

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Miscellaneous Case No: HAM 030 of 2008

BETWEEN:

THE STATE

Applicant

AND:

GANESH f/n Kotaiya

Respondent

Date of Hearing: 31st July 2009

Date of Ruling: 17th September 2009

Counsel: Ms V. Lidise for State
Mr. S. Sharma for Respondent

RULING

[1] This is an application for enlargement of time by the State to appeal against an order of acquittal entered by the learned trial Magistrate on 31 July 2008 following a submission of no case to answer. The application for enlargement of time to appeal was filed on 25 September 2008. The appeal is out of time by just

about a month. The delay is due to the unavailability of the court record and the legal requirement for a written sanction of the Director of Public Prosecutions to appeal against an acquittal.

- [2] The respondent opposes the application on the grounds that the State has neither shown good cause for the delay nor is there any merit in the appeal.
- [3] Section 310(2) of the Criminal Procedure Code provides that an appeal to the High Court must be lodged within 28 days from the date of the decision appealed against, unless the period of limitation has been enlarged by the court. An enlargement of the period of limitation is discretionary. The court considers matters such as the prospects of success in the appeal, the length and reasons for delay and the prejudice to the opponent party (***State v Patel*** [2002] AAU0002/025).
- [4] The respondent was charged with one count of occasioning death by dangerous driving contrary to sections 97(2)(c) and 114 of the Land Transport Act 35 of 1998.
- [5] The facts were largely undisputed. The respondent is a driver by profession. On 1 October 2005, he drove his employer's truck carrying a container from Suva to Lautoka. He left Suva at 11.00am and arrived in Lautoka at 6pm. After dropping the container at Lautoka wharf, the respondent drove to his employer's yard to park the truck. It was dark by then. As he was about to make a right turn at an island on the road, he hit the victim who was crossing the road. The point of impact was in the middle of the road. The victim, who was 75 years old, was an

employee of Lautoka City Council and was cleaning the street at the time. He died on 8 October 2005 due to subdural haemorrhage.

- [6] A vehicle examiner from the Land Transport Authority inspected the truck that hit the victim. He found no mechanical fault in the truck.
- [7] A sketch plan of the accident was tendered in evidence. The distance from the point of impact to the nearest street light was 16.5 metres.
- [8] In his caution interview, the respondent said he was driving at a speed of 10-15 kmph when he hit the victim. He had his lights on low beam. He only saw the victim when he was one yard away. The victim was crossing the road by pushing a cart and was not wearing any reflector. After the victim was hit, he went underneath the truck. The respondent immediately stopped the truck and pulled the victim out with the assistance of a Fijian man.
- [9] At trial, the prosecution called only one witness. Aisake Tuibua was at a close proximity from the point of accident. The witness said he turned around when he heard brake sounds and saw a person thrown in front of a truck. He said the victim was wearing an old reflector, which was orange in colour. In cross-examination, the witness said the respondent was not driving dangerously before the impact. The witness did not give any evidence of speed or manner of the respondent's driving.

[10] After close of the evidence for the prosecution, the defence applied for a no case to answer. The application was granted and the respondent was acquitted under section 210 of the Criminal Procedure Code.

[11] 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.”

[12] The test under section 210 has two limbs:

- (i) whether there is relevant and admissible evidence implicating the accused in respect of each element of the charged offence;
- (ii) whether the prosecution evidence has been so discredited by cross examination that no reasonable tribunal could convict.

[13] Either limb of the test can be relied upon to make an application for no case to answer in the Magistrates' Court.

[14] In the present case, the learned Magistrate relied on both limbs to acquit the respondent. Firstly, the learned Magistrate found the evidence of Aisake Tuibua unreliable because he was discredited in cross-examination, and secondly, there was no evidence that the respondent drove his truck in a dangerous manner, which was an essential ingredient of the charged offence.

- [15] The State advances four grounds of appeal. None suggests that the learned Magistrate blemished the test under section 210.
- [16] The first ground is that the learned Magistrate erred in law and fact in excluding the sworn evidence of Aisake Tuibua.
- [17] Aisake Tuibua was cross-examined on omissions in his statement to the police. For instance, his police statement did not mention anything about the victim wearing a reflector or that the victim was thrown in front of the truck. The witness explained that the police did not ask him about these matters.
- [18] The learned Magistrate's reasons for disregarding the evidence of Aisake Tuibua were:

"The evidence of Aisake was very discredited as to how he witnessed the accident. Aisake said that he only saw the deceased about a metre or a yard away from the truck just before the collision and this version corresponds with what the accused said. There is no evidence that the victim was wearing any kind of reflective clothings. Aisake did not tell the police that the victim was wearing reflective clothings and nor was the accused questioned about the victim wearing any kind of reflective clothings. There is no evidence that any notice board was placed anywhere prior to the scene of the accident on the street informing the motorists that work was in progress. The accused only saw the victim when he was about a yard away and in the circumstances he took the precautions that a reasonable and prudent driver was expected to take but unfortunately he could not avoid colliding with the deceased. It cannot therefore be alleged that the accused drove his motor vehicle in a dangerous manner and therefore no fault can be attributed to the accused."

- [19] An appellate court will be slow to disturb a trial magistrate's findings of fact or assessment of credibility of witnesses, unless satisfied that a completely wrong assessment of the evidence has been made or the correct principle has not been applied. In the present case, the trial Magistrate had the advantage of observing the demeanour of Aisake Tuibua when he gave evidence and was cross examined on the inconsistencies with his previous statement. The learned Magistrate found the inconsistencies were on material facts. He rejected the witness's explanation for the inconsistencies and found his evidence unreliable.
- [20] No error of law or fact has been shown in the assessment of Aisake Tuibua's evidence. There is no merit in the first ground.
- [21] The remaining three grounds concern sufficiency of evidence adduced by the prosecution to prove the charge and can be dealt together.
- [22] The essential elements of the offence of occasioning death by dangerous driving are:
1. The accused,
 2. Drove a motor vehicle,
 3. In a manner which was dangerous to the public,
 4. Caused the death of another.
- [23] The first, second and fourth elements were not in dispute. The third element was in dispute and the learned Magistrate found no evidence of it.
- [24] The State submits that the respondent drove inattentively and therefore was careless. His carelessness constitutes dangerous manner of driving. The State

relies on the decision of the High Court in **Ajnesh Kumar v. State** [2002] FJHC 291 as the authority for the proposition that careless driving constitutes sufficient proof of dangerous driving if death is caused.

[25] In **Ajnesh Kumar**, the High Court said:

“The test for a charge of Dangerous Driving is an objective one, as is the test for Careless Driving. The difference between the Careless Driving and Dangerous Driving is not the manner of driving, (which has the same test) but the situation that has been caused thereby. In other words, a person who drives carelessly, also drives dangerously, if viewed objectively, his/her manner of driving creates a dangerous situation. Thus a person who drives carelessly, drives dangerously if he/she thereby causes a death.”

[26] If the sentence “a person who drives carelessly drives dangerously if he/she caused the death of another person” is taken in isolation, then there is some force in the State’s submissions. However, a sentence should not be read in isolation but in the context of the rest of the judgment to determine the principle established by the case.

[27] The High Court has not changed what has been the longstanding law on dangerous driving causing death in Fiji. This is evident when the case of **Ajnesh Kumar** was taken on appeal to the Court of Appeal (**Kumar v. State Criminal Appeal No. AAU0014 of 2002S**). The Court of Appeal said:

“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 p.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”.

[28] The Court of Appeal also said:

“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 v. Regina Supra* 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.”

[29] More recently in ***Ram Karan v. State*** *Criminal Appeal No. AAU014 of 2007S*, the Court of Appeal confirmed that the principles laid down in ***Gosney*** applied to a charge brought under section 97(2)(c) of the Land Transport Act.

[30] Further in **Ram Karan**, the Court of Appeal observed:

“..... it is almost certainly well past the time when there can be a debate about this topic because the Court of Appeal of Fiji has embraced **R v. Gosney** [1971] 3 All ER 220, (1971) 55 Cr App R 502 with its reference to a requirement of fault.”

[31] Having considered the evidence and the submissions of counsel, I am satisfied that there was no evidence led by the prosecution to prove that there was fault on the part of the respondent which created a dangerous situation to others on the road. In this regard the learned Magistrate was correct in law and fact to find that there was no evidence of an essential element of the charged offence.

[32] For these reasons, I find the appeal is bound to fail and leave must be refused without considering the matter any further.

[33] The application to appeal out of time is refused.

Daniel Goundar
JUDGE

At Suva
17th September 2009