

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

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A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 61 of 1983

BETWEEN : NARENDRA MALIK s/o Subarmani Appellant

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

Mr. S. C. Verma Counsel for the Appellant

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

J U D G M E N T

Case referred to:

(1) Nirmal v R 15 FLR 194

This is an appeal from the magistrate's court at Lautoka.

The appellant was convicted of careless driving.

The complainant's house was on an elevated site above a roadway in Lautoka. He testified that he drove a van down the driveway on to the roadway and drove on his left side in an easterly direction. Another van, driven by the appellant, approached from the opposite direction. The latter van was on its incorrect side, that is, the complainant's side of the road, and was swerving. The complainant swerved to his extreme left. The appellant's van collided with his. Both vehicles were damaged approximately on their front left doors.

It was the appellant's evidence that when the complainant's van emerged from driveway it swung across the road on to its incorrect side, that is, the appellant's side of the road, and in attempting to swerve back to its correct side it struck the appellant's van.

Clearly both versions could not be correct. The learned Counsel for the Defence Mr. Verma submits that the learned trial magistrate erred in fact and in law in convicting the appellant having, regard to the nature of the evidence adduced, and that such conviction is against weight of evidence adduced.

Two other eye-witnesses gave evidence for the prosecution. On the issue of credibility the learned trial Magistrate accepted their version. Such evidence requires examination. The complainant at first said his vehicle suffered "damages on my left front tyre and beside it." Later he said that the damage was "on left hand side closer to the rear door." This of course conflicted with a police officer's evidence, which

indicated that the front left door was damaged. The complainant testified that he wished to swerve towards the left footpath to avoid the appellant's van but there were children playing thereon. His passengers testified however that there were "no men women and children" about. The complainant said he went to his "extreme left" yet in cross-examination he stated that "I went to his side to avoid children." "The accident was in middle of the road," he said. He later conceded, "accident on Defendant's side of the road."

The complainant's passenger on the other hand testified that complainant swerved to his left to avoid the accident and that the accident occurred on the complainant's side of the road. In cross-examination he testified that the complainant "swerved to his right. That is why he was hit on left." Nonetheless he maintained that the collision occurred on "our side of road." The witness specifically denied that the complainant had driven out of his driveway just before the collision, despite the complainant's evidence on the point: he maintained that the complainant was "returning from Waiyavi after dropping Auntie." The complainant's van was loaded with soft drinks at the time. Mr. Verma submits that such fact, combined with the fact that the complainant's home was on an elevated site, lends support to appellant's version that complainant's van swung across the road on to its incorrect side.

A passer by observed the collision from a distance of two chains. He also testified that complainant's van emerged from the driveway. He said that the appellant's van passed him at speed - he could not say however if the speed was in excess of speed limit, as he was on foot. It passed him on its correct side and then turned slightly towards the right. "It went further ahead and then came on to the middle of the road," he said. He qualified this by saying, "Van went slightly on right and towards middle." He testified that the "accident was in the middle of the road", yet he said, "at that time P.W.2 (complainant) was on his correct side." Then he added "accident on complainant's side of the road." The witness' evidence was obviously contradictory in itself - apart from being at variance with the evidence of the location of the damage to the vehicles. Further a factor which emerged from his evidence was that children were playing on the footpath, but they were playing not on the complainant's but the appellant's side of the road. More importantly the witness' evidence indicates that the appellant was at least originally travelling on his correct side of road, not completely on his wrong side as the complainant and his passenger had it, and thereafter moved over towards the middle of the road.

In contrast with all this, the appellant was in no way shaken in cross-examination. A passenger in his vehicle gave evidence which corroborated that of the appellant. The only statement he made which conflicted with the uncontested evidence, was that the complainant's van "was damaged on right hand side."

The learned trial magistrate observed:

"I have given full and careful consideration to all the relevant evidence.

I also saw and heard the witnesses give evidence and tested their demeanour against all the evidence in this case."

A witness' demeanour is but one of the considerations affecting the acceptance or rejection of his evidence, or part thereof. The situation may arise where the court has little else but the witnesses' demeanour on which to base its decision, but this can only be a rare occurrence. In the case of Nirmal v R (1) the Court of Appeal observed (at p.196 at A):

"We think the learned Judge here fell into the error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence, and by that alone. This is wrong if it can be avoided. We adopt a passage from the judgment of the Court of Appeal of East Africa in Uganda v Khimchand Kalidas Shah and Ors. (1966) E.A. 30 at p.31 -

"Of course,a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject." "

It matters not how impressive a witness' demeanour may appear to be: if what he is saying is contradictory in itself or is contradicted by independent and obviously reliable evidence, then his evidence must be discounted. On the record the prosecution evidence in the present case, apart from that of the police officer, was studded with inconsistencies, particularly that of the complainant and his passenger. Not alone were such inconsistencies apparent, they conflicted with the real evidence in the case. The learned trial Magistrate observed "As usual there are two conflicting versions of how this accident occurred." That is invariably the situation in any road-traffic case, and that is why the real evidence in the case, the evidence and sketch-plan of the police officer showing e.g. brake-marks and indications of a point of impact on the road and the location of the damage on the vehicles involved, is extremely important. The greatest care should be taken in adducing such evidence, and in ensuring that any sketch-plan submitted is fully explanatory.

In the present case although the learned trial magistrate said that he had considered all of the evidence, he made not a single reference in his judgment to the police officer, nor his evidence nor the sketch-plan produced by him. The sketch-plan, showing brake-marks on the appellant's side of the road, indicates that the collision occurred on that side. Further, the police officers' evidence of the damage to the vehicles surely supports the appellant's rather than the complainant's version.

Under the circumstances I am not satisfied that had the learned trial magistrate given full consideration to the aspects of the evidence which I have outlined that he would have inevitably convicted the appellant. It would be unsafe to allow conviction to stand. The appeal is allowed. The conviction and sentence are set aside.

Delivered In The Open Court This 5th Day of May , 1984



(B. P. Cullinan)

Judge