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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 75 of 1983

BETWEEN : BISUN DEO s/o Ram Charan — Appellant

A N D : R E G I N A M — Respondent

Mr. V. K. Kalyan — Counsel for the Appellant

Mr. M. Raza, Principal Legal Officer, Counsel for the Respondent

J U D G M E N T

Cases referred to:

(1)Baker v Longhurst (E) & Sons Ltd (1953) 2 K.B. 401

(2)Morris v Luton Corporation (1946) 1 All E.R.1

(3)Tidy v Battman (1934) 1 K.B. 319

(4)Tart v Chitty (G.W.) & Co. Ltd. (1933) 2K.B. 453

(5)Stewart v Hancock (1940) 2 All E.R.427

The appellant was convicted by the magistrate's court at Lautoka of careless driving. He appeals against conviction.

The vehicle driven by the appellant collided at night with a stationary taxi parked on the left side of the road. It was the taxi-driver's evidence that, having run out of fuel and parked his vehicle, "all lights (of the taxi) were on." The appellant testified that the taxi was unlit. A defence witness, apparently an impartial witness, who arrived at the scene of the accident, shortly thereafter it seems, and took the injured appellant out of his vehicle and placed him in another vehicle for transport to hospital, testified that the taxi was unlit when he saw it thereafter. He testified indeed that he asked the taxi driver whether his lights had been on at the time of the accident: the taxi-driver did not reply but instead went and switched on the illustrated taxi sign on the roof and also the front lights: the rear lights did not operate as apparently the rear of the taxi had been damaged in the collision. The taxi-driver admitted that he had been convicted before another court, in respect of the particular transaction, of having defective tyres and of parking his vehicle without displaying lights: he had pleaded not guilty to the latter charge, the evidence for the prosecution being tendered by three witnesses, including the appellant and the second defence witness in the present case.

As to the position of the taxi when parked, the taxi-driver testified that only the two right tyres were on the roadway, "the rest of car (was) on grass verge", he said. The appellant testified that all four wheels were on the roadway and that the left side of the taxi was as much as two feet from the edge thereof. A police officer, who on the record must be regarded as an independent witness, arrived on the scene. He found that the "private car front bonnet and all parts (were) damaged"; the "taxi was damaged at rear", Considering that both rear lights on the taxi were inoperative it seems the damage was not limited to one point at the rear. Judging by the damage to the front of the appellant's vehicle, it appears that his vehicle struck the rear of the taxi squarely, rather than a glancing blow caused by, say, the left front of the appellant's vehicle coming in contact with the right rear of the taxi. This aspect is borne out by the brake-marks caused by the appellant's vehicle at the scene, which stretched some 9.9 metres back from where the appellant's vehicle came to rest on the left side of the road, near to the centre line of the road: the brake-marks curve slightly towards the centre of the road, possibly indicating avoiding action on the part of the appellant. The police officer opined that the point of impact was apparently at a point 1.2 metres from the edge of the road. As against that he said that the "point of impact (was) in middle of Ba half of road," that is, in effect, 1.9 metres from the edge of the road. Quite clearly therefore, the taxi driver could not have been telling the truth as to the position of his vehicle.

The learned trial magistrate apparently accepted, on the basis of the taxi-driver's previous conviction, that the taxi was unlit. His judgment in part reads:

> "It goes without saying that because a witness has given untruthful testimony about one aspect of the matter it does not follow either as a rule of law or as a matter of course that the court must treat all his evidence as discredited.
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> However, I have warned myself that if I consider this witness's evidence relevant it should be submitted to the closest scrutiny before acceptance and if accepted, to determine the weight that should be attached to it."

The learned trial magistrate made no finding as to the precise position of the taxi on the roadway. I consider he was obliged to do so. The real evidence in the case was before him, and as I have said, it clearly supported the appellant's version that the taxi was parked entirely on the roadway, if not at some distance from the left edge thereof. Further, such aspect must surely have affected the taxi-driver's credibility on the issue of whether or not the taxi had its lights on. In this respect the

learned trial magistrate observed,

> "The issue whether the stationary vehicle was lit or unlit at the time of the accident is, in my view, irrelevant for these proceedings.
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> It is not a defence to this charge but may be a relevant factor in apportioning the responsibility in a civil suit."

The learned Counsel for the appellant Mr. Kalyan submits that the learne trial magistrate here fell into error. The learned trial magistrate's view that the nature of the hazard, namely, the position of the taxi on the roadway, with or without lights showing, could not affect the question of whether or not the appellant's driving fell below the standard of the reasonably competent and careful driver, bears examination. Much depends on the facts of each case. As to the second paragraph it seems to me to evoke the oft-heard approach that "contributory negligence has no place in criminal law": strictly speaking the expression is correct, as 'contributory' negligence per se connotes negligence by the defendant. If the 'contributory' negligence is of such an order however that, in all the circumstances of the case, a reasonably competent and careful driver could not have forseen or avoided the hazard, then such negligence is certainly relevant in criminal proceedings: in that case of course there is no negligence on the part of the driver and the negligence of the other party is not contributory as such.

It was the appellant's evidence that he approached the point on the road at 60 k.p.h. The taxi-driver put his speed at 40-50 m.p.h., that is, on a stretch of road where the speed limit was 80 k.p.h. The taxi was driven some 23.9 metres from where the appellant's vehicle came to rest: this aspect does not necessarily indicate an excessive speed on the part of the appellant, as the taxi went into a drain and the downward fall of the ground might well have added to the taxi's foward speed: there were no brake-marks on the roadway left by the taxi, indicating possibly that it might not have been in gear or have had its hand-brake applied. After impact, the appellant's vehicle, pushing the empty taxi in front of it, carried foward no more than 6.8 metres: that can hardly indicate an excessive residual speed. Neither does it indicate a high original speed, as the brake marks made by the appellant's vehicle commenced only 3.1 metres or 10 feet before the point of impact. One must allow for the fact that the brake marks would not necessarily indicate the exact point of reaction of the appellant to the hazard, which must have laid further back from the point of impact. The table of braking distances contained in Wilkinson's Road Traffic Offences, 10 Ed. (at back page), shows that for a vehicle travelling at 40 m.p.h. the "thinking" or "reaction" distance is 40 feet, the braking distance 80 feet, and the overall stopping distance 120 feet. It was the

appellant's evidence that he was some 20 yards from the taxi, travelling at 40 m.p.h., when he first saw it. It seems to me that the real evidence in the case lends support to his evidence.

Quite clearly it would have been impossible, in all the circumstances, for the appellant to have avoided collision with the taxi at that stage. The real question however was whether or not his driving fell below the standard of the reasonably competent and careful driver in failing to observe the taxi before that.

The learned counsel for the Prosecution Mr. Raza, Principal Legal Officer, submits that the appellant himself admitted in cross-examination "That time I was not concentrating - before accident." The appellant immediately stated thereafter however, "Not true accident due to my fault." I have consulted the manuscript record on the point and I am quite satisfied that the copy record is not correct and should have read in the first sentence above, "Not true I was not concentrating before accident."

I am indebted to Mr. Kalyan for placing a number of authorities before me. He has referred me to the case of Baker v Longhurst (E) & Sons Ltd. (1) (1933) 2 K.B. 461 in which Scrutton L.J. (at p.468) laid down the following principle in express terms:

> "Either he (the plaintiff) was going at a pace at which he could not stop within the limits of his vision, or if he could stop within the limits of his vision he was not looking out. In either event he was guilty of negligence."

Mr. Kalyan submits that the above principle was strongly disapproved in the case of Morris v Luton Corporation (2) (1946)1 E.R.1. In that case the plaintiff while riding a bicycle during a "black-out" collided with an unlit air-raid shelter projecting over 7 feet onto the roadway. It is of note that the trial judge found that there was no contributory negligence on the part of the plaintiff, a finding upheld by the Court of Appeal. The Court found that the respondents were under a duty to illuminate the shelter, but the judgment of Lord Greene M.R., adopted by MacKinnon L.J. and Tucker L.J. is of particular interest in the following dicta (at p.3 at B):

> "Counsel for the respondent says that it (the trial Judge's finding of no contributory negligence) was wrong because it violated a principle which he first described as a principle of law and afterwards, alternatively, suggested was a principle of good driving or something like that. I need scarcely say that I refer to the well known passage in the judgment of SCRUTTON, L.J., in Baker v Longhurst (E) & Sons Ltd. (1), where, interpreting him literally, he appears to lay down a sort of general proposition ((1933) 2 K.B. 461, at p.468) that a person riding in the dark must be able to pull up within the limits of his vision.

I cannot help thinking that that observation turned out in the result to be a very unfortunate one because the question as has been so often pointed out, is a question of fact. There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps sometimes slips unconsciously; I may have done it myself for all I know: but it is much to be deprecated because these are questions of fact dependent on the circumstances of each case. I cannot regard that observation of SCRUTTON, L.J., as in any sense affecting other cases where the circumstances are different.

In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of LORD WRIGHT sitting in this court in Tidy v Battman (3) where he says (at p.322), referring to Tart v Chitty (G.W.) & Co. Ltd. (4) and Baker v Longhurst (1), that they show:

(1934) 1K.B. 8

(1933) 2K.B. 2

> ".....that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts." "

As to the facts in the present case, the appellant testified that he had 'dipped' his vehicle's headlights as a vehicle was approaching from the opposite direction. Both the approaching lights and the dipping of his own lights no doubt had the effect of limiting his vision, which was further limited by the full headlights of a following vehicle reflected in his rear-view mirror. Just then the latter vehicle overtook him from behind and when overtaking sounded its horn. At the sound of the horn the appellant glanced momentarily to his right. When he looked to his front again the unlit taxi was looming in front, now doubly illuminated by the lights of the appellant's vehicle and those of the vehicle overtaking the appellant. At that stage it was but 20 yards away.

The facts of this case are somewhat on all fours with those of the Privy Council case of Stewart v Hancock (5) to which Mr. Kalyan has referred me. In that case the appellant while riding his motor cycle along a main highway approached the respondent's unlit stationary motor vehicle parked on the left side of the road. Another vehicle driven by one named Singer, when hailed by the respondent, had ealier stopped on the right side of the road facing the direction from which the appellant approached, some thirty yards nearer to the appellant, with headlights showing. On seeing such lights the appellant reduced speed from 35 m.p.h. to 25 m.p.h. On passing the beam

(1940) 2 K.B.

of the car on his right hand side, the appellant observed the respondent's car for the first time at a distance of only 20 to 30 feet, too late to avoid a collision. Judgment for the appellant at the trial by jury was set aside by the Court of Appeal of New Zealand (Ostler, J. Smith J. & Johnston J), Smith J. dissenting. On appeal to the Privy Council the Opinion of their Lordships, delivered by Lord Roche, reads in part (at p.430 at H):

> "Numerous cases were cited in the Court of Appeal and before their Lordships, including cases of collisions by motor vehicles with stationary unlighted objects. Their Lordships are of opinion that no useful purpose would be served by a further discussion of those cases, and still less by a consideration of the question of whether any particular one of them was rightly decided on the facts. They agree with the summary of their legal effect presented by OSTLER, J., who, in dealing with Tidy v Battman (3), A JUDGMENT OF MACNAGHTEN, J., approved by the Court of Appeal, read the following passage from the judgment of MACNAGHTEN, J., at pp.320, 321:
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> > "At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands, and the light coming from other sources ..... It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it."
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> Then OSTLER, J., proceeded as follows:
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> > "With that passage I respectfully agree. It might be para phrased and shortened into a statement that negligence is a question of fact, not of law: that each case must depend upon its own facts, and that there is no rule of law which in every case disqualifies a motorist from recovering damages where he has run into a stationary unlighted object."

Lord Roche referred to the above extract as an "admirable summary of the law applicable to this case". Although the issues involved were those in a civil action for negligence, they are, I consider equally applicable to the facts in the present case. In Stewart v Hancock (5) the Privy Council preferred the opinion of Smith J (at p.432 at E) which, in the circumstances of this case, I consider appropriate to set out:

> "In my opinion, the jury might infer from this evidence, not only that the respondent glanced towards Singer's car because he thought he had had engine trouble, but also that the respondent would look towards Singer's car after slowing down because he thought people might step out from behind Singer's car, and that he did so look after passing Singer's car, because when he "looked back," the unlighted car was looming ahead about 20 ft. to 30 ft. away. The lights of Singer's car had a slight blinding effect at the moment of passing, but the jury might infer, I think, that, during the

operation of the blinding effect, the respondent would have covered some part of the distance between Singer's car and the appellant's. In these circumstances, and those affecting the illumination of the road, the jury might conclude, reasonably, I think, that the respondent was exposed to a special hazard, in the first place, in meeting at night on a main highway in the country a stationary car (a) with lights showing across the road and causing a slight blindness as he passed it, (b) in such circumstances that it properly required some attention after the cyclist had recovered his sight, and (c) in such circumstances that he was induced to move further over to his left, and, in the second place, in being thus brought more into direct line with an unlit stationary car only 90 ft. away from Singer's car, which was not shown up by the light of his cycle before his attention was engaged by Singer's car, and which, as the jury might think, was only 20 ft. to 30 ft. away from respondent when he again looked ahead after looking to the rear of Singer's car to see if people might step out there."

The Privy Council's opinion thereafter reads (at p.432 at H):

> ".....their Lordships hold a clear opinion that there was proper and ample evidence before the jury that the appellant, whilst dealing with a situation of some difficulty, created by the respondent himself, and whilst keeping a good look out, properly attended for a sufficient time to an element of possible danger - namely, Singer's car - to account for the fact that he did not see the respondent's unlit car quite in time to avert the consequences of its naturally unexpected presence. With regard to the appellant's speed, it was contended that this was excessive, and that he should have stopped if he could not see. This was a consideration which no doubt was urged by counsel in addressing the jury, and was no doubt considered by the jury, but, having regard in particular to the fact that, so far as all appearances and observation could show, there was no car but Singer's car to be considered, it seems to their Lordships to be impossible to hold that the jury was bound to find negligence in this regard. For these reasons, their Lordships hold that the Court of Appeal was wrong in directing that judgment should be entered for the respondent."

When it came to dealing with the hazard facing the appellant in this case, the learned trial magistrate dealt with the issue thus:

> "I find that in not seeing the stationary vehicle when it was there to be seen, driving with dipped headlights without anticipating the presence of unlighted obstructions, looking at an overtaking vehicle at night although momentarily are not actions of a reasonable, competent and an experienced driver."

Mr. Kalyan submits that the learned trial magistrate again fell into error in the above passage. To observe that the appellant did not see the stationary vehicle "when it was there to be seen" simply begs the question. It seems such observation stems from an earlier statement by the learned trial magistrate that other vehicles had previously passed the stationary

vehicle going towards Ba: "why", he observed, "if these other vehicles were able safely to pass the stationary vehicle could the defendant not do the same?" The unlit taxi obviously constituted a hazard to all road users: the question however as to whether such hazard could be negotiated safely obviously depended largely on the presence of other traffic on the road at the time and to some extent on other factors: the inherent danger in the hazard would no doubt vary in respect of each and every driver who approached it.

Again, I do not necessarily agree with the learned trial magistrate that "looking at an overtaking vehicle at night, although mementarily" is necessarily negligence: if indeed an overtaking vehicle comes too close to the other vehicle, or "cuts in" sharply in front of it, the driver of the latter vehicle might be forced, for his own safety, to at least glance at the overtaking vehicle. In the present case the learned trial magistrate apparently accepted the appellant's evidence but made little attempt to analyse it, in order to determine whether the appellant faced a special hazard of the nature of the one faced by, say, the appellant in Stewart v Hancock (5). In the present case the appellant's vision was limited, as I have previously said; as he maintained observation on the hazard ahead, that is, the approaching vehicle with lights on, he was presented with another hazard, that of the overtaking vehicle, engaged in what would appear to be a dangerous manoeuvre at the time, with the other vehicle approaching; it seems logical to expect that the appellant would be inclined to drive closer to the left margin, thus unwittingly increasing the hazard of the unsighted taxi in front; a horn is a warning device, as Mr. Kalyan submits, and its application at that stage and at such proximity by the overtaking vehicle would I consider startle, or temporarily distract a driver, or perhaps cause him to momentarily glance towards the other vehicle to observe why the horn was sounded. Had the learned trial magistrate viewed the evidence in this light it is quite impossible for me to say that he would inevitably have found that the appellant's driving fell below the standard of the reasonably competent and careful driver.

Under the circumstances it would be unsafe to allow the conviction to stand. The appeal is allowed and the conviction and sentence are set aside.

Delivered In Open Court At Lautoka This 4th Day of May, 1984

(B. P. Cullinan)

Judge