

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 218 OF 2019**

**STATE**

**V**

**KUSHAL DUTT**

Counsel : Ms. W. Elo for State  
: Mr. A.K. Singh for Defence

Date of Judgment : 25 November 2020

Date of Sentence : 02 December 2020

**SENTENCE**

1. Mr. Kushal Dutt, you were charged with one count of Manslaughter Contrary to Section 239 of the Crimes Act 2009 and one count Dangerous Driving Occasioning Grievous Bodily Harm Contrary to Section 97 (4)(b) and Section 114 of the Land Transport Act 1998 (LTA).
2. After a full trial, you were acquitted of Manslaughter because the Court found that the Prosecution failed to prove beyond reasonable doubt that you are responsible for the death of Mr. Akash Sharma, the deceased in this case. However the Court was sure that you drove the vehicle recklessly and dangerously at an excessive speed and were grossly negligent in causing grievous bodily harm to Mr. Akash Sharma. Accordingly, you were found guilty of Dangerous Driving Occasioning Grievous Bodily Harm Contrary to Section 97 (4) (b) read

with section 114 of the Land Transport Act 1998. You were also found guilty for the same offence on count two for occasioning grievous bodily harm to Mr. Badaal Sharma.

3. Having been convicted of two counts of Dangerous Driving Occasioning Grievous Bodily Harm, you now come before this Court to receive the sentence.
4. You and the two Sharma brothers were good friends and also immediate neighbours. After an evening grog session, all of you decided to switch to beer and got in to Nissan Xtrail with Registration No. IM-115, a vehicle owned by your former employer, and you drove it to Nakasi to buy beer at around midnight. Akash was sitting in the front passenger seat, and his brother Badaal was sitting at the back seat.
5. Having bought beer, you drove the vehicle back home at a normal speed until you turn into Koranivia Road where you suddenly started to drive the vehicle very fast. You did not listen to Sharma brothers who repeatedly warn you to slow down. As you were approaching the narrow one-way bridge you could see, at a distance, another vehicle from the opposite side approximately 50 -100 m ahead of you, on or near the bridge, coming towards you with head lights on. You did not apply breaks and slow down the vehicle despite the repeated warnings by the two Sharma brothers to slow down. When the oncoming vehicle was on the bridge, you could not control the vehicle due to the high speed and the sudden application of breaks was of no avail. The vehicle went off road causing it to be flown over the creek to hit the mud bank at the opposite side.
6. Due to the impact caused by your reckless driving, Akash sharma received serious bodily injuries. He died after two days after an operation. The Pathologist who did the post mortem examined the injuries in greater detail but none of them, according to her, was fatal. The penetrative blunt trauma caused by the impact had damaged part of Akash's intestines which was successfully fixed by an operation. After the operation, due to an intervening cause (lack of medical care), the remains of surgical waste or gastric contents in the stomach infiltrated the respiratory system thus blocking the airway and the death of Akash Sharma was caused by asphyxiation.

7. The impact caused by your reckless driving also caused serious bodily injuries to Badaal Sharma, scars of which are still visible in his body. He also had to undergo an operation requiring him to spend 2-3 weeks in the hospital.
8. The penalty prescribed for this offence under section 114 of the LTA is a maximum fine \$2000 and/or 2 years imprisonment and disqualification for 12 months. In addition the court may order up to 3 demerit points against the accused under section 59 [3] of LTA. The tariff has been set by previous cases in the High Court and that band is from suspended sentence up to 2 years imprisonment. (Chand HAA11.2015, and Ali HAA 51.2016, Singh v State [2018] FJHC 1064; HAA66.2018 (6 November 2018).
9. This piece of driving was not a mere error of judgment. You had been a driver for ten years. Being a resident of the area and as a regular user of this road, you were aware of the condition of the road and that of the bridge and the risks involved in night time driving. The two passengers travelling in the vehicle repeatedly warn you to slow down but you paid no heed to the warnings. You maintained the same high speed when the risk was so obvious. The culpability of your offending is at its highest and the harm caused to the victims is great.
10. It is aggravating that you drove the vehicle at an excessive speed in a dangerous manner despite the warnings of the two passengers. The two victims were highly vulnerable as passengers who were at the mercy of you because you had the full control of the vehicle. Although it was shown that Akash's death was caused by asphyxiation due to lack of medical care, if it were not for your reckless conduct Akash would not have been hospitalised in the first place. There is evidence that you had attempted to interfere with the main Prosecution witness and influenced him to doctor the evidence in your favour. It is a serious matter that subverts the course of justice. I would increase your sentence to reflect these aggravating features.
11. Your Counsel has filed a comprehensive written mitigation submission. He seeks a lenient sentence to facilitate your rehabilitation and has referred to two earlier cases where a full suspended sentence was ordered. In terms of the gravity of recklessness and the harm caused to the victims, none of them bears any resemblance to the present case so as to be helpful in

crafting your sentence. Sentencing is an individualised exercise where each case turns on its own particular fact situation and this Court does not necessarily have to follow the sentencing approach adopted in other cases. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

12. I accept that you are 32 years of age and a father of a daughter 4 years old. Your Counsel has drawn my attention to a letter written by him on your behalf to the Director of Public Prosecution indicating that you were ready to take a progressive approach if the charges are reduced to Careless Driving. He submits that the Manslaughter charge prevented you from pleading guilty to a lesser offence and that you are remorseful of your action.
13. I am however not convinced that you are genuinely remorseful. You have made an unsuccessful attempt to put the blame on the deceased by falsely making him the errant driver and, failing of which, you tried to falsely implicate the deceased by suggesting to his brother that the deceased meddled in your driving. In the course of your testimony you put the blame on the deceased and his brother for accompanying you to buy beer at night. Furthermore, you kept on denying the responsibility and tried to put the blame on the driver of the on-coming vehicle. Your conduct and the evidence in my opinion do not suggest that you are genuinely remorseful.
14. You are a first offender and had maintained a clear driving record since 2008. The medical certificate tendered by your Counsel suggests that you have also received some injuries as a result of the accident. The physical suffering therefrom and the agony of two long years elapsed between the accident and the trial are quite understandable. The loss of your employment after the accident would no doubt have added insult to injury. However in the absence of any evidence that the written-off vehicle was not insured, I would not believe that you will have to pay for the car damages to the tune of approximately \$ 70,000/- to the owner of the vehicle. I have taken into these matters and your personal circumstances into consideration in reducing the sentence.

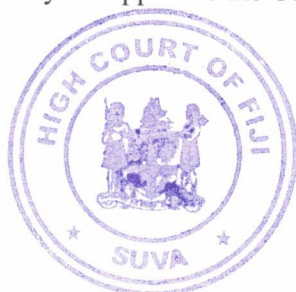


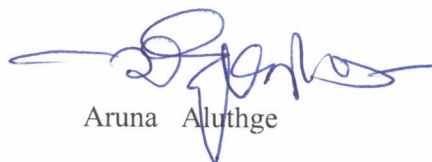
15. I considered whether or not a disqualification order and a fine should be imposed. Since you have not been convicted for dangerous driving with excess alcohol you are not liable for mandatory disqualification under LTA. I considered your personal circumstances in this regard. You have already lost your employment and your Counsel has submitted that you now earn a living as a market vendor. You are currently paying \$ 300 monthly to settle the bill of sale for the car that is used to do your current business. The driving has become a source of livelihood and I am conscious of the hardship that will be faced by you and the family if a disqualification is ordered. You have maintained a good previous character and a clear driving record since 2008. Therefore I have decided against ordering a disqualification of the licence or a fine. However, I would order that 3 demerit points be awarded against you.
  
16. A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that, if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence (*In R v Cooksley* [2003] EWCA Crim 996 [2003] 3 All ER).
  
17. I would like to reiterate what was said in *Hill v State* [2018] FJCA 123; AAU109.2015 (10 August 2018). Road accidents cause immense human suffering. Every year, a considerable number of people are killed and seriously injured. This represents a serious economic burden. The Supreme Court and the High Court have recognised that the prevalence of a crime in the society is a matter to be reckoned with in increasing the sentence. *Alfaaz v State* [2018] FJSC 17 (30 August 2018) *State v Takalaibau* [2018] FJHC 505 (15 June 2018).
  
18. The offences you are convicted of are the same and founded on the same facts. Therefore, in view of Section 17 of the Sentencing and Penalties Act, this is a fit case to impose an aggregate sentence of imprisonment for both the counts you are convicted of.

19. Having considered the gravity of the offence and the harm caused to the victims, I start your sentence with a starting point of 18 months' imprisonment. I increase your sentence by 18 months for aggravation to reach 36 months and deduct 18 months for mitigation to reach a final sentence of 24 months' imprisonment.
20. I would appreciate the comprehensive written submission of Mr. Singh who has strenuously argued for a full suspended sentence. However the pain and the suffering caused to the victims should properly be taken into consideration so are the deterrent effect and the public denunciation. The proportionality principle enshrined in the Constitution operates to guard against the imposition of unduly lenient or unduly harsh sentences. The principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances.
21. To balance the prospects of your rehabilitation with deterrence and denunciation, a partially suspended sentence is warranted in this case. Having considered your good character and the clean record that weighted heavily in favour of a lenient sentence, I order that you serve only 12 months in the correction centre and the balance 12 months is suspended for a period of 2 years. The god has created my office to punish the offenders according to law and in the name of justice. It is unfortunate that I have to send you to the Correction Centre, albeit for a short period, in my final sitting in Fiji.

#### Summary

22. Mr. Kushal Dutt, you are sentenced to an aggregate imprisonment term of 24 months for both counts. I order that you serve only 12 months in the correction centre and the balance 12 months is suspended for a period of 2 years. There will be 3 demerit points awarded against you.
23. You have 30 days to appeal to the Court of Appeal.



  
Aruna Aluthge  
Judge

At Suva

3 December 2020

Solicitors: Office of Director of Public Prosecution for State  
AK Singh Law for Defence