IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

VIDYA PRASAD

Appellant

CASE NO: HAA. 15 of 2018
[MC Nausori Traffic Case No. 1641 of 2014]

Vs.

STATE

Respondent

Counsel	:	Mr. J. Reddy and Mr. J. Vulakouvaki for Appellant Ms. S. Serukai for Respondent
Hearing on	:	11 June 2018
Judgment on	:	20 July 2018

JUDGMENT

1. The appellant was convicted by the magistrate court for the offence of dangerous driving occasioning death contrary to sections 97(2)(b) and 114 of the Land Transport Act No. 35 of 1998 ("LTA Act") after a trial. He was sentenced on 13/02/18 for a term of 27 months imprisonment with a non-parole period of 20 months. The appellant was disqualified from driving for a period of 4 years from the date of the sentence.

2. The charge reads thus;

Statement of Offence

DANGEROUS DRIVING OCCASIONING DEATH: *contrary to section 97(2)(b) and 114 of the Land Transport Act No. 35 of 1998.*

Particulars of Offence

VIDYA PRASAD, *on the 1st day of July 2014 at Nausori in the Central Division drove a motor vehicle registration number FS001 on Sawani, Serea Road, Waibau in a manner which was dangerous to the public having regards to all the circumstances of the case thereby caused the death to Jone Soronakadavu.*

3. The appellant had filed a timely appeal against his conviction and sentence. The grounds of appeal are as follows;

Against Conviction:

1. *That the learned trial magistrate erred in law and in fact in convicting the Appellant on the charge of Causing Death by Dangerous Driving.*

2. *The learned trial magistrate erred in law and in fact in convicting the accused when no evidence was adduced by the prosecution in relation to the speed zone of the area where the accident took place.*

3. *That the learned trial magistrate erred in law and in fact in convicting the appellant when no evidence was adduced by the prosecution that the accused was speeding or over-speeding.*

4. *That the learned trial magistrate erred in law and in fact in convicting the appellant when no evidence was adduced by the prosecution that the appellant was driving in a manner dangerous to the public at the time of accident.*

5. *That the learned trial magistrate erred in law and in fact in not considering the fact that the victim ran across the road from in front of a parked bus thus obscuring the vision of the appellant.*

6. *That the learned trial magistrate erred in law and in fact in not considering the fact that it was the victim that crossed the path of the appellant's truck by coming straight into the path of the truck.*

7. *That the learned trial magistrate erred in law and in fact in not considering the fact that the appellant swerved, maneuvered and steered the truck to the extreme right hand side of the road in order to avoid the accident.*

8. *That the learned trial magistrate erred in law and in fact when she failed to uphold the defence's submission that the appellant was not driving in a dangerous manner.*

9. *That the learned magistrate erred in law and in fact in holding that a truck travelling at 50kmph can be stopped suddenly when it is impossible to do so.*

10. *That the learned magistrate erred in law and in fact when she failed to consider the following material facts when she convicted the appellant for causing death by dangerous driving;*

(a) that there was no consumption of alcohol;
(b) that the appellant was not racing or competing with other drivers;
(c) that there was no persistent and deliberate course of very bad driving;
(d) that there was no bad behavior on the part of the appellant like failing to stop or escaping from the scene of the accident.
(e) that the appellant did not drive recklessly.

Against Sentence

That the sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case in view of the foregoing grounds;

1. *That the appellant was a 1st offender.*
2. *That the appellant had a good driving record up to the date of accident.*
3. *That the appellant had a good character generally.*
4. *That the appellant was remorseful for his actions.*
5. *That the learned trial magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances.*

4. Though the appellant had listed the above ten grounds of appeal as grounds against the conviction, the counsel for the appellant had not addressed those grounds individually and in detail in the written submissions. To be precise, the written submission filed on behalf of the appellant does not specifically deal with a single ground of appeal that is listed in the notice of appeal. In fact, both in written and oral submissions the counsel for the appellant concentrated on an issue which was not raised as a ground of appeal. In that, the counsel argued that the charge was defective for the reason that the section cited in the charge is 97(2)(b) of the LTA act and that subsection refers to dangerous speeding but the particulars of the offence alleges that he was driving in a dangerous manner.

5. According to the court record, I note that the appellant was represented by a lawyer before the magistrate court and no objection had been raised before the magistrate court in that regard.

6. Section 279 of the Criminal Procedure Act provides thus;

No appeal on point of form or matter of variance

(1) Subject to sub-section (2), no finding, sentence or order passed by a Magistrates Court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect of substance or form or for any variance between such information, complaint, summons or warrant and the evidence, unless it is found that –

(a) such objection was raised before the Magistrates Court whose decision is appealed from; and

(b) the Magistrates Court refused to adjourn the hearing of the case to a future day notwithstanding that it was shown to the Magistrates Court that by such variance the appellant had been deceived or misled.

(2) If the appellant was not represented by a lawyer at the hearing before the Magistrates Court, the High Court may allow any such objection to be raised.

7. It is manifestly clear from the above provisions that this court cannot entertain a ground of appeal in relation to a defect in a charge based on a matter of variance where the appellant was represented by a lawyer before the magistrate court unless that objection was raised before the Learned Magistrate and the Learned Magistrate had refused adjourn the hearing on that account.

8. In light of the above provisions, this issue raised on behalf of the appellant in the submissions on the purported defect in the charge cannot be entertained by this court even if that was included as a ground of appeal in the petition of appeal. The circumstances in the case of ***Narayan v State*** [2010] FJHC 463; HAA041.2010 (21 October 2010) that was cited by the counsel for the appellant and for the respondent were different from this case. Whereas, in that case a relevant objection had been raised before the Learned Magistrate on behalf of the appellant and therefore the provisions of section 279 of the Criminal Procedure Act did not apply in that case.

9. On the other hand, if the appellant was in fact prejudiced by the purported defect in the charge as alleged I would expect that to be raised as a ground of appeal in the petition of appeal. To the contrary, I note that while the 2nd and 3rd grounds of appeal alleges that there was no evidence on the appellant speeding, the 4th ground alleges that there was no evidence that the appellant was driving in a manner

dangerous to the public. This shows that the appellant was not prejudiced by the variance that is now highlighted and in fact the appellant and his counsel had tackled the case in relation to speed and also the manner of driving during the trial. I also note that the Learned Magistrate when she discussed the elements, had referred to both speed and the manner of driving. Moreover, the Learned Magistrate had concluded that the appellant was driving in a speed dangerous to others and he was also driving in a manner dangerous to others.

10. In this case the counsel for the respondent has conceded that this appeal should be allowed based on the aforementioned variance. This concession made by the counsel for the respondent is ill-founded in light of the discussion above, especially in view of the clear provisions of section 279 of the Criminal Procedure Act and therefore would be disregarded. Indeed a prosecutor is expected to be a minister of justice and has a duty to prosecute fairly. However, it would be a grave misconception if a prosecutor forms the view that the said duty is discharged by being quick to make concessions in cases. The decision whether to concede on a particular point should only be made after a thorough examination of all relevant facts and the law. Prosecutors should bear in mind that a concession that is not supported by the applicable law and the facts of a case would suggest lack of diligence and could also be construed as an attempt to mislead the court.

Appeal against the conviction

11. According to the evidence adduced by the prosecution in the instant case, the appellant who was driving a truck was following a school bus and had overtaken that bus when it stopped at a place where it is used as a bus stop. This part of the road where the appellant decided to overtake the bus had a continuous line which the appellant had to cut across in order to overtake. Moreover, there was a left bend in front where the right lane would not be clearly visible when there is a vehicle in front.

12. Therefore the evidence in this case suggests that the appellant had violated the road rules when he overtook the bus, and it was not an appropriate place anyway to

overtake a vehicle given the left bend in front. The poor visibility of the vehicles coming from the opposite direction in that part of the road would probably have been the reason for the authorities to have the continuous line. It is also noted that the vehicle the appellant decided to overtake at that point was a bus carrying passengers which also happened to be a school bus.

13. Though the commuters are time and again advised not to cross the road in front of the bus they were travelling in, a driver of a vehicle which is behind a bus that just stopped, should anticipate commuters crossing the road in front of parked buss and also people crossing from the other side of the road to catch the bus. Therefore, a driver should be careful when he/she decides to overtake a parked bus and if a decision was taken to overtake, then should be very cautious about the speed while overtaking.

14. In this case, the Learned Magistrate had clearly explained how and why she drew the inferences from the available evidence to come to the conclusion that the appellant was driving in a speed and also a manner, dangerous to others at the time of the impact. It was open for the Learned Magistrate to come that conclusion from the available evidence.

15. In this case, the evidence do suggest contributory negligence on the part of the deceased and especially, his guardian(s). It also appears that the place the bus stopped was not a suitable place to be used as a bus stop in the first place, though the accused had acknowledged that he had the knowledge that the said place was used as a bus stop. So, the driver of the bus also appear to have contributed to this fatal accident and may be even the relevant authorities for their inaction in allowing such a place to be used as a bus stop. However, the fault or the negligence of the other parties cannot be regarded as a defence in this case where the evidence clearly suggest that the appellant was driving in a speed and in a manner dangerous to the public when he overtook the school bus on the relevant day irrespective of whatever faults or the negligence of others.

16. It was not necessary for the prosecution to prove that the appellant was exceeding

the relevant speed limit at the time of impact in order to establish that the appellant was driving at a speed dangerous to another person. Given that the appellant was overtaking a school bus taken together with the other circumstances of the case, and the circumstantial evidence regarding the speed the appellant was travelling, it was open for the Learned Magistrate to come to the conclusion that the prosecution had established beyond reasonable doubt that the appellant was traveling at a speed dangerous to the public at the material time.

17. All in all, I do not find any substantial error in the Learned Magistrate's reasoning and the conclusions and I do not find merit in any of the issues raised in the grounds of appeal against conviction.

Appeal against the sentence

18. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499)."*

19. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;
    a) acted upon a wrong principle;
    b) allowed extraneous or irrelevant matters to guide or affect him/her;
    c) mistook the facts; or
    d) did not take into account some relevant consideration.

20. The Learned Magistrate had identified the applicable tariff as an imprisonment

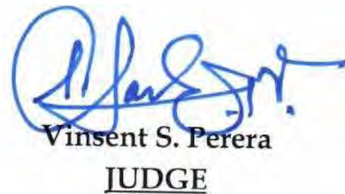
term of 2 to 4 years. The final sentence imposed on the appellant which is an imprisonment term of 27 months with a non-parole period of 20 months is well within that tariff.

21. The counsel for the appellant had failed to demonstrate how the above sentence could be regarded as harsh and excessive or that it is wrong in principle as alleged in the ground of appeal against the sentence. The appeal against the sentence also fails.

22. In the circumstances, I would dismiss this appeal and affirm the impugned judgment and the sentence.

Orders;

a) Appeal against the conviction is dismissed;
b) Appeal against the sentence is dismissed;
c) The judgment and the sentence of the Learned Magistrate in MC Nausori Traffic Case No. 1641 of 2014 is affirmed.



Vinsent S. Perera
JUDGE

Solicitors;
Jiten Reddy Lawyers, Nakasi for the Appellant
Office of the Director of Public Prosecutions for the State