IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Labasa Criminal Appeal No. 24 of 1978

Between:

MOHAMMED HANIF s/o GOWAR ALI

and

REGINAM

JUDGMENT

This is an appeal against the conviction of the appellant by Labasa Magistrates Court on 29th June 1978 of causing death by dangerous driving contrary to section 269(1) of the Penal Code, driving without a driving licence contrary to section 23(1) of the Traffic Ordinance, and using a motor vehicle which was not insured against third party risks contrary to section 4(1) of the Motor Vehicles (Third Party Insurance) Ordinance.

The prosecution evidence established that a van which was being driven in the direction of Nabouwalu proceeded in a zigzag manner and then overturned, resulting in the death of a passenger. Upon an inspection of the scene by a police investigating officer the van was found to have overturned on a straight road without having struck any other object, and the front right tyre was found to be punctured. On the same day the van was examined by a motor vehicle examiner who reported that the puncture to the front right tyre may have

been caused by a sharp object one quarter of an inch long. Upon the appellant being interviewed some days later he denied that he was driving the van but confirmed that at the scene he saw that the front right tyre was punctured. It would appear from the cross-examination of the police investigating officer that he also interviewed one Tahir, who claimed that he was driving the van at the time of the accident and that the tyre had burst.

At the close of the prosecution case, defence counsel submitted that there was no case to answer, his ground being that the van had not been involved in a collision with another vehicle or with any other object and that the only way to account for what had occurred was that the tyre had burst, which did not constitute dangerous driving.

The trial Magistrate properly held that there was a prima facie case to answer, but gave his reasons which he should not have done. As this Court pointed out in R. v. Sepeti Vakararawa (Suva Cr.App.No. 13 of 1973):-

> "To give reasons at that stage may create the impression that specific findings of fact are being arrived at without the defence having been heard and it is an undesirable practice. If a Court finds that there is no case to answer it is of course necessary for the Court to give its reasons, as it concludes that trial. But on finding that a prima facie case has been made out it is usual for the Court only to rule that there is a case to answer and to put the accused on his defence, and this is the better practice."

In giving his reasons the trial Magistrate stated: "There is evidence that the van ... somersaulted after proceeding in a zigzag manner and ended up on its side with the deceased underneath. It behaved in an abnormal way. There is no evidence to shew whether the right front tyre was punctured before or after the vehicle somersaulted"; from which it is clear that at that stage the trial Magistrate had the matter of the punctured tyre in mind, although he may have overlooked that there was some evidence that the tyre punctured before the vehicle somersaulted, in that the motor vehicle examiner's report shewed certain damage to the vehicle as a result of the accident, including the hood having been punctured, but did not include the tyre as having been punctured as a result of the accident. However as the report of the motor vehicle examiner was produced under the provisions of section 184A of the Criminal Procedure Code, instead of his being called as a witness as he should have been in the circumstances of this case, the findings of the motor vehicle examiner were not enlarged upon.

The appellant gave evidence denying that he was driving the van and called a number of witnesses, including Tahir who testified that he was driving the van at the time of the accident and that it overturned as a result of the front right tyre puncturing.

In his final address, defence counsel submitted firstly, that there was a reasonable doubt as to whether the appellant was driving the van, and secondly, that there was a reasonable doubt as to whether the van was driven in a dangerous

manner there being no dispute as to the tyre puncturing.

The trial Magistrate opened his judgment by stating:-

> "The real issue is whether the accused was driving the vehicle which caused the death, or he was not. If he was driving, then no explanation has been given for the abnormal way in which the vehicle behaved, causing the death of Santa Prasad."

The rest of the trial Magistrate's judgment was concerned with the evidence relating to the question of identification, and contained no reference to the punctured tyre.

The appellant submits that the trial Magistrate misdirected himself in holding that, in effect, the only issue was whether or not it was the appellant who was driving the vehicle; and I can come to no other conclusion, in which the Crown concurs, that in convicting the appellant the trial Magistrate failed to direct his mind to the relevance of the punctured tyre; that is to say, that having found that it was the appellant who was driving, the trial Magistrate failed to consider whether he was driving dangerously.

For a person to be convicted of causing death by dangerous driving the prosecution must establish beyond reasonable doubt that, viewed objectively, a potentially dangerous situation arose resulting in death and that one of the causes of that situation was the faulty manner of the accused's driving which fell below the standard of care or skill of a competent and

experienced driver (R. v. Rajendra Singh Suva Cr.App.No. 74 of 1978). Consequently if the danger is created by a sudden total loss of control, in no way due to any fault on the part of the driver, he is not liable (R. v. Spurge (1961) 2 All E.R. 688; applied in R. v. Gosney (1971) 3 All E.R. 220).

Sudden loss of control may be caused by a mechanical defect, but as Lord Goddard pointed out in R. v. Spurge (supra at 691): "cases in which a mechanical defect can successfully be relied on as a defence to a charge of dangerous driving must be rare indeed. This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor car in such circumstances is manifestly dangerous". (See also R. v. Robert Millar (1970) 1 All E.R. 577.)

It is for an accused to put forward the special circumstances which he maintains caused loss of control, but once they have been raised they must be considered with the rest of the evidence in the case, and if the Court is left with a reasonable doubt the accused is entitled to be acquitted.

In the present case the defence was put forward that the dangerous situation was created by a sudden loss of control due to the front right tyre puncturing; and it was necessary for the trial Magistrate in the end to consider this with the rest of the evidence, which he did not do.

... the appeal must be allowed, but as the trial Magistrate did not direct his mind to this aspect of the matter and ... finding thereon I consider it a proper case in which ... retrial; and consequently I shall not deal with ... and appeal which were raised.

... offences of driving without a licence and without ... party policy are separate issues I think it ... circumstances, that they also form the subject ... that all relevant evidence can be heard anew.

... be quashed and the case remitted to Labasa Mag... for retrial before another Resident Magistrate.

Chief Justice

Suva,
9th December ...