

IN THE RESIDENT MAGISTRATE'S COURT OF FIJI
AT NAVUA

Traffic Case : 4210/2011

STATE

VS

REHANA KHATOON KHAN

For Prosecution : Mr. Prakash from the ODPP
For Accused : Mr. Rabuku

Judgment

- [1] The accused was charged with one count of Dangerous Driving Occasioning Death contrary to section 97(2) (c) and 114 of the LTA Act No. 35 of 1998. The charge read as follows:

Statement of Offence (a)

DANGEROUS DRIVING OCCASIONING DEATH:- Contrary to Section 97 (2) (c) of and 114 of the Land Transport Authority Act Number 35 of 1998.

Particulars of offence (b)

REHANA KHATOONKHAN F/N MOHAMMED ISHAQ KHAN, on the 10th day of June, 2011, at Navua in the Central Division, drove a motor vehicle registration number FM 166 on Queens Road, Qaributa, Navua in a manner which was dangerous to the public regarding all circumstances of the case whereby the said motor vehicle went off the road causing the death of a pedestrian namely **RICHARD ISIKELI NACOLA TABUALOVONI**.

- [2] The accused pleaded not guilty to the charge and this matter proceeded for hearing and concluded on 28 May 2013.
- [3] The prosecution called 05 witnesses (04 civil witnesses and police officer) and for the defence the accused gave sworn evidence. The defence also called the sister of the accused as a witness.

Summary of Evidence

- [4] PW1, Luke Tabualovoni is the father of the victim. He said on 10 June 2011 he was with his son on the side of the road and saw a car coming at high speed. The car was heading to Suva. At that time PW1 was standing side by side with his son (deceased). Suddenly the vehicle veered off the road and next thing he knew was that the car picking his son. PW1 saw him fall on the middle of the road and as soon as he ran to the victim he saw the child dead. PW1 identified the accused as the driver of the vehicle.
- [5] In cross examination PW1 denied speaking to the accused's sister or a Taxi driver called Vimal about the accident. PW1 also denied telling them that the victim running to the road before the accident. PW1 also admitted giving a statement to the police 3 days after the incident and said at that time he was traumatized. He also said in that statement he did not agree with the part where it was mentioned that his son ran to the road. (statement was marked as Defence Ex-01). PW1 further said at that time he was holding his son and the vehicle came to them.
- [6] PW2, was Chadra Shekar Shama who witnessed the incident. He said on that day he was standing in his poach and was watching the road. He saw PW1 holding the victim's hand on the side of the road and suddenly a vehicle came and bumped them. At that time the driver was going around 90-100kmph and PW2 identified the accused in the court.
- [7] In cross examination PW2 said the accident happened just opposite his house and at that time pW1 was holding his son's hand. He also said the victim did not run to the road before the accident and he pointed the police where the accident happened.
- [8] PW3, Javend Nasirud was the examiner from the LTA and said there was no mechanical fault in the vehicle.
- [9] PW4, PC 1755 Nair visited the scene and drew sketch plans. They were drawn on 10 June 2011 (day of the incident) and said he found fresh tyre marks on the side of the road. In cross examination PW4 said the point of impact was shown by an eye witness (PW2) and the accused did not show the point.

- [10] PW5, Nanise Naniu said she saw the father and the child standing side of the road and heard a sound and saw the child rolling in front. The prosecution did not call any other witnesses and closed their case. The defence was given the rights and opted to give sworn evidence.
- [11] The accused in her evidence said she was driving around 60kmph on that day and saw the people standing beside the road. Suddenly a child ran to the road and the accused swerved right to save him but bumped him in the middle of the road. The vehicle landed in the drain. She also denied the vehicle went out of the road and picked the child and also denied driving in a dangerous manner at that time.
- [12] In cross examination she said she saw the pedestrians before the accident and was not lying about the speed.
- [13] Second witness called by the defence is Shabina Khan, the sister of the accused. She said she heard about the accident and went to hospital. There a Fijian guy came and told her he was the victim's father and before the accident the victim crossed the road. The defence wanted to call one more witness and the Court granted time to bring him. Finally on 28 May 2013 the defence informed the Court that they would not want to call him and also closed the case.
- [14] Both parties opted to file closing submission and were given till 17 June 2013 to file them. The judgment was fixed to be given on 01 July 2013. Only the prosecution has filed the submission. The defence has failed to do so and therefore I have to proceed without that.

The Law

- [15] The accused was charged with one count of Dangerous Driving Occasioning Death contrary to section 97(2) (c) and 114 of the LTA Act No. 35 of 1998. Section 97(2) (c) of the Act state:-

“—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 :-

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

[16] In **Rao v The State, Criminal Appeal No HAA 102 of 2007** Her Ladyship Justice Shameem outlined the elements of the offences under Section 97(2) of the Land Transport Act as :-

- I. The Accused drove the vehicle**
- II. He occasioned death**
- III. In an impact**
- IV. At the time of the impact the accused was either drunk or speeding or driving in a manner dangerous to other road users.**

[17] In this case the accused was charged under section 97(2) (c) of the Act and the therefore the elements of this offence are

- I. The Accused drove the motor vehicle**
- II. That he occasioned the death**
- III. In an impact**
- IV. At that time of the impact the accused was driving in a manner dangerous to another person**

[18] In Archibald (1996) term dangerous has been described as danger either of injury to any person or of serious damage to property. Additionally, it states that a person is to be regarded as driving dangerously if:-

[a] The way or manner he drives falls far below what would be expected of a competent and careful driver,

[b] It would be obvious to a competent and careful driver that driving in that way would be dangerous.

- [19] In **Semisi Lasike v The State [2002] FJHC 159**; Justice Shameem also noted that **“Dangerous driving is the causing of a dangerous situation by a manner of driving which falls below the standard expected of a prudent driver”**.
- [20] In **Woolmington v DPP (1935) AC 462** it was held that 'no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the accused, is part of the common law".
- [21] In **State v Seniloli [2004] FJHC 48; HAC0028.2003S (5 August 2004)** Justice Shameem told to assessors (summing up);

“The standard of proof in a criminal case is one of proof beyond reasonable doubt.

This means that you **must be satisfied** so that you feel sure of the guilt of the accused persons before you express an opinion that they are guilty. If you have any reasonable doubt as to whether the accused persons committed the offence charged against each of them on the Information, then it is your duty to express an opinion that the accused are not guilty. It is only if you are satisfied so that you feel sure of their guilt that you must express an opinion that they are guilty. One of the defence counsel asked you if you had the slightest doubt about the accused’s guilt. That is not the correct test. **The correct test is whether you have any reasonable doubt about the guilt of the accused.”**

Analysis of Evidence

[22] The following elements are not disputed by the both parties.

- I. The Accused drove the vehicle**
- II. She occasioned death**
- III. In an impact**

[23] Therefore the only issue to be determined in this case is whether the accused was driving in a dangerous manner at the time of the accident. Basically there are two

versions in this case. The prosecution says that the victim was standing with his father beside that road when suddenly the accused's vehicle came to them and caused this accident. Denying this the defence said the child ran to the road and got bumped and at that time she was driving around 60kmph.

[24] First I will consider the evidence that would favor the accused in this case. The complainant, the father in his evidence said that he was standing with his son when this accident happened. But according to defence PW1 has given a statement 03 days after the accident (defence Ex-01) and in that statement he has said the child ran to the road.

[25] Sister of the accused whilst giving evidence said she met PW1 in the hospital and he again told her the child ran to the road. From these evidence the defence was trying to highlight that PW1 was not a credible witness and his out of court statements were supporting the defence's version. Therefore before turning to other evidence I will consider above grounds.

[26] **Evidence of Shabina Khan**- She is the sister of the accused and therefore could not be considered as an impartial witness. In cross examination the PW1 vigorously denied telling her about the accident. Also even though according to the witness PW1 told her about the accident on 10 June 2013 she never informed police about that. She was revealing about it first time only in this Court. Therefore I am not prepared to give much weight to this evidence.

[27] **PW1's statement to the police** - According to the defence PW1, 03 days after the accident made a statement to the police and in that said that the victim ran to the road. When asked about this PW1 in court admitted making the statement but said he did not agree to that part. Since PW1 did not admit this part only value in this statement would be to decide about the credibility of that witness.

[28] In **R v Golder** [1960] 1 WLR it was held that :

'When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should be not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements whether

sworn or unsworn, do not constitute evidence upon which they can act

(emphasis mine)

[29] In **Gyan Singh v State** 9 FLT 105, Fiji High court held that:

“It is the duty of the trial judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy of credence and, if so, what weight should be attached to it.

[30] In **Prem Chand Singh v The State** 11 FLR 119 at p.125 again Fiji High Court said :

We accept as an accurate statement of the law the extract quoted by counsel for the appellants from Leonard Harries (1927) 20 Cr. App. R. 144 at 147:-

“If, therefore, it appears, that the has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury, and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility.”

*A the same time it is still a matter for the Assessors in their advice to the Judge, and for the learned trial Judge in his judgment, to determine just what credence can be given to the evidence of the witnesses concerned and just what weight can be place upon it. This aspect of the matter was examined by this Court in **Gyan Singh v. Reginam (1963) 9 F.L.R. 105**”.*

[31] In this case PW1 has given a statement 03 days after the accident contradicting his evidence in the court. PW1 whilst giving evidence in the witness box said he did not agree with that part and at that time he was traumatized. I believe that is a valid explanation that Court can accept. The victim was the son of PW1. PW1 was also

present at the scene and witnesses firsthand the accident. I can accept him being traumatized from the incident even after 03 days. Therefore even with this contradiction I am prepared to accept the evidence of PW1 in the witness box.

- [32] The accused in his evidence said the accident happened because the child ran to the road. Even though her evidence was consistent with her caution statement this statement was given after consultation of her solicitor.
- [33] Now I will consider the prosecution's evidence in this case. As noted above PW1 throughout his evidence said he was standing with his son when the vehicle came and picked his son. This position he held in cross examination too even when he was confronted with his police statement. I have already decided that PW1 is a credible witness.
- [34] PW3 was the LTA examiner who confirmed that there was no fault in the vehicle. Even though PW5 was supposed to be an eye witness she could not explain how the accident happened. This leave with PW2 and PW4 who I believe are crucial witnesses in this case.
- [35] PW4, PC Nair visited the scene and drew the sketch plans. Rough sketch plan was marked as Ex-06 and fair sketch plan was marked as EX-07. Rough sketch plan was drawn around 0815hrs just after the accident. In it alleged point of impact was marked on the side of the road. Leading to this place is tyre marks of a vehicle which would be consistent with the prosecution version.
- [36] According to PW4, the accused did not show the point of impact. Only one witness called Satish (PW2) showed the point of impact.
- [37] In the rough sketch plan there is another point marked in the middle and it states this was pointed out by the father of the victim. This point was not marked in fair sketch plan. According to PW4 he did not speak to the father on that day. The defence also did not ask any question about this from PW4 or from PW1. Therefore I am not in a position to comment about this.
- [38] According to PW4, the point of impact marked as "O" in fair sketch plan was shown by one eye witness called Satish. He was standing in the verandah of his house

when the accident happened. This eye witness was called as the second witness for the prosecution case.

[39] PW2, Mr. Chadar Shekar in his evidence said on that day he was standing on his poach and saw the victim with PW1 side of the road. Suddenly the accused's vehicle veered out of the road and bumped the victim. In cross examination witness said he did not discuss about the incident with anyone and said he showed the police the point of impact. PW2 also denied the victim ran to the road before the accident.

[40] I believe PW2 is a credible witness in this case. At that time he was standing in his house and saw the incident clearly. He showed the point of impact to PW4 who drew the plan around 0815hrs just after the accident. Therefore he could not have time to discuss this with anyone or concoct a story to suit anyone.

[41] Also unlike some other witnesses called by parties (sister of the accused) PW2 is not partial to any side. He has no reason to favor PW1 or give unfavorable evidence against the accused. Even in his cross examination the defence did not manage to mark any serious contradictions. Therefore I am prepared to accept PW2's evidence in this case.

[42] Therefore after considering all the evidence this Court accept the prosecution's version that the accident happened whilst the victim was standing with his father beside the road.

[43] Main witnesses for the prosecution said the accused was coming at high speed and veered of the road. According to the accused she was traveling around 60kmph. If that is so she would have had time to apply for the brakes maybe even preventing this accident. There were no brake marks before the accident.

[44] The wheel marks before the impact measured 36.8m. This shows once again the accused was traveling at high speed and lost control of the vehicle. As admitted by the accused she was traveling daily from Navua to Suva and knew about the road. She would have known people were standing beside the road waiting for transport.

[45] The evidence presented in this case point out also at the time of the accident the accused was driving in a dangerous manner causing this incident.

[46] Therefore I hold that the prosecution has proved beyond reasonable doubt that the accused committed this offence.

[47] The accused is found guilty for the offence of Dangerous Driving Occasioning Death contrary to section 97(2) (c) and 114 of the LTA Act No. 35 of 1998. Accordingly I convict her for this charge.

[48] 28 days to appeal

01 July 2013

H. S. P. Somaratne
Resident Magistrate