AJNESH KUMAR v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

REDDY P, GALLEN and SMELLIE JJA

27, 30 August 2002

[2002] FJCA 12

Criminal law — sentencing — appeal against conviction and sentence — dangerous driving causing death — grounds of appeal — whether the learned trial magistrate erred in law in not taking consideration of the accused's speedometer — whether the learned trial magistrate and learned appeal judge erred in law when they failed to consider that there was no evidence to prove the accused's dangerous driving — whether the learned trial magistrate erred in law when he disbelieved the accused — whether the learned appeal judge erred in law for failing to allow the Appellant to adduce further evidence — whether the learned appeal judge erred in law for failing to hold the magistrate's record was incomplete — Court of Appeal Act s 21.

The Appellant was convicted and sentenced in the Magistrate's Court on one count of dangerous driving causing death. He was sentenced to 18 months' imprisonment and disqualified from driving for 2 years. He appealed against both conviction and sentence to the High Court. The appeals were dismissed by the High Court. The Appellant then appealed to the Court of Appeal against conviction only on the ground that there was no evidence to confirm or prove that the Accused's manner of driving was dangerous.

Held — (1) In order to justify a conviction, there must not only be a dangerous situation but there must also have been some fault on the part of the driver causing the situation. So long as there is fault on the part of the driver which creates a dangerous situation he can be guilty of causing death by dangerous driving. It does not matter whether the driving was careless dangerous or reckless.

(2) The findings of fact are sufficient to establish that the driving by the accused resulted in a dangerous situation.

(3) On the ground that the Appellant was not allowed to adduce further evidence, the conclusions both as to admission and relevance are factual and do not give rise to a question of law which would allow us to reconsider this aspect of the appeal.

(4) Any inadequacy of the record does not raise a question of law. It is not clear that this was raised in the High Court except in support of a contention that the Appellant's defence had been inadequately conducted. The judge rejected this ground and it cannot be a ground for appeal.

Appeal dismissed.

No case referred to.

A. K. Singh for the Appellant

G. H. Allan for the Respondent

Judgment

Reddy P, Gallen and Smellie JJA. On the 13th October 2000 the Appellant was convicted in the Magistrate's Court on one count of dangerous driving causing death contrary to s 238(1) of the Penal Code. He was sentenced to 18 months' imprisonment and disqualified from driving for 2 years.

He appealed against both conviction and sentence to the High Court. The facts as set out in the judgment of the High Court are as follows:

The evidence at the trial was that Riaz Alam Buksh was driving to Suva from Nadi on 13th January 1998 in CX134 when he reached Nabukavesi at about 12.15 pm. There was another car behind him. The Appellant's truck was driving from the other side, according to Mr Buksh, on the wrong side of the road. As Mr Buksh pulled to the left, the truck swerved towards his car and collided with it. Mr Buksh's car went into the drain on the side of the road. The Appellant's truck then collided with CV624, driven by the deceased, which also landed in the drain. The deceased was found to be dead on arrival at the CWM Hospital. There were no other witnesses of the accident. However Umlesh Chand (PW9) saw the Appellant's vehicle driving past Wainadoi and overtaking him half a mile before the accident occurred. Mr Chand was travelling at 60kmph and said that the Appellant was driving fast when he overtook him. The investigating officer arrived at the scene after 12.30 pm and drew a sketch plan. He found the Appellant's truck lying on its left side across the road. CV624 was on the left side of the road with its rear in the drain. The Appellant was present and pointed out the point of impact which "was on the left side of the lane towards Suva". The Appellant's truck was 5.4 metres from the point of impact. There were broken vehicle pieces on the left side of the road towards Suva.

The Appellant gave sworn evidence saying that as he approached the bend at Nabukavesi, he saw a car overtake another car and come towards him on his side of the road. He tried to swerve to avoid an accident but could not do so because the car was coming too fast. The car hit his truck on the truck's right side, he lost control of his vehicle and it went to the other side of the road and hit the Nissan Sabero. He said there were two impacts. He denied being present when the sketch plan was drawn, and could not explain why the broken glass was not on the right side of the road.

The appeals against both conviction and sentence were dismissed by the High Court. The Appellant then appealed to this Court against conviction only.

Under s 21 of the Court of Appeal Act, this being a second appeal, only questions of law may be raised.

The first ground of appeal on which counsel for the Appellant relied is:

That the Learned trial Magistrate and/or the Learned Appeal Judge erred in Law when they failed to take into consideration that accused's vehicle's speedometer was locked at 35 kmph that clearly confirms that he was travelling at 35 kmph before the accident.

Although Mr Singh endeavoured to argue this ground gave rise to a question of law we are satisfied that it does not and we reject it.

The second ground of appeal on which counsel relied is:

That the Learned Trial Magistrate and/or that the Learned Appeal Judge erred in Law when they failed to consider that there was no evidence to confirm or prove that the accused's manner of driving was dangerous having regard to all the circumstance of the case.

The distinction between the offences of dangerous driving causing death and careless driving causing death has been the subject of many decisions in various jurisdictions. In Fiji the decision in *Sambhu Lal v Regina* Fiji Court of Appeal Criminal Appeal No 49 of 1986 having analysed the law followed the English decision in *R v Gosney* [1971] 3 All ER 220 (the law in England then being the same as in Fiji).At 224 of *Gosney* it was stated:

In order to justify a conviction there must be not only a situation which viewed objectively was dangerous but there must also have been some fault on the part of the driver causing the situation.

The court in *Gosney* went on to note that the fault involved may be no more than slight. These observations were accepted by the Court of Appeal in Fiji which accepted a summing up which included the direction:

So long as there is fault on the part of the driver which creates a dangerous situation he can be guilty of causing death by dangerous driving and it matters not whether the driving was careless dangerous or reckless.

Mr Singh argued that there was no evidence that the Appellant drove his vehicle in a dangerous manner prior to the accident. He complained that the magistrate failed to state "what was dangerous that caused the accident". Mr Singh queried the evidence as to speed and the position of the Appellant on the roadway at the relevant times contending that the judge was not justified in accepting either fact had been proved to a sufficient extent to support that the manner of driving was sufficiently dangerous to satisfy the charge. In so far as his argument depends on controverting the factual findings the argument cannot succeed. These are findings we cannot disturb. In so far as they place the emphasis on the manner of driving as distinct from the situation created the argument is contrary to the decision in *Sambhu Lal v Regina* (Criminal Appeal 49/1986). Mr Singh submitted that the judge in the High Court was wrong in stating that a person who drives carelessly also drives dangerously if he/she thereby causes a death.

The view of the judge in the High Court is in accordance with the longstanding decision of this court in *Sambhu Lal* (above) which has been consistently applied in Fiji. It may be that in an appropriate case that decision could be reconsidered but this is not such a case. The findings of fact are sufficient to establish that the driving as distinct from the situation it created was dangerous.

The third ground relied upon is:

That the Learned Trial Magistrate erred in law when he failed to give reasons why he believed the complainant and disbelieved the accused.

We accept that there was an obligation on the magistrate to give reasons for his conclusion in terms of the evidence but consider Mr Allan is correct when he submits the magistrate in this case provided sufficient by way of reasons and reasoning to meet the obligation imposed upon him.

The fourth ground of appeal is:

That the Learned Appeal Judge erred in Law when she failed to allow the Appellant to adduce further evidence.

This relates to photographs taken by an insurance assessor which Mr Singh contends support the account given by the Appellant of what occurred.

The judge in the High Court did not allow the photographs to be adduced on the grounds that they could have been available with reasonable diligence at the trial. We might ourselves have come to a different conclusion on the factual aspects of this application but the conclusions both as to admission and relevance are factual and do not give rise to a question of law which would allow us to reconsider this aspect of the appeal.

The fifth ground is:

That the Learned Appeal Judge erred in Law when she failed to hold that the Magistrate's Court record was incomplete.

We are unable to see that any inadequacy of the record raises a question of law. It is not clear that this was raised in the High Court except in support of a contention that the Appellant's defence had been inadequately conducted. The judge rejected this ground and we cannot see how on the basis it is now put forward it raises a question of law.

The last ground is:

That the Learned Appeal Judge erred in Law when she failed to consider that there was no point of impact in respect of the first accident to confirm who was at fault.

This ground is wholly factual and it is not open to us to reconsider it.

Accordingly the appeal must fail and is dismissed.

Appeal dismissed.