IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 63 of 1983

BETWEEN : SACHIDA SEGRAN s/o Kaliappan Gounder Appellant

A N D : R E G I N A M Respondent

Mr. Kishore Govind, Counsel for the Appellant

Mr. S. C. Maharaj, Counsel for the Respondent

J U D G M E N T

On the 26th day of August 1983 the appellant was convicted after trial by Ba Magistrate's Court of causing death by dangerous driving contrary to section 238(1) of the Penal Code and was sentenced to a fine of $250.00 in default five months' imprisonment and was disqualified from driving for a period of two years.

The appellant has appealed against conviction and sentence.

As the Crown concedes that the conviction should not be upheld I do not consider it necessary to set out the details of the case, but shall confine myself to the material defects.

The appellant was driving a motor vehicle along Vatukoula Back Road at Navatu, Ba, when he knocked down and killed a small boy of about 5 years of age. The time of accident was about 4.30 p.m. The deceased and her sister, P.W.4, about 8 years of age were walking on their right hand side of the road. The sister was walking on the outer side of the road and the deceased on the inner side of the road. The motor car driven by the appellant came from the opposite side i.e. from the direction of Vatukoula travelling towards Ba town when this fatal accident took place. This accident took place on 13/3/82 but for some reason not apparent from the record no charge was filed until 11/8/82 and it took the Court almost one year to complete the case.

Most accidents are avoidable but not in every case is the driver of the vehicle concerned criminally responsible. Where children are involved one must avoid certain amount of prejudice against the driver, although naturally expecting a driver to be extra careful. But children sometimes run out in front of vehicles leaving a driver no chance of avoiding an accident, and the Court must consider very carefully the circumstances of every accident.

In this case there were apparently quite serious inconsistencies.

P.W.4, a child of very tender years gave unsworn evidence. The Magistrate was quite satisfied that she did not understand the nature of oath. Her testimony as a matter of law required corroboration (proviso to section 10(1) of the Juveniles Act). However, the question of corroboration only arises if the witness is otherwise to be believed. If the witness is not credible her evidence must be rejected, even if there could be found evidence capable of being corroborated in other testimony (D.P.P. v KILBOURNE (1973) 57 Criminal Appeal Report 381.

The evidence of P.W.4 when analysed is revealed as self-contradictory and inherently unreliable. While the trial Magistrate in his judgment realised her testimony discredited he failed to appreciate that her evidence was not worthy of belief.

P.W.4 said that she was walking on the right hand side of the road and the deceased was on her left. In her unsworn evidence she denied deceased tried to cross the road before being hit. In her statement to police dated 16/3/82 she said the deceased was on the side of road when hit by appellant's car. In her unsworn evidence she stated that she was coached by P.W.6, Sergeant Hari Narayan Singh, to say this. n her other statement to police on the day of accident (13/3/82) she said the deceased left her hand and all of a sudden ran in front of appellant's motor vehicle. The Magistrate ignored P.W.4's statement of 13/3/82 stating that the child was in an agitated state and seemed to pay more attention to her statement of 16/3/82 which she said was coached by Sgt. Hari Narayan Singh. P.W.1 had gone to the scene immediately after the accident but by the time he reached the scene the appellant had picked the deceased and rushed him to the hospital. The Magistrate in his judgment said -

"The P.W.4 received no physical injury at all leading support to her testimony that sometime before the accident the deceased had separated from the P.W.4 whose hand he had shortly before clutched.

It is a notorious fact that children of such tender years behave in the most unpredicted ways."

Doesn't this also lend support to the evidence given by the appellant that the deceased wasn't holding the hand of P.W.4 and all of a sudden ran in front of his moving car?

The appellant gave evidence on oath his evidence being the same story that he had earlier given to the police. He said he saw the two children walking from the opposite direction on the side of the road. The children were walking on their right side. He first saw the children about 1½ chains in front of him. The appellant was also on his correct side of the road. He said when he was about 5 yards away from the children the child suddenly ran in front of his car. The appellant swerved to his right to avoid the accident but it was too late. It is not that the appellant had failed to have a proper look out but had seen the child before the accident and had blown his horn.

I think from what I have already indicated that this version of accident is more probable than those given by P.W.4.

The Magistrate fairly correctly set out in his judgment the evidence given by the prosecution and by the appellant, but he did not analyse it in any way, nor did he in terms consider the appellant's evidence that the child had rushed across the road. He did not consider the discrepancies and inconsistencies or the probabilities in the prosecution case.

The Magistrate found as a fact hat the appellant had hit the child when the child was about onepace from the edge of the road.

P.W.7 drew the sketch plan of the scene of accident. He found broken pieces of glasses starting from appellant's left edge of the road and continuing diagonally acros to middle of road of some 77 feet. P.W.7 marked on the plan where he found broken pieces of glasses but there is no measurement shown on the plan that the broken pieces were found one pace from the left edge of the road.

The Magistrate recorded in abbreviated form the evidence of P.W.7.

P.W.7 in evidence said :

> "I drew sketch plan - this is Exhibit 5. I recorded measurements in plan. Tar-sealed road. Road 30' wide. Broken pieces of glass. (Marked 'X') and vehicle to front marked 'Y' - 77'. 'X' from side of road in left is 1 pace".

The Magistrate found the place marked 'X' on the plan as the point of impact. The glasses were scattered mainly on the left hand side of the road. P.W.7 did not collect any broken pieces of glass from the road. Next day P.W.8 who was the investigating officer went and picked only two pieces. It was virtually impossible to find the place marked 'X' on the plan as the actual point of impact.

The learned Magistrate emphasised the speed of appellant's vehicle. The appellant said he was travelling at 40 km/h. However, in considering a charge of this nature section 238(1) of the Penal Code requires the Court to have,

> "regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on the road, ....."

There was no evidence as to the amount of traffic to be expected but evidence as to the traffic at the time showed that the conditions were very quiet. There was nothing at all in the evidence to suggest that the road, traffic, weather or other conditions were such as to make it patently dangerous to drive at 40 km/h. One is entitled to expect that the pedestrian must wait until there is no danger from approaching traffic before commencing to cross. To my mind the evidence does not show that the appellant had a clear opportunity of avoiding the accident by applying his brakes.

Crown Counsel has not contested this appeal and conceded the conviction could not be upheld.

With respect to the learned Magistrate I take the view that the evidence could not justify the conviction.

The appeal is allowed. Accordingly, I set aside the conviction and sentence. If the fine has been paid it should be returned to the appellant. The order disqualifying the appellant from holding or obtaining a driving licence for 2 years is revoked. The endorsement on his licence is to be cancelled.

LAUTOKA,
20th January, 1984

(S. N. Sadal)
Acting Puisne Judge