

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.: HAA 29 OF 2009**

**BETWEEN:**

**THE STATE**

***Appellant***

**AND:**

**NAPOLIONI NAKIBO**

***Respondent***

**Counsel: Ms. V. Lidise for the Appellant  
Mr. I. Khan for the Respondent**

**Date of Hearing: Thursday 4 June 2009**

**Date of Judgment: Friday 5 June 2009**

## **JUDGMENT**

[1] This is an application to appeal out of time against acquittal of the respondent on a charge of dangerous driving causing death.

- [2] The appeal is out of time by one month. The main contention of the State is that the learned Magistrate failed to consider the totality of evidence led by the prosecution before acquitting the respondent under section 210 of the Criminal Procedure Code.

Section 210 provides:

*“If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.”*

The test under section 210 is:

- “(1) Whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and*
- (2) Whether on the prosecution case at its highest, a reasonable tribunal could convict. Where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a submission of no case. Where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case” **(Abdul Gani Sahib v State [2005] HAA0022/05S 28 April 2005).***

- [3] The evidence led by the prosecution at the trial was largely undisputed by the respondent. On 23 September 2005 at 1.30pm, the respondent and the deceased were traveling together towards Ba in a police vehicle. The respondent was driving the vehicle while the deceased was a passenger. While approaching Matawalu village, the respondent overtook another vehicle. While overtaking the other vehicle, the respondent's vehicle went out of the road and tumbled three times before landing in a drain.

- [4] The two eye witnesses to the accident were not able to say what speed the respondent's vehicle was traveling. In his caution interview, which was tendered as part of the prosecution case, the respondent said that he was driving at a speed of 60 km/ph and while overtaking another vehicle, something broke in the front wheel of his vehicle and his vehicle went out of control before tumbling into a drain.
- [5] The respondent said there was no oncoming vehicle and the road was newly tarsealed with loose gravels all over.
- [6] The State submitted that albeit there was no direct evidence of speeding, there was circumstantial evidence from which an inference of high speed could have been drawn. The State points out to the sketch plan which was tendered by consent and which showed that the vehicle skid for about 20 meters before tumbling three times.
- [7] The hurdle for the State is that no expert evidence was led to show that the skid of 20 meters could only be caused if the vehicle was traveling on a high speed and that such skid was unlikely if the vehicle was traveling at a low speed.
- [8] The further hurdle for the State is that no evidence was led to rebut the respondent's claim that something broke in the front wheel of his vehicle that caused the accident.

- [9] On a charge of dangerous driving causing death, the prosecution must prove that the driver's manner of driving fell below the standard expected of a reasonable and prudent driver, and thereby caused a dangerous situation as a result of which, a person died **[Kumar v State (2002) FJHC; HAA014.2001S (12 April 2002)]**.
- [10] Albeit the learned Magistrate did not properly articulate the test under section 210, he nevertheless arrived at a correct conclusion by upholding the no case to answer application.
- [11] There was no evidence led by the prosecution that the respondent's manner of driving fell below the standard expected of a reasonable and prudent driver. The fact that there was an accident that resulted in death is not sufficient proof of the offence of dangerous drive causing death.
- [12] The prosecution must lead evidence of the manner of driving which create a dangerous situation and places the driver at fault. Since no such evidence was led the respondent was properly acquitted at the close of the prosecution case.
- [13] I find the State's appeal is without merits. The application to appeal out of time is refused.

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**Daniel Goundar**  
**JUDGE**

**At Lautoka**  
**5 June 2009**