

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 72 of 1983

BETWEEN : ROSHEN ALI s/o Akbar Ali Appellant  
AND : R E G I N A M Respondent

Mr. Iqbal Khan Counsel for the Appellant  
Mr. M. Raza Counsel for the Respondent

J U D G M E N T

Cases referred to:

- (1) R v Spurge (1961) 2 All E.R. 688
- (2) R v Gosney (1971) 3 All E.R. 220

This is an appeal from the Magistrate's Court at Lautoka. The appellant was convicted of dangerous driving.

The evidence indicated that appellant's vehicle swerved to the opposite side of the road at a bend, colliding with an approaching vehicle. The driver and passenger therein suffered injuries as a result of the collision. They both testified that as they approached the bend the appellant attempted to overtake vehicles in front of him and on the bend, thus causing the collision.

The appellant raised the defence of sudden mechanical defect. He testified that he had not attempted to overtake on the bend. His evidence was that as he approached the bend he experienced a puncture causing his vehicle to swerve. His evidence reads -

"Just before the Natabua bend I was following one bus. The bend is quite small. When I was behind the bus I felt my tyre got punctured. The car started to balance. The car pulled. I felt car got dragged to one side. The road was wet. I could not apply brake or else car would have tumbled. I came to my side."

A police officer who arrived at the scene of the collision shortly after testified that the "front tyre of the accused's motor vehicle was damaged. The rim was damaged." The complainant also testified that the front right tyre of the appellant's vehicle was flat.

Learned Counsel for appellant Mr. Khan submits that the appellant having raised the defence of sudden mechanical defect, the onus was on the prosecution to disprove such defence. He referred the Court to the authority of R v Spurge (1). In that case Salmon J. in delivering the judgment of the Court of Criminal Appeal had this to say (at p.691 at H):

961) 2  
R.688

"The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict."

Those dicta were approved by the Court of Appeal, Criminal Division in R v Gosney (2). The learned magistrate correctly observed that the onus was upon the prosecution to disprove the appellant's defence. He dealt with the issue thus:

971) 3  
R.220

"Accused said his tyre got punctured. Accused was very evasive when questioned on what part of the road the accident took place. Once he said the accident took place about a foot on other side of the road. It must be noted that P.W.1 was not cross-examined or any allegation made that he went on the incorrect side and hit Accused's motor vehicle. It was a very heavy impact. The rim of the tyre of Accused's motor vehicle was damaged. Accused said his car started to zig zag. If his car was zig zagging as he described it would have gone out of the road. Accused on oath said he was not in a hurry to go to hospital whereas in his interview with police he said he was in a hurry.

Both P.W.1 and P.W.2 could not be telling lies. Accused's motor vehicle was not zig zagging nor his tyre got punctured before the accident. As stated above Accused was very evasive. I accept the evidence of P.W.1 that the tyre of Accused's motor vehicle got punctured because of the impact and not before. Accident took place because Accused overtook a motor vehicle in front, went on his incorrect side of the road and collided with P.W.1's motor vehicle."

I do not necessarily agree with the learned trial magistrate that a swerving car must necessarily swerve off the road: much depends on the violence of the swerve or swerves. Again, I do not see how in the particular circumstances the complainant could offer any evidence as to the cause of the puncture: that, as I see it, was a matter for expert evidence. There was evidence of a front tyre rim having been damaged apparently in the collision: that did not however preclude the possibility of a puncture before the collision: indeed the tyre rim could well have

been damaged after a puncture, simply by contact with the road surface. The learned trial magistrate's observations must then amount to misdirections and the conviction can only be sustained if the first leg of the proviso to section 319(1) of the Criminal Procedure Code can be applied.


On the issue of credibility the learned trial magistrate found the appellant to be evasive and there is ample evidence to support this finding. He accepted the evidence of the complainant and his wife; and in particular their evidence that the appellant's car was not seen to swerve but approached them directly in an attempt to pass out other vehicles. That evidence is supported by the appellant's own evidence, or rather the contrast between his evidence and his statement to the police. In the statement he said that after the puncture he wished to avoid collision with the bus, which he was following, and fearing to swerve to his left onto tramlines, he swerved instead to the right into the path of the approaching vehicle. If it was the case that he was merely following a vehicle in front, then I fail to appreciate the necessity to deliberately swerve to either side on a bend in the road: surely the puncture would have caused the forward speed of his vehicle to decrease rather than increase. He testified at first that he did not brake and then that he did so, but "not very hard" and "slowly".

Again, whereas in his evidence he testified that "I felt car got dragged to one side", that is, that he had no control over his vehicle, in his statement the appellant informed the police that the swerving of his vehicle to the right hand side was brought about by a conscious decision and manoeuvre on his part. Further, at no stage did the appellant ever volunteer what tyre on his vehicle had suffered a puncture, not even whether it was a front rather than a rear tyre. The complainant gave such evidence, but one would have expected the appellant to have himself specified the tyre. There were other inconsistencies which the learned trial magistrate noted, as illustrated in the above extract from his judgment. Under the circumstances, I consider that the learned trial magistrate was fully justified in accepting the evidence of the complainant and his wife, namely, that the appellant's vehicle was not seen to swerve but instead caused the collision by attempting to pass other vehicles on a bend in the road, and in rejecting the appellant's explanation. I am satisfied therefore that had learned trial magistrate correctly directed himself on the evidence, he would inevitably have convicted the appellant and I apply the proviso accordingly. The appeal against conviction is dismissed.

(4)

As to sentence the learned trial magistrate imposed a fine of \$75 and ordered that the appellant serve two months' imprisonment in default thereof. He also ordered endorsement of the driving licence. Mr. Khan submits that the fine was severe. Under the provisions of section 38 of the Traffic Act, Cap. 152 (1967 Edition), section 35(1)(a) of the Penal Code and section 7 of the Criminal Procedure Code the learned trial magistrate could have imposed a fine not exceeding \$1,000. Although the appellant was a first offender the fine was nonetheless lenient. As to endorsement, it was mandatory under the provisions of section 38(2) of the Traffic Act. The appeal against sentence is also dismissed.

Delivered in Open Court at Lautoka This 6th Day of April, 1984



(B. P. Cullinan)

Judge