

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 27 OF 2022**

**IN THE MATTER** of an Appeal from the Decision of the Magistrate's Court of Ba, in Traffic Case No. 524 of 2016.

**BETWEEN** : **AJAY KUMAR**

**APPELLANT**

**AND** : **THE STATE**

**RESPONDENT**

**Counsel** : Mr. Anil J. Singh with Ms. Pritisha Prasad for the Appellant  
Ms. Saini Naibe for the Respondent

**Dates of Hearing** : 18 January 2023 and 20 February 2023

**Judgment** : 27 March 2023

**JUDGMENT**

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Ba.

[2] In the Magistrate's Court of Ba, the Appellant was charged with one count of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (c), (5) (c), (8) and 114 of the Land Transport Act No. 35 of 1998 (Land Transport Act), as follows:

### ***Statement of Offence (a)***

**DANGEROUS DRIVING OCCASIONING DEATH:** Contrary to Section 97 (2) (c), (5) (c), (8) and 114 of the Land Transport Act No. 35 of 1998.

### ***Particulars of Offence (b)***

**AJAY KUMAR**, on the 7<sup>th</sup> day of May 2016, at Ba, in the Western Division, drove a motor vehicle registration number EH 006 on Kings Road, Tuvu, in a manner dangerous to another person, involved in an impact occasioning death of **PARWATI NARAIN**.

- [3] The Appellant was first produced in Court on 12 May 2016, on the above charge. [The charge is found at page 10 of the Copy Record of the Magistrate's Court]. On 6 October 2016, his plea had been taken. The Appellant pleaded not guilty to the charge and the matter had proceeded to trial.
- [4] On 16 May 2022, the Appellant had been found guilty of the charge and convicted. On 28 June 2022, the Appellant had been imposed a sentence of 3 years imprisonment, with a non-parole period of 18 months imprisonment. In addition, the Appellant was ordered to pay a fine of \$400.00 within 30 days. In default, he is to serve 40 days in prison, which term is consecutive to the sentence of 3 years imprisonment.
- [5] Furthermore, the Appellant was disqualified from driving for a period of 3 years, which is to take effect upon his release from prison.
- [6] Aggrieved by the said Order, on 18 July 2022, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.
- [7] This matter was taken up for hearing before me on 18 January 2023 and 20 February 2023. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. The Learned Counsel for the Appellant filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[8] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

1. The Learned Magistrate erroneously failed to consider that the vehicle in which the deceased was travelling was being driven by an unlicensed driver, overloaded, and passengers unrestrained and that the said vehicle after impact lost control and collided with the lamp post which caused the death of the deceased, thereby causing a grave miscarriage of justice.
2. The Learned Magistrate failed to consider that the Appellant was travelling uphill and the other vehicle downhill and that the recollection of the witnesses was embellished and reconstructed after the accident and then given in Court some four years after the event, as such it was dangerous to rely on it, thereby causing a miscarriage of justice.
3. The Learned Magistrate erroneously accepted that mud on the road as the correct point of impact when there was no evidence of debris from the impact to substantiate the point of impact thereby erroneously disbelieving the Appellant and causing a miscarriage of justice.
4. The Learned Magistrate did not have proper regard to the burden of proof, as there was no independent witness and the two opposing versions of the occupants of the two vehicles had to give rise to a reasonable doubt, as the two versions were diametrically opposed to each other and the death of the deceased was actually caused by the prosecution witness, who lost control because of excessive speed and errant driving which led to an impact with the lamp post, thereby causing a grave miscarriage of justice.
5. The Learned Magistrate erred in his sentencing exercise as he took irrelevant matters into consideration particularly, a defence submission which was incompetently prepared erroneously questioning the Magistrate's decision but causing a miscarriage of justice to the Appellant.
6. The Learned Magistrate erroneously regarded the damage to the other vehicle as an aggravating factor, increasing the sentence by two years in custody when such a factor was not an aggravating factor thereby acting upon a wrong principle in law, causing the Appellant's sentence to miscarry.
7. The Learned Magistrate erroneously held that the Appellant's subjective factors including his heart disease were not exceptional in the circumstances thereby imposing an erroneous condition for the subjective factors to be

considered objectively, thereby causing the sentence to be manifestly excessive and harsh.

8. The Learned Magistrate erroneously considered his sentence mathematically when he was required to consider the objective and subjective features and balancing the need for deterrence with the need for mercy and rehabilitation, thereby misdirecting itself.
9. The Learned Magistrate erroneously increased the sentence by two years thereby inter alia depriving the Appellant of consideration under Section 26 (1) and (2) (b) of the Sentencing and Penalties Act 2009, as this was an appropriate case for such consideration, having regard to the delay in sentence and the Appellant's heart condition.

[9] As can be observed Grounds 1 to 4 are Grounds of Appeal against the conviction; and Grounds 5-9 are Grounds of Appeal against the sentence.

### The Law and Analysis

[10] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."*

**[11]** Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*"(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

## The Grounds of Appeal against Conviction

[12] Since the four Grounds of Appeal against conviction relate to the evidence in this case and the burden of proof, I am of the opinion that the said Grounds of Appeal are inter-related. As such, they will be addressed together.

[13] The Appellant was charged in the Magistrate's Court for the offence of Dangerous Driving Occasioning Death, contrary to Section 97 (2) (c) of the Land Transport Act, read with Section 97 (5) (c) and 97 (8) of the said Act. For ease of reference, Section 97 of the Land Transport Act is re-produced below:

*97. - (1) A person commits the offence of aggravated dangerous driving occasioning death if the person commits the offence under subsection (2) in circumstances of aggravation.*

***(2) A person commits the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle -***

*(a) under the influence of intoxicating liquor or of a drug;*

*(b) at a speed dangerous to another person or persons; or*

***(c) in a manner dangerous to another person or persons.***

*(3) A person commits the offence of aggravated dangerous driving occasioning grievous bodily harm if the person commits the offence under subsection (4) in circumstances of aggravation.*

*(4) A person commits the offence of dangerous driving occasioning grievous bodily harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle -*

*(a) under the influence of intoxicating liquor or of a drug;*

*(b) at a speed dangerous to another person or persons; or*

*(c) in a manner dangerous to another person or persons.*

***(5) For the purposes of this section, the circumstances in which a vehicle is involved in an impact occasioning the death of, or grievous bodily harm to, a person include if the death or harm is occasioned through any of the following -***

*(a) the vehicle overturning or leaving a public street while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);*

*(b) an impact between any object and the vehicle while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);*

***(c) an impact between the person and the vehicle;***

*(d) the impact of the vehicle with another vehicle or an object in, on or near which the person is at the time of the impact;*

*(e) an impact with anything on, or attached to, the vehicle;*

*(f) an impact with anything that is in motion through falling from the vehicle.*

*(6) For the purposes of this section, a vehicle is also involved in an impact occasioning the death of, or grievous bodily harm to, a person if -*

*(a) the death or harm is occasioned through the vehicle causing an impact between other vehicles or between another vehicle and any object or person or causing another vehicle to overturn or leave a public street; and*

*(b) the prosecution proves that the first-mentioned vehicle caused the impact.*

*(7) In this section, "circumstances of aggravation" means any circumstances at the time of the impact occasioning death or grievous bodily harm in which -*

*(a) more than the prescribed concentration of alcohol was present in the accused's blood; or*

*(b) the accused was driving the vehicle concerned on a public street at a speed that exceeded, by more than 45 kilometres per hour, the prescribed speed limit (if any) applicable to that length of public street; or*

*(c) the accused was driving the vehicle to escape pursuit by a police or authorised officer.*

***(8) A person who commits an offence under subsection (1), (2), (3) or (4) is liable on conviction to the prescribed penalty.***

[Emphasis above is my own].

**[14]** The prescribed penalty for the offence is found at Section 114 of the Land Transport Act.

**[15]** Therefore, in order to prove the charge of Dangerous Driving Occasioning Death, the prosecution must establish beyond reasonable doubt that;

- (i) The accused (The Appellant);
- (ii) On the specified day (in this instance on 7 May 2016);
- (iii) At Ba, in the Western Division;
- (iv) Was driving a vehicle bearing registration number EH 006;
- (v) The said vehicle was involved in an impact;
- (vi) The impact occasioned (or caused) the death of the deceased Parwati Narain; and
- (vii) At the time, the accused was driving the said vehicle in a dangerous manner.

**[16]** In terms of Section 97 (5) of the Land Transport Act it is stated that for the purposes of this Section, the circumstances in which a vehicle is involved in an impact occasioning the death of a person include if the death is occasioned through any of the means stipulated in the said sub-section.

**[17]** In the Statement of Offence, reference is made to Section 97 (5) (c), which is a reference to *an impact between the person and the vehicle*. However, in my opinion, since the deceased was in another vehicle at the time, in the instant case, the more appropriate provision would have been Section 97 (5) (d), which makes reference to *the impact of the vehicle with another vehicle or an object in, on or near which the person is at the time of the impact*.

**[18]** The Judgment of the Learned Magistrate is found from pages 141 to 151 of the Copy Record of the Magistrate's Court. Therein, the Learned Magistrate has set out the elements the prosecution must establish beyond reasonable doubt in order to prove the charge of Dangerous Driving Occasioning Death, in a similar manner [at paragraph 7 of his Judgment].

**[19]** The Learned Magistrate has considered the accused driving a vehicle (bearing registration number EH 006) as one element (instead of two elements). Accordingly, he has identified the elements of the offence as follows:



- i) The accused (The Appellant) was driving a vehicle;
- ii) That the said vehicle was involved in an impact;
- iii) The impact occasioned (or caused) the death of the deceased Parwati Narain;  
and
- iv) At the time, the accused was driving the said vehicle in a dangerous manner.

**[20]** Having duly identified the elements of the offence, the Magistrate has gone on to say that the only disputed issue is the 4<sup>th</sup> element above – namely at the time, the accused was driving the said vehicle in a dangerous manner.

**[21]** This fact is further emphasized by the following two paragraphs in the judgment:

*Paragraph 15 – There is no dispute that on the date and time in question, the accused was driving vehicle EH 006 along Kings Road at Tuvu, Ba. Accused was travelling from Lautoka towards Ba. Further, at about the same time Nithun Niteshwar Bir (PW 1) was driving vehicle registration number DG 904 along Kings Road at Tuvu, Ba and travelling from Ba towards Lautoka.*

*Paragraph 16 – There is no dispute that the vehicle driven by the accused and the vehicle driven by Nithun Niteshwar Bir (PW 1) collided. The collision led to an impact causing the deceased who was a passenger in PW 1's vehicle to sustain injuries and died as a result. The post-mortem report confirms the same.*

**[22]** I concede that the fact that the accused, was driving a vehicle, and that the said vehicle was involved in an impact may not be disputed issues in the case. However, the fact that due to the said impact that death was caused to the deceased is a fundamental element of the charge that the prosecution must establish beyond reasonable doubt so as to find the Appellant guilty of this offence. That is to say that the death was caused to the deceased as a direct consequence of the said impact.

**[23]** This is more so due to the fact that PW 1 was an unlicensed driver and the fact that the vehicle he was driving was overloaded. The fact that the PW1 was charged by the Police for driving without a driving license and in contravention of a third party insurance policy is another issue.

[24] However, in his judgment the Learned Magistrate has failed to take these matters into consideration. The full emphasis of his judgment has been on the final element, whether the accused was driving the vehicle in a dangerous manner at the time. The entire analysis of his judgment (from pages 147 to 150 of the Copy Record of the Magistrate's Court) has been on this basis.

[25] Accordingly, the Learned Magistrate has come to the finding that he is satisfied beyond reasonable doubt that the prosecution have proved the 4<sup>th</sup> element of the offence charged beyond reasonable doubt and as such proved the charge against the accused beyond reasonable doubt.

[26] In my view, this is a fatal error on the part of the Learned Magistrate. As stated previously, the fact that due to the impact of the two vehicles that death was caused to the deceased is a fundamental element of the charge that the prosecution must establish beyond reasonable doubt so as to find the Appellant guilty of this offence. In my view, the Learned Magistrate has failed to address his mind to this issue.

[27] For this reason, it is my opinion that, the conviction against the accused is unjust and unreasonable.

[28] For the aforesaid reasons, I find that the Grounds of Appeal against the conviction has merit and that accordingly, the conviction should be set aside.

[29] Since the conviction is being set aside, the sentence imposed on the Appellant is accordingly set aside.

### **Conclusion**

[30] Accordingly, I conclude that this Appeal should be allowed and the conviction and sentence be set aside.

### **FINAL ORDERS**

[31] In light of the above, the final orders of this Court are as follows:

1. Appeal is allowed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Ba in Traffic Case No. 524 of 2016 is set aside.



AT LAUTOKA

This 27<sup>th</sup> Day of March 2023

Solicitors for the Appellant :  
Solicitors for the Respondent:

  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

Anil J. Singh Lawyers, Barristers and Solicitors, Nadi.  
Office of the Director of Public Prosecutions, Lautoka.