IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0007 OF 1999S
(Criminal Case No. HAA0004 of 1999)

BETWEEN:

JANAK PRASAD

Appellant

AND:

THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal

Hearing: **Monday, 7 February 2000, Suva**

Counsel: **Mr. M. Raza for the Appellant**
Mr. J. Naigulevu for the Respondent

Date of Judgment: **Friday, 11 February 2000**

JUDGMENT OF THE COURT

After a defended hearing, the appellant was convicted in the Magistrates' Court at Suva of causing death by dangerous driving contrary to s.238(1) of the Penal Code (Cap.17). His appeal to the High Court against conviction and sentence was dismissed by Townsley J. on 27 January 1999 and he now appeals to this Court on a question of law only under s.22(1) of the Court of Appeal Act. The question as eventually formulated by Mr. Raza was whether the learned Magistrate had shifted the onus of proof from the prosecution to the defendant. To understand the way this submission was advanced it is necessary to make a brief survey of the evidence.

The appellant was driving his truck on the Queens Road near Nawaibale at 8:30 a.m. on 10 April 1997 in clear conditions.. He was coming down a slope intending to turn across the highway into an access road on his right. The other vehicle involved, a car, was being driven in the opposite direction and collided with the truck, the point of impact appearing to be on the

tar-seal about .9 m from the right hand side of the road, in relation to the truck's direction of travel. Both vehicles ended up off the sealed road and partly across the entrance to the side road. The plan produce at the hearing was made by a police officer who attended the scene, from information provided by the accused. It showed a skid mark 29m long on the gravel edge next to the tar- seal, said to be from the car. Both its driver and front seat passanger were killed. The accused did not give evidence but his police statement was admitted in which he said he did not see the car before making his turn. A number of witnesses gave evidence, some of it conflicting.

In her decision the learned Magistrate recorded that the burden of proof was on the prosecution, and then dealt with the evidence, finding that the accused turned right without keeping a proper lookout or stopping to see if the road was clear. She added that even if the car had braked it could not avoid the collision as the two vehicles were so close to each other, and that "the brake marks as shown on the plan was not shown to be the brake mark of the car". In the High Court his Lordship traversed the evidence and expressed his own conclusions about the consistency or reliability of some witnesses, and had no difficulty in upholding the decision. However, he did not deal with the present question of law which Mr. Raza said was also advanced in the High Court appeal.

He submits that in finding the brake marks shown on the plan were not proved to be those of the car, the learned Magistrate was rejecting the prosecution's own evidence to that effect and putting the onus on the accused of proving that they did come from the car. Their significance to the defence case, as we understood Mr. Raza, was to suggest that the car had gone off the tar-seal and was travelling entirely on the gravel shoulder, with the impact occuring after the truck driver had completed his turn, and that it was not on the main part of the road where

on-coming traffic could have been expected and have been seen by a turning vehicle. His Lordship pointed to evidence that the car was not travelling on the gravel, and which also raised a question about the reliability of the attribution of the mark to the car. These are not issues for this Court; we must ask whether the learned Magistrate's refusal to accept that attribution as a proved fact amounted to a reversal of the onus of proof. We are satisfied that the answer must be "No". She was doing no more than any judge of fact was entitled to do, in making an assessment of the reliability of one item of evidence in the light of all the relevant testimony bearing on the point. Both she and the learned Judge may have been mistaken on this point (we do not say they were); but if they were it was a mistake of fact, and cannot give rise to a further appeal to this Court on a question of law.

Result

The appeal is dismissed.

.....
Sir Moti Tikaram
President

.....
Sir Maurice Casey
Justice of Appeal

.....
Sir Thomas Eichelbaum
Justice of Appeal

Solicitors:

Messrs. M. Raza and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

C:\OFFICE\WPWIN\WPDOCS\USHA\AAU0007U.99S