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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUKOKA

Appellate Jurisdiction

Criminal Appeal No. 92 of 1979

BETWEEN : GOPENDRA NATH SHARMA
s/o Raj Bali Sharma . Appellant

AND : R E G I N A Respondent

Mr. R.S. Shankar Counsel for Appellant
Mr. D. Williams Counsel for Respondent

JUDGMENT

This is a motorist's appeal against 3 convictions connected with an absence of lights on his truck and driving at night. The petition has numbered the counts in reverse order referring to count III as count I but I will adhere to the numbers given to them on the police charge sheet.

Counts I & II allege driving without lights C/Regs. 64 & 65(3) respectively of the Traffic Regulations and the appeals thereon can be disposed of very shortly. Mr. D. Williams, Principal Crown Counsel, did not support those convictions on the ground that counts I & II were defective in that the particulars failed to allege that the driving occurred at night. The omission in each case was of something going to the very root of the alleged offence. The appeals on counts I and II must be allowed:

Count III alleged that the appellant drove his truck at night when the red rear reflectors were obscured C/R. 65(1).

The grounds of appeal were -

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- (i) that there was no evidence of the time the sun had set consequently nothing to show that the appellant was driving at night;
- (ii) that the learned magistrate had erred in not accepting the evidence of a witness from the weather office as to the state of visibility at the material time.

"Night" is defined by the Traffic Regs, 1974 as the period between sun-set and sun-rise. The evidence showed that the appellant was driving his truck at 6.30 p.m. and the appellant urges that there was no evidence to show that the sun had set prior to 6.30 p.m.

P.W.3 from the weather office stated that visibility at 7.00 p.m. on 13/4/79 was 7 miles and the appellant contends that that evidence points to it not being dark and therefore the sun could not have set. However, visibility is not necessarily a condition connected only with the intensity of daylight. Visibility may be remarkably good during the hours of darkness depending upon the clarity of the atmosphere. A light visible for 10 miles on a clear night may not be visible within a mile when the atmosphere is murky. The moon is visible on clear nights as well as the stars. There is no substance in that ground.

What evidence was there that the sun had set at 6.30 p.m.? P.W. 1, a Vehicle Examiner, saw the appellant driving his truck at that time. It was dark enough to require P.W. 1 to have all his lights on and to cause him to overtake the appellant more than once in an effort to stop him and get him to switch on his lights. The appellant ignored him. P.W. 2 said he was driving with his lights on at 6.30 p.m. and he saw the appellant's truck without lights. The darkness could have been due to a variety of reasons viz. a heavy storm and dark clouds, exceptionally hazy atmosphere, the sun having set.

The evidence of P.W. 3 (supra) showed that the atmosphere was very clear; there was obviously no storm cloud. A person who lives in Fiji knows that at 6.30 p.m. the sun may well have set and if it is dark at 6.30 p.m. when the atmosphere is clear and motorists generally have switched on their lights then the sun has no doubt set. I do not think the learned magistrate was in error in relying upon such evidence.

However, there was other evidence of a more conclusive nature which was made available to the learned magistrate and which he erroneously treated as inadmissible. It was from P.W. 3 (supra) who stated that he was in charge of the Weather Office and tendered the records showing that on the day in question the sun had set at 6.02 p.m.

Mr. Gordon for the defendant objected to that evidence on the ground that the record had not been prepared by P.W.3 himself and the learned magistrate upheld that objection. However, in spite of his objection being upheld Mr. Gordon in cross-examination proceeded to obtain from the witness the record of visibility during day time and at 7.00 p.m.

With respect to the learned magistrate I would regard the Marine Department and the Weather Office as public departments and public offices. Official documents therein would in my view be covered by The Public Documents Ord. Cap.33. It was stated in STURKA v. FRECCIA 5. App. Cas.623 at 624 that a public document is one made by a public officer for the purpose of the public making use of it. Under Section 2...

of the Ordinance it was sufficient for the prosecutor to tender the original records of the Weather Office showing the entries of observations on the weather recorded by the officers employed for that purpose, or for a certified copy of the record to be tendered to the court. The original record was tendered by the officer in charge of the records and he had been employed there for 38 years. It showed that sunset occurred at 6.02 p.m. The learned magistrate should have considered it.

In all the circumstances I consider that there was evidence to show that the sun had set prior to 6.30 p.m. The appeal on count II fails.

It is ordered that the convictions on counts I & II be quashed and that the fines imposed thereon be remitted if they have been paid.

The appeal on count III is dismissed.

LAUTOKA
1st February, 1980

(J.T. WILLIAMS)
JUDGE