MOHAMMED ABDUL RAZAK

v.

REGINAM

[SUPREME COURT, 1973 (Grant J.), 9th January]

Appellate Jurisdiction

Criminal law—traffic offences—dangerous driving causing death—Penal Code (Cap. 11) s. 269 (1)—speed—standard of care and skill.

Criminal law—judgment—whether magistrate obliged to give reasons for acceptance or rejection of evidence—compliance with Criminal Procedure Code (Cap. 14) s. 154.

Appeal—finding of fact by magistrate—circumstances in which appellate court will disturb the finding of fact.

The appellant's bus approached a narrow bridge at 40 m.p.h. and without braking or slowing collided with an oncoming bus as a result of which it left the road and toppled down an embankment killing one of its passengers.

Held: 1. The magistrate was entirely justified in coming to the conclusion that the speed of the bus was excessive and that the appellant had fallen below the skill of a competent and experienced driver.

2. A magistrate is not obliged to give his reasons for his acceptance or rejection of the evidence of any particular witness provided that the evidence in question is sufficient to establish the ingredients of the offence.

3. An appellate court will only in rare cases disturb the finding of fact of the court below. The appellant must show that the verdict was unreasonable or cannot be supported having regard to the evidence.

Cases referred to:

R. v. Gosney [1971] 3 All E.R. 220; [1971] 3 W.L.R. 343.

R. v. White, 17 Cr. App. R. 60.

R. v. Jan Barkat Ali, 18 F.L.R. 129.

Clark v. Edinburgh Tramways Co. [1919] S.C. (H.L.) 35.

R. v. Hart, 10 Cr. App. R. 176.

Mohammed Hakim Khan v. Dukh Bhajan Sharma, 4 F.L.R. 183.

Yuill v. Yuill [1945] 1 All E.R. 183; 61 T.L.R. 176.

Khoo Sit Hoh v. Lim Thean Tong [1912] A.C. 323.

R. v. Kanchan Singh, 4 F.L.R. 69.

R. v. Dutton [1972] Crim. L.R. 321.

Appeal against conviction by a Magistrate's Court.

GRANT J.: [9th January 1973] —

On the 17th day of July, 1972 the appellant was convicted after trial of Causing Death By Dangerous Driving contrary to Section 269(1) of the Penal Code, sentenced to six months imprisonment and disqualified from holding a driving licence for three years.

The appellant appealed against conviction and sentence on the following grounds:— A

(i) That the conviction was against the weight of evidence.

(ii) That the learned Magistrate erred in fact and in law in finding on the evidence before him that the appellant was guilty of the offence charged.

(iii) That the learned Magistrate erred in not judiciously weighing the evidence and in ignoring evidence called by the defence and the plan produced by the prosecution.

(iv) That the learned Magistrate erred in holding that the appellant did not slow down nor brake while approaching or on the bridge. B

(v) That the learned Magistrate erred in holding that the Shore Bus was going backwards on impact.

(vi) That the learned Magistrate erred in holding on the facts that the appellant attempted to cross a bridge obstructed at the other end.

(vii) That inasmuch as DW. 6 (Ram Nath) was a witness whom the police were to call and did not do so compelling the defence to call him the learned Magistrate erred in totally ignoring his evidence and the statement made by him to the police after the accident where such evidence was supported by evidence of other witnesses at the trial. C

(viii) That the sentence was in all the circumstances excessive.

The deceased was a passenger on a bus driven by the appellant from the direction of Navua towards Suva which at a narrow bridge in the vicinity of Lami and while D in top gear came into collision with another bus that had been travelling in the opposite direction. The impact caused mechanical damage to the bus driven by the appellant so that it could not be stopped and it proceeded under full power to leave the road, topple over an embankment and land in water, causing injuries to the deceased and resulting in her death through drowning.

Three passengers on the bus driven by the appellant, the driver of the other bus E and a passenger on it, all testified that prior to the impact the appellant was driving fast, one passenger describing it as " the fastest ride since I have been in Suva ", one witness estimating the speed at forty five to fifty miles per hour and another at about fifty miles per hour.

Two prosecution witnesses also testified that prior to impact the bus driven by the appellant struck part of the bridge on its nearside and after the accident a F police superintendent observed tyre marks on the nearside footpath of the bridge and a bent railing which supported this version of events.

The driver of the other bus testified that his vehicle was already on the bridge, travelling slowly, when the bus driven by the appellant approached the bridge at a fast speed from the opposite direction and forming the impression that the bus driven by the appellant could not stop he immediately stopped and started reversing in an effort to avoid a collision, which version of events was corroborated by one G of his passengers, but that before he could reverse completely off the bridge the bus driven by the appellant struck his vehicle forcing it backwards a distance of fifty four feet, which is consistent with the position in which it was found by a police constable after the accident, as shown on a sketch plan drawn by him. I might add that on this sketch plan the police constable marked the " scene of impact " as being thirty six feet beyond the bridge on the Suva side but he gave no evidence as to how he came to this opinion other than stating that it was a point indicated H to him, and there can be no reasonable doubt, on a consideration of the whole of the evidence, that the place of impact was towards the end of the bridge on the Suva side.

Although the appellant claimed that immediately before the impact he had slowed down almost to a stop and was travelling at only four to five miles per hour an expert witness called on his behalf, who testified that the maximum speed at which the bus could be driven was forty miles per hour, was of the opinion that it could not have been travelling at only four to five miles per hour at the time of impact as that would have caused momentary inertia and the bus would not have " taken off " at full power, as it did.

In his judgment the trial Magistrate summarised the evidence of each and every witness, except one who was declared hostile and utterly discredited, and after stating that he had reviewed the evidence of all the witnesses the trial Magistrate proceeded to make the following findings of fact:—

(1) that the bus being driven by the appellant was travelling fast, the weight of the evidence clearly indicating that the appellant's speed was around forty miles per hour;

(2) that the appellant did not slow down on entering the bridge;

(3) that the appellant did not brake on approaching the bridge nor while he was on it;

(4) that the appellant tried to squeeze through and scraped along the left-hand side of the bridge in the effort;

(5) that the bus driven by the appellant collided with the other bus and not vice versa;

(6) That the other bus was going backwards on impact.

Having perused the record I am satisfied that there was ample evidence, if accepted by the trial Magistrate as it was, to fully support these findings of fact.

The trial Magistrate then considered *R. v. Gosney* [1971] 3 All E.R. 220 and concluded that the appellant had fallen below the care and skill of a competent and experienced driver in relation to the manner of driving, the speed being excessive in the circumstances of the case, namely the approach to and crossing of a narrow bridge on Queens Road obstructed as it was by another vehicle; a conclusion which, in my view, was entirely justified.

I am unable to accept the submission that the trial Magistrate ignored the evidence called by the defence. In his judgment he set out the salient features of the evidence of the appellant and three witnesses called by the defence before making his findings of fact. Certainly he made no specific reference to the sketch plan, but apart from the so-called " scene of impact " marked thereon which in the circumstances was of little if any weight, this plan does not lend support to the appellant's version of events. The trial Magistrate also made no reference to certain photographs that were produced but it does not follow that he did not pay due regard to them.

Turning now to the seventh ground of appeal, prior to the trial counsel for the appellant was informed by the prosecution that this particular witness, inter alia, was to be called by the Crown whereas at the hearing the prosecuting officer declined to call him. However in the event this occasioned no prejudice to the appellant. The witness in question was called by the defence and gave evidence adverse to the appellant. A previous statement which he had made to the police and which was favourable to the appellant was made available to counsel for the appellant who was granted leave by the Court to declare the witness hostile, as a result of which the witness was discredited and the trial Magistrate did not take his evidence into account against the appellant. In view of the fact that the

witness did not ratify his previous police statement on oath but insisted that the testimony he had given was the truth the trial Magistrate could not treat the police statement as evidence in the trial in any way (*R. v. White* 17 Cr. App. R. 60) and the result would have been no different if the prosecution had called this witness and counsel for the appellant had cross-examined him on the basis of his previous inconsistent statement. A

On the hearing of the appeal it was submitted on behalf of the appellant that the trial Magistrate had not given any reasons for not accepting the appellant's version of events or that of certain witnesses called by him and that although the trial Magistrate had stated that the evidence of one particular witness called by the appellant was entirely unsatisfactory he had not given his reasons for coming to that conclusion. It was held in *R. v. Jan Barkat Ali* (18 F.L.R. 129) that a Magistrate is not obliged to give reasons for his acceptance or rejection of the evidence of any particular witness and so long as the evidence to which he has referred and which he accepts is sufficient to establish the ingredients of the offence there has been no failure to comply with the statutory requirements of Section 154 of the Criminal Procedure Code. To quote Lord Shaw in *Clarke v. Edinburgh Tramways Co.* [1919] S.C. (H.L.) 35 " When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not". Further, as the English Court of Criminal Appeal has pointed out, there are cases where it is difficult to say which is the exact piece of evidence that leaves an unsatisfactory impression on the mind (*R. v. Hart* 10 Cr. App. R. 176 at 178), although so far as the witness particularly referred to by the trial Magistrate is concerned the exact piece of evidence that leaves an unsatisfactory impression on the mind is obvious on the record, namely in evidence in chief she claimed that the bus driven by the appellant was knocked over by the other bus which appeared to be going fast whereas in cross-examination she stated that the other bus was backing at the time of impact. B C D E

As counsel for the appellant will no doubt recall, in *Mohammed Hakim Khan v. Dukh Bhanjan Sharma* 4 F.L.R. 183 (in which he is incorrectly reported as appearing for the respondent instead of the appellant), he made submissions of a similar nature to those made on the hearing of the present appeal to the effect that the learned Magistrate had failed to consider all the evidence critically and that no careful analysis had been made of the evidence, and the then Chief Justice after considering *Yuill v. Yuill* [1945] 1 All E.R. 183 and *Khoo Sit Hoh v. Lim Thean Tong* [1912] A.C. 323 stated (at page 187) that an appellate court will only in rare cases disturb the finding of fact in the Court below, based on verbal testimony and the judge's observation of the demeanour of the witnesses, and the appeal was dismissed. That was a civil case but the same considerations apply here and in my opinion this is not one of the rare cases referred to in which an appellate court would be warranted in disturbing the findings of fact in the Court below. In *R. v. Kamchan Singh* 4 F.L.R. 69 this Court held that for an appeal to succeed on the ground that the conviction was against the weight of evidence the appellant must show that the verdict is unreasonable or cannot be supported having regard to the evidence. It is necessary for him to show that there was no evidence on which the Magistrate could reach the conclusion which he did reach if he properly directed himself. This the appellant has failed to do and having considered the evidence and the judgment of the trial Magistrate I have come to the conclusion that none of the grounds of appeal relating to conviction has been established. F G

The only other point I think it necessary to comment on specifically is one raised on the hearing of the appeal, that as the impact occasioned mechanical damage making it impossible to stop the movement of the bus which the appellant was driving which led to the bus leaving the road and to the death of the deceased, this was a factor beyond the control of the appellant who accordingly was not responsible for her death. I am unable to accept this submission. It was the dangerous driving of the appellant which was directly responsible for the collision and it was the collision that resulted in the death of the deceased. There was an unbroken chain of causation and no novus actus interveniens.

With regard to sentence, the trial Magistrate gave careful thought to this matter and explained his reasons for imposing the sentence which he did. Clearly there was here an element of deliberate risk, a reckless disregard for the safety of the passengers entrusted to the appellant's care, and in these circumstances a sentence of imprisonment is not wrong in principle, nor is a term of six months' imprisonment excessive (*R. v. Dutton* [1972] Crim. L.R. 321). As to the period of disqualification imposed, in the circumstances this is lenient.

The appeal against conviction and sentence is accordingly dismissed.

Appeal dismissed.