IN THE SUPREME COURT OF FIJI (WESTERN DIVISION) A T L A U T O K A Appellate Jurisdiction Criminal Appeal No. 30 of 1982

RETWEEN: PONSALI s/o Manadhan Goundar

Appellant

AND: REGINA

Respondenti

Er. S. R. Shankar Er. S. C. Maharaj

Counsel for the Appellant Counsel for the Respondent

JUDGHENT

The appellant was charged with three counts, namely causing death by dangerous driving contrary to section 269(1) of the Penal Code (now Section 238); driving a motor vehicle whilst under the influence of drink contrary to Section 39(1) of the Traffic Act. The third count of dangerous driving is difficult to understand since the offence is covered in count 1, and is not expressed as being an alternative count.

The appellant pleaded not guilty, and four prosecution witnesses were called. At that stage the appellant stated that he wished to plead guilty, which he then did after the charges were explained to him and he made quite unequivocal admissions showing that he understood the charges and admitted them. He was thereupon convicted on the three counts, and after hearing the appellant in mitigation the magistrate sentenced him to two years imprisonment on count 1, three months imprisonment on count 2 and three months imprisonment on count 3, all to run concurrently. He was also disqualified from driving or holding a driving licence for five years on count 1 and one year on count 2.

The appeal was originally against conviction and sentence, but except as to count 3 the appeal was restricted in effect only to the sentence of two cours imprisonment on count 1. As to count 3 since this offence is covered by count 1 no conviction or sentence should have been passed on this count. Crown counse concedes this point so to that extent the appeal succeeds and the conviction and sentence on count 3 are set aside.

As to the appeal against the two years imprisonment on count 1 defence counsel has argued strongly that this is harsh and excessive and out of keeping with sentences passed for similar offences in other cases. It is of course never easy to equate one case with another, one may have much more reprehensible features than others. I was referred to the case of R. v. Guilefoyle /19737 2AUR 844 where Lawton, L. J. set out guiding principles with regard to the different kinds of circumstances giving rise to this offence. There are offences of this type where for instance the dangerous driving may result from a lapse of judgment. But Lawton, L. J. made it clear that in the more reprehensible type of dangerous driving, where for instance there is a reckless disregard for the lives and safety of others a custodial sentence is called for. In this case there is little to be said in the appellant's favour. He had been drinking and was drunk. His condition was such that at the petrol station at Madi the pump attendant asked him if he was able to drive home. The appellant should then have been warned, if he was not already aware of his own condition. le drove off from the petrol station in a dangerous manner.

At the scene of the accident, according to eye witness reports, he was driving at high speed, swerved right across onto the wrong side of the road on a clear road for no reason and drove head on into a car coming in the opposite direction. It is sometimes said that God looks after fools and drunks, and the appellant was certainly comparatively unharmed by the accident. But in the other car, the driver, Dr. Arora, was badly injured and has needed an artificial knee-cap. His wife who was seven months pregnant was killed, and the foetus also died. This tragedy was caused by the appellant driving such too fast and dangerously at a time when he should not have been behind the wheel at all.

The appellant has been a driver for twenty years, and has been an ambulance driver, without any previous convictions. That is in his favour, but on the other hand a driver of that experience should know the danger of trying to drive in his condition at any time, let alone at night. The courts cannot help but take note of the fact that there is a lot of drunken and dangerous driving on the roads of Fiji, a fact which is causing much public concern.

The present case would certainly come within the category that Lawton, i.... said warranted a custodial sentence, (although the magistrate has not recorded his reasons for the sentence it is clear that his view of the case brought it within this category) and the only question is whether two years is appropriate or excessive. The Penal Code prescribes a penalty of five years for an offence under Section 238 so the penalty inflicted is well within the magistrate's discretion.

Defence counsel has referred me to cases where a fine has been imposed, jut those are all cases where the dangerous driving has been reprehensible but perhaps more errors of judgment. There have been cases where a similar gentence has been passed, but counsel has argued that these were exceptionally bad cases.

However this also is a bad case, and in the circumstances I cannot find that the magistrate exercised his discretion in the matter of sentence incorrectly. If the sentence is heavy, it is still well within his discretion and I see no reason to interfere with it. The appeal is therefore dismissed.

Lautoka,

21st May, 1982

G. O. L. Dyke

Judge

