all the attendant circumstances.

The classical judgment guiding courts and setting out the principles to be considered in charges of this nature is contained in R. v. Guilfoyle 1973 2 A.E.R.844 to which the learned Chief Justice drew attention in the above mentioned bail application. In it the Court of Appeal indicated that the element of drink was one to be considered, but of course this would have to be carefully examined. I feel it is unnecessary for me to reiterate the guidelines laid down in R.v. Guilfoyle (supra). It has been done several times in Fiji.

What was the quality of the appellant's driving? What evidence is there of recklessness or drink, or a selfish disregard for the safety of others ? There was no evidence led on the quality of the appellant's driving because he had pleaded guilty. Although he had been charged with driving under the influence of drink it was withdrawn. Therefore it was essential that the prosecution should carefully outline all that was known of the appellant's

conduct, driving and his behaviour before and after the accident. There were police at the scene and their precautions taken to warn approaching traffic should have been detailed so as to indicate the extreme carelessness or deliberate recklessness displayed by the appellant, if any.

There was a police officer with a torch but where was he ? Was he flashing it at the appellant or at traffic from the other direction ? Was he some distance from the obstructing motor lorry trying to slow down oncoming vehicles say 40 yards from the scene? He may have been beside the truck and not much of a warning to anyone.

How was the police Land Rover parked? Its headlights were on but one meets stationary cars in main roads with headlights dipped or on full beam and the drivers are too stupid to respond to the "dipping lights" of approaching traffic. 'Buses frequently stop with headlamps blazing to pick up or set down passengers and the drivers are too lacking in courtesy or intelligence to dip their lights. The appellant noted the Land Rover

headlamps and dipped his own. What was there to draw his attention to the fact that those headlights were intended as a danger signal ? If the appellant could not see clearly because of those lights and did not slow down on the assumption that the road ahead was clear then he was negligent. But it was not necessarily a reckless negligence demonstrating a complete disregard for the safety of others. There is nothing in the prosecution outline of facts to point to the degree of carelessness. The facts do not reveal that the appellant must have known there was danger and took a deliberate chance in spite of timely, clear and unambiguous warnings of danger. On the contrary the facts show that he did not see the lorry until it was too late and in trying to avoid it his rear side struck the end of the motor lorry. On the facts presented it is not apparent that he failed to see the lorry because of gross carelessness or that although he saw it in sufficient time he tried to avoid it without slowing down thereby taking a serious risk. Why was the appellant charged with driving under the influence of drink? If there was evidence that he had been drinking this should have been

stated in the facts if his behaviour in any way reflected on drinking.

Laymen frequently criticise what they regard as excessive leniency by the Courts in cases of what they very wrongly term "motoring manslaughter." It should be borne in mind that causing death by dangerous driving is a very different offence from manslaughter. Motorists being human beings are not perfect and at any given time are prone to errors, misjudgments, and acts of negligence which may or may not cause danger depending on the circumstances. But they have no intention as a rule of being careless or dangerous; they have no intention or desire to hurt the person who is perhaps the victim of that carelessness. On the other hand manslaughter is the result of an intention on the part of the accused to do some harm to his victim; it is not a matter of unintentional carelessness which results in a manslaughter charge. Therefore unless a motorist exhibits a reckless disregard for safety he is unlikely to be sentenced to imprisonment because unlike cases of manslaughter he had no intention to hurt anyone.

With respect to the learned magistrate there was not sufficient in the pauce facts presented by the prosecution to justify a conclusion that the appellant proceeded recklessly, and that he had ignored unambiguous and ample warnings or that he was so extremely negligent that he failed to see them. The mode of the appellant's driving was not shown to be such as to merit an immediate term of imprisonment.

The terms of imprisonment are set aside and in their place I impose a fine of $300 or 6 months' imprisonment on its I & II conncurrently, and the period of disqualification is upheld.

The conviction on count III is quashed.

(Sgd.) (J.T. Williams)
JUDGE

LAUTOKA,

7th November, 1978.