

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 032/2009

BETWEEN:

THE STATE

(Appellant)

AND:

SAMISONI KAKAIVALU

(Respondent)

Hearing: 31st July 2009

Judgment: 14th August 2009

Counsel: Ms W George for the State

Respondent in person

J U D G M E N T

1. On 1st May 2008, in the presence of his Counsel, the respondent pleaded guilty to the following charge:

C H A R G E

(COMPLAINT BY PUBLIC OFFICER)

Statement of Offence

**DRIVING MOTOR VEHICLE WHILST THERE IS PRESENT IN THE
BLOOD A CONCENTRATION OF ALCOHOL IN EXCESS OF THE
PRESCRIBED LIMIT:**

Contrary to Section 103 (1) (a) and 114 of the Land Transport Act 35 of 1998.

Particulars of Offence

SAMISONI KAKAIVALU on the 12th day of January, 2007, at Nasinu in the Central Division drove a motor vehicle registration number I869B on Kings Road, Vesida, whilst there was present in 100 millilitres of his blood a concentration of 171.6 milligrams of alcohol which was in excess of the prescribed limit.

2. The prosecution then presented their facts. It said that, on 12th January 2007, at about 11.15pm, the respondent was driving his

motor vehicle, along Kings Road at Nasinu in the Central Division. His motor vehicle was stopped by the police, for suspected drunk driving. He was breath tested, and it was found to be positive. He was later tested in the dragger machine. It was found that in 100 millilitres of his blood, there was a concentration of 171.6 milligrams of alcohol, which was above the prescribed limit. These facts were put to the accused on 1st May 2008, and he admitted it. He was found guilty as charged, on 15th August 2008, and thereafter convicted accordingly.

3. The Learned Resident Magistrate then passed the following sentence, after considering his plea in mitigation, "...I have decided to impose a fine of \$300, and to restrict your driving as follows. That you are only to drive from 9am to 10pm. You are not to drive outside those hours ..."
4. The State appealed against the above sentence, arguing that:
 - (i) The Learned Resident Magistrate erred in law and in fact, when she ordered a partial disqualification, contrary to the minimum mandatory terms of section 114 of the Land Transport Act No. 35 of 1998.

5. It is now well settled that, in "excess breath alcohol type driving offences" (sections 103 (1) (a) and 114 of the Land Transport Act No.35 of 1998), partial driving disqualification is prohibited. Her Ladyship Justice Shameem has expounded on the point in **State vs Jitesh Prasad**, High Court, Suva, Criminal Appeal No. HAA 038 of 2003. When discussing sections 103(a) and 114 of the Land Transport Act No.35 of 1998, Justice Shameem said, "...The legislature has provided for no power to order partial disqualification. This is logical. The order for disqualification is a sentence which acknowledges that a driver is a safety risk for other road users. By allowing him/her to use the road during some hours of the day, how is the safety of other road users protected? In this case, the learned Magistrate ordered that the respondent could drive between 6am and 6pm daily, the very hour the roads are busiest! The Courts do not have the powers to order disqualifications between certain hours of the day.....where a person is disqualified from driving; he is taken off the roads for the period of time specified...." (pages 4 to 5).
6. I respectfully agree with Justice Shameem, and the law, as expounded in **State vs Jitesh Prasad** (supra), must be applied in this case. This is so, despite the respondent's submission, that he's already served his sentence on November 2008. He paid his \$300

fine on 2nd September 2008. Although I sympathize with the respondent's predicament in this case, the law must nevertheless be applied. The Learned Resident Magistrate's partial disqualification order on 15th August 2008 was null and void. The disqualification period, in this case, runs from a maximum of 2 years to a minimum of 3 months.

7. The State's appeal against sentence is granted. The respondent is disqualified from holding or obtaining a driver's licence for the minimum of 3 months, effective forthwith, and to expire on 14th November 2009.

[Salesi Temo]

ACTING JUDGE

AT Suva
14th August 2009