000034

IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 25 of 1983

Between:

LAWRENCE PESI WONG — Appellant

and

REGINAM — Respondent

Mr. W.D.D. Morgan for the Appellant
Mr. K. Bulewa for the Respondent

JUDGMENT

On 17th January 1983 in the Suva Magistrate's Court appellant was convicted after trial of the offence of dangerous driving, contrary to section 38(1) of the Traffic Act and was fined $50. The case arose out of a collision between two motor vehicles on the Queen's Road at Lami, one of which was driven by the appellant who was at fault.

Appellant is appealing against his conviction on the following ground:

> "That the learned trial Magistrate erred in law and in fact in entering a conviction against the accused when the requirements of section 41 of the Traffic Act had not been complied with."

Section 41 of the Traffic Act provides as follows:

> "41. Where a person is prosecuted for an offence under any of the provisions of this Part of this Ordinance relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either -
>
> (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or
>
> (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or
>
> (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time

> and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence:"

It is common ground that appellant was neither warned at the time of the offence of a possible prosecution against him arising from the motor collision (section 41(a)) nor was a summons for the commission of an offence issued against him within fourteen days (section 41(b)) and nor was a notice of intended prosecution served on him within fourteen days of the offence (section 41(c)). That being so it is clear that in order to sustain appellant's conviction it must be shown that one or other of the two limbs of proviso (a) to section 41 was applicable to the circumstances of this case.

Proviso (a) states as follows:

"Provided that -

(a) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that -

(i) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or

(ii) the accused by his own conduct contributed to the failure; and"

It is clear that the first limb of the proviso was not applicable on the facts of the case. This leaves only the second limb of the proviso to be considered, namely whether the appellant by his own conduct contributed to the failure of service of the requiste notice upon him under section 41. Indeed it was upon this basis that the appeal was argued and as a result the trial Magistrate rejected the submission made on behalf of appellant that the trial was null and void for lack of jurisdiction to prosecute.

Evidence was given at the trial by the investigating officer in the case, P.C. Poasa (P.W.4), purportedly to establish that appellant by his own conduct contributed to the failure of a notice of intended prosecution being served upon him as prescribed by section 41. The evidence which was accepted by the trial Magistrate is summarised and evaluated in the following passage from his judgment:

> "I have however considered the evidence given by P.W.4 who stated that he had searched for the accused on numerous occasions and dates both at the C.W.M. Hospital, at his residence and at his place of work to serve notice and record his statement and failed to meet him P.W.4 on the following dates: 7.4.81, 8.4.81, 11.4.81, 15.4.81, 18.4.81, 20.4.81, 21.4.81. He had finally met the accused on 28.4.81 when the accused had reported back for work and recorded his statement. No Notice of Intended Prosecution had been served on the accused 14 days had already lapsed. It transpired that the accused had remained at home for three weeks and could not be contacted by the Police. I am satisfied on the evidence of P.W.4 which I accept, that the accused by his own conduct contributed to the failure by the Police to serve a Notice of Intended Prosecution."

With respect I do not think that on the evidence quoted above the trial Magistrate was justified in holding "that the accused by his own conduct contributed to the failure by the police to serve a notice of intended prosecution." I think it should be emphasised that at all material times the police were under statutory duty to serve such notice upon appellant. That they had not properly done so is clear from the evidence before the Court. The words of the trial Magistrate in this regard are noteworthy. He stated (see above): "it transpired that the accused had remained at home for three weeks and could not be contacted by the police". Clearly under the provisions of section 41 it was for the police to contact appellant and do all they could to serve the notice and not the other way round so that if the police chose not to exert themselves in the matter as they appeared to have done they did so at their own risk. It was well known to the police that appellant was staying at home because of his injuries in the accident but

000037

no police officer made any serious effort to get on to him. There was no evidence suggesting that appellant might have been engaged in a game of "hide and seek" with the police as to justify the assertion that by his own conduct appellant contributed to the failure of the police to serve a notice of intended prosecution on him. It seems to me that this was perhaps more a case of want of diligence on the part of the police regarding an important procedural requirement under the Traffic Act.

In these circumstances I must uphold appellant's contention that section 41 of the Traffic Act had not been complied with thereby rendering his trial null and void.

Counsel for respondent submitted that in the event of such a finding he would submit that this was a case in which the proviso to section 319 of the Criminal Procedure Code should be applied and that the appeal dismissed because no substantial miscarriage of justice had actually occurred.

The provisions of section 41 are clearly mandatory and in my respectful opinion could not be waived. To do so would defeat the intention of the Legislature that service of such a notice of intended prosecution was a necessary pre-condition for initiating a prosecution under section 41 of the Act.

Appeal is allowed and the conviction and sentence are set aside.

Chief Justice

Suva,
10th June, 1983.