IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction

Criminal Appeal No. 89 of 1979

Between:

ABDUL SHAHEED s/o Karamudean — Appellant

and

REGINAM — Respondent

Sahu Khan & Sahu Khan for the Appellant
D. Williams for the Respondent

JUDGMENT

The accused pleaded not guilty in the Magistrate's Court to 3 traffic offences:-

(i) dangerous driving
(ii) careless driving
(iii) failing to stop after an accident contrary to Section 43 and 85 of Cap. 152.

He was acquitted of dangerous driving but convicted for careless driving. The magistrate upheld a defence submission at the close of the prosecution case that the 3rd count was defective in quoting the wrong subsection and acquitted.

He appeals against his conviction for careless driving and the Director of Public Prosecutions appeals against the acquittals of dangerous driving and of failing to stop after and accident.

Grounds 1 and 2 of the accused's appeal against his conviction can be read together as complaining that the magistrate failed to consider the defence case and erraneously concluded that the accused drove the car which was involved in the accident.

The driver of the other car was P.W. 1 and his passenger was P.W. 2. They said that as they drove from Ba towards Tavua at 10.30 p.m. on 11/11/78 a taxi travelling in the opposite direction collided with them. It was a glancing blow. The P.W.'s claimed to be on their correct side and that the taxi veered to their side and its rear bumper scraped along the side of their car and carried on without stopping. The taxi was not driving at a high speed. P.W. 1 turned and pursued it and noted its number as AB 336 and that it contained children.

P.W. 2 noted the number AB 336, the make and colour of the taxi describing it as a white Ford Falcon; he also observed that the passengers included an Indian woman and children. In cross examination he stated that the words "Tavolea Cabs" appeared on the door.

P.W. 1 tried to get the taxi to stop but he did not succeed and overtook it and reported to the police at Ba.

The defence evidence was an alibi in which the accused admitted being the driver of a white Falcon Taxi AB 336 on the day in question; that he had been to Tavua and returned from Tavua to Lautoka therefore following the same route as the offending vehicle, and that the taxi bore the name Tovolea Cab. He also had his Indian wife and children in the taxi. In all these respects the defence evidence was not in conflict with the prosecution. However, the accused said that he left Tavua about 6.30 p.m. arriving at Lautoka at 8.00 p.m., and that he was about 40 miles away in Lautoka having yoqona with his friends when the alleged accident occured. D.W. 2 stated that he was with the accused in Lautoka during the evening.

In support of the first ground of the accused's

appeal Mr. R. Sahu Khan complained that the learned magistrate had not considered the defence evidence and had not shown whether or not he disbelieved the defence witness.

The learned magistrate briefly set out in his judgment the prosecution case and the alibi defence He noted the coincidence that the accused was driving a taxi from Tavua that day, that he had an Indian woman and children in the taxi. The only difference in their evidence was as to time. He stated that he believed the prosecution witness. He had seen them and heard them. Their conduct in pursuing the offending vehicle was in my view consistent with persons who had been bumped by a car which did not stop. In stating that he believes certain witnesses a magistrate does not have to record a detailed examination of all the evidence. A magistrate's judgment does not have to be recorded in the same manner as a judge's summing up. It is sufficient that he shows that he has considered it and that he reveals whom he believes - see Vunivate Draunimasi v. Reginam Criminal Appeal 25/77 (Lautoka). The learned magistrate in the instant case stated that he had noted the demeanour of the prosecution and defence witness.

In my view there was every indication that the magistrate had considered and weighed the evidence.

Grounds 1 and 2 of the accused's appeal fails.

Ground 3 seems to be a standard ground thrown in as a make weight in criminal appeals. It alleges that the finding of guilt cannot be supported by the evidence. There was ample evidence which the magistrate believed and which pointed to the accused's guilt on count II of careless driving.

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The appeal as against count II fails.

Turning now to the Director of Public Prosecutions appeal against the acquittal on count I for dangerous driving the evidence does not show that the accused was consciously on the wrong side of the road; that he deliberately drove a reckless or dangerous rather than careless driving. The learned magistrate arrived at a finding of carelss driving on the facts he had found proved and I would hesitate to express the view that he was in error.

The Director of Public Prosecution's appeal on count I fails and the acquittal for dangerous driving is confirmed.

The Director of Public Prosecution also appeals against the finding that the charge on count III of "failing to stop" is defective.

The learned magistrate held that count III was bad in that the offence is created by Section 43(1). In his view it is created by Section 43(4)(b). Section 43(1) and Section 43(4)(b) read as follows :-

"43(1) If in any case, owning to the presence of a motor vehicle on a road -

(a) an accident occurs whereby personal injury is caused to a person other than the driver of that vehicle, or

(b) damage is caused to a vehicle other than the motor vehicle or a trailer driven thereby or to an animal other than an animal in or on that motor vehicle or a trailer driven thereby,

[the driver of the motor vehicle shall stop and if required so to do by any person having reasonable ground for so requiring, give his name and address and also the name and address of the owner and the registration number.]

(4) Any person who -

(a) fails to comply with the provisions of subsection (1) of this section in a case where personal injury has been caused, shall be guilty of an offence and on conviction shall be liable to a fine not exceeding two hundred pounds or to imprisonment for a term not exceeding two years;

(b) fails to comply with the provisions of subsection (1) of this section in a case where personal injury has not been caused, shall be guilty of an offence and on conviction shall be liable to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;"

It will be observed that it is Section 43(1) which imposes upon a driver the duty of stopping when an accident occurs and it also sets out the action he must take when he stops. One cannot say that subsection one which imposes a duty, the contravention of which constitutes an offence, does not help to create the offence. If no duty were imposed by subsection one then it could not be contravened.

Section 43(4)(b) does indicate that an offence is created by failing to comply with section 43(1) and it sets out the penalty. But I cannot accept that an omission to refer to subsection (4) (b) makes the charge a nullity. Indeed it is incorrect to say that the count refers to the wrong section because the offence does come under section 43. The offence is that the accused, contrary to the requirements of section 43(1), failed to stop, and that is what is alleged in Count III. Section 43(4)(b) does not create any duty therefore one cannot contravene it.

Mr Sahu Khan contended that Section 43(1) created 2 offences as set out in (a) & (b) thereof one being referable to personal injury and the other (b) referring to damage where there is no personal injury. But (a) and (b) are not

drafted as separate paragraphs, they are not even separate sentences; in fact the whole of subsection one is contained in a single sentence. It imposes the same duty on a car driver whether he caused personal injury or material damage, which is to stop and to give certain particulars if required. Subsection 4(a) imposes $400 fine or 2 years imprisonment for failing to stop after causing personal injury and subsection 4(b) imposes $200 or 6 months imprisonment where there is no personal injury. The gravamen is a failure to stop but the consequences of that failure are more serious to the offender where the accident has resulted in personal injury. It would be drawing a very fine distinction to hold that a failure to stop after causing personal injury and a failure to stop after damaging property only were completely separate offences. It frequently happens that a motor accident causes personal injury and damage to property but it is unlikely that two offences of failing to stop would arise as against the driver who did not stop. At most one can only say the charge or count could have been more explicitly drafted. Had there been a conviction on count III then on an appeal based on the ground that the charge on count was void I would have taken the view that it was not void but that it was not satisfactorily drafted although not so as to cause any injustice and I would, if need be, have applied "the proviso". Such a course was taken by the Fiji Court of Appeal in C.D. Skipper v. Regina Criminal Appeal 70/78. Vol.II 1979 cyclostyled reports 305 at page 19 to 24 where the wrong section had in fact been quoted in the statement of offence. In my view it was not erroneous to charge count III under Section 43(1) but it would have been preferable to state the offence as "Failing to stop after an accident contrary to Section 43 subsections (1) and (4)(b) of Cap.152".

With respect to the learned magistrate I am of the opinion that he erred in holding that the

charged in count III was so defective as to be a nullity.

It is ordered that the learned magistrate shall continue the hearing on Count III by calling on the accused to make out his defence thereto.

(Sgd)

LAUTOKA (J.T. WILLIAMS)
1st February, 1980 JUDGE