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IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CRIMINAL APPEAL NO. 83 OF 1980

Between:

FRANCIS RAMAN son of Behari Prasad — APPELLANT

- and -

R E G I N A M — RESPONDENT

J U D G M E N T

The appellant was convicted by the Magistrate's Court, Suva of careless driving contrary to section 38 (1) of the Traffic Ordinance on the 20th June, 1980. He was fined $45 in default 25 days imprisonment and his licence was ordered to be endorsed. He appeals against conviction and sentence.

The prosecution called three witnesses who actually saw the accident and the complainant who was injured in the accident. While it is not uncommon to have eye witnesses relate varying stories it would be difficult to find a case where four prosecution witnesses contradicted each other on so many material points.

On the 31st March, 1979 at 8 p.m. P.W.1 and a number of other Fijians were at 7 miles on the Kings Road. P.W.1 a 77 year old man was intending to return to Lagere. The story he related in Court was as follows :

He wished to cross the main road to the Nausori bus stop. He was crossing the road quickly and had crossed the white line in the centre of the main road when he was struck by a vehicle and was seriously injured. He said he looked before he crossed and the road was clear. He saw

no lights at all or any vehicles as he crossed.

P.W.2 was also intending to cross the road to the bus stop. He saw a motor cycle approaching from his right. Its light was dim. The motor cycle was on its left side of the road about 20 yards away. He said P.W.1 was standing in the centre of the road as a car was coming from his left. After the car passed P.W.1 continued on his way and had gone about 3 yards when he was struck by the motor cycle. He said the appellant's side of the road was clear at the time of the accident.

P.W.3 said that P.W.1 crossed the road in a hurry walking quickly and running. As he was crossing the white line she was about a yard behind him with her child. She then saw a motor cycle about 3 yards from her on her right. She grabbed her child and leaped back onto the footpath. There was one car just approaching from the Suva side (her left). When she looked back she saw P.W.1 lying on the road. She noticed no light on the motor cycle.

P.W.4 said P.W.1 was struck by the motor cycle when he was past the centre white line on the road. P.W.4 only saw the vehicle when it was quite close about 4 yards away. He said the side of the road the vehicle was travelling on was clear. He said P.W.1 did not stop before he was hit - he did not stop on the centre line. He saw no car coming from the Suva direction and the motor cycle lights were not on. He said he could have seen the motor cycle 10 yards away without lights if he had looked.

A police witness who investigated the accident found bloodstains on both sides of the centre line.

There was no evidence of the speed the appellant was travelling prior to the accident other than his estimate of 20 - 25 miles per hour. Only 1 prosecution witness saw him early enough to be able to state that the appellant was on his correct side of the road before the accident.

The appellant gave evidence. As he approached Kinoya junction he saw people on both sides of the road.

He said all of a sudden there were 3 or 4 people on the road who looked as if they were about tocross but they did not cross. When he was very close to them one of this group suddenly leaped in front of his motor cycle. The appellant had no time to avoid him. He said he did not swerve to the right.

Faced with this conflict of evidence the learned Magistrate looked for and found only one alleged fact that all prosecution eye witnesses testified to and that was that P.W.1 had crossed the centre line of the road before he was hit. How far past the centre line he had gone is not known. The Magistrate was of the view that the appellant struck P.W.1 on the wrong side of the centre line. He was also of the view that if P.W.1 had got anywhere near the centre line of the road before he was hit the appellant should have had time to avoidhim. The Magistrate considered the appellant had not been keeping a proper lookout.

The Magistrate stated :

> " I am sure the accused realised too late, swerved to the right and not the left and struck the old man where stated. It is for this reason he slithered to the right at first after impact.
>
> This evidence does not in any way show any danger in the way he was driving. It does clearly show a lack of due care and attention.

The Magistrate acquitted the appellant of dangerous driving and convicted him of careless driving.

Mr. Gates appearing for the Director of Public Prosecutions, conceded that the learned Magistrate had made very few findings of fact and that either there should be a retrial or the conviction should be quashed.

I favour the latter course. The Magistrate, who stated he was impressed by all the civilian prosecution witnesses, accepted their evidence as being correct about the point of impact. He went on to say in his judgment :

> "However, none of them either claim to have seen the accused prior to the collision on the wrong side nor do any suggest he was driving too fast."

What is amply clear from the evidence is that the appellant was suddenly presented with the situation of an old man running across the road and a mother and child close behind him. Accepting the only finding of fact stated by the Magistrate namely the point of impact the fact that the appellant swerved right instead of left in the agony of the moment is not indicative of failure to keep a proper lookout.

Proper evaluation of the evidence should have resulted in the Magistrate finding that P.W.1 was solely responsible for his own misfortune. It is a notorious fact however that drivers and pedestrians frequently fail to see the approach of a motor cycle. People are conditioned to looking for cars and the image of a motor cycle approaching often fails to register.

Accepting a point of impact somewhere across the white line on the road is too unreliable a fact on which to make an assumption that the appellant had time to see P.W.1 crossing the road if he had been keeping a proper lookout. It is in any event in my view an assumption not justified by the evidence which the Magistrate did accept.

The appeal is allowed. The confiction is quashed. The fine if paid is to be refunded to the appellant.

R

(R.G. KERMODE)
JUDGE

SUVA,

22.10 1980.