

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA07 OF 2017

(Magistrates' Court Case No. 334 of 2014)

BETWEEN: MITTUN NAIDU

APPELLANT

AND: THE STATE

RESPONDENT

Counsel: Mr A Kohli for the Appellant
 Mr R Kumar for the Respondent

Date of Hearing: 16 January 2018

Date of Judgment: 02 March 2018

JUDGMENT

- [1] This is an appeal against both conviction and sentence.
- [2] Following a trial in the Magistrates' Court at Savusavu, the appellant was tried of aggravated dangerous driving occasioning death contrary to sections 97 (1), (2) (c), (5) (a), (8) and 114 of Land Transport Act of 1998 but convicted of a lesser offence of dangerous driving occasioning death. On 28 April 2017, the appellant was sentenced to 2 ½ years' imprisonment and suspended for driving for 3 years. The appeal was filed on 3 May 2017. The appeal is timely.

- [3] On 23 May 2017, Madigan J granted the appellant bail pending an appeal in an extempore ruling.
- [4] The grounds of appeal are:
- (a) **THAT** the Learned Trial Magistrate erred in law and in fact in finding the accused guilty of the charges in the absence of evidence to substantiate the same.
 - (b) **THAT** the Learned Trial Magistrate erred in law and in fact in taking into account irrelevant matters and not taking into account relevant matters.
 - (c) **THAT** the Learned Trial Magistrate failed to take into account the sentences handed down by other courts in similar cases.
- [5] At the trial, the prosecution led evidence that on 3 January 2014 the appellant lost control of his motor vehicle while driving along Hibiscus Highway. The deceased was a passenger in his vehicle. He was sitting on the front passenger seat and not wearing a seat belt when the impact occurred. There were no other passengers in the vehicle at the time of the impact.
- [6] The vehicle was a station wagon. It was used as a taxi. According to the vehicle accident report, no mechanical defects were found on the vehicle.
- [7] The road where the impact occurred had recently been tar sealed. The appellant lost control of his vehicle as it approached a bend. The vehicle hit a concrete post on the left side of the road, flipped and landed upside down. The passenger died at the scene. The victim's skull was fractured as a result of the impact. The cause of death was brain injury.
- [8] The appellant gave evidence. He did not dispute his identity as the driver of the vehicle. He gave an innocent explanation for the cause of the accident. He said that he was driving between 50 – 60km/hr when he lost control of his vehicle. He said that he had to move his vehicle to the far left side of the road to avoid impact with an oncoming truck. He said that he lost control of his vehicle when he moved it to the

left side of the road and on the loose gravel. He denied driving the vehicle in a dangerous manner.

[9] The appellant was charged with aggravated dangerous driving occasioning death contrary to sections 97 (1) (2) (c), 5 (a), (8) and 114 of the Land Transport Act.

[10] Section 97 (1) provides:

A person commits the offence of aggravated dangerous driving occasioning death if the person commits the offence under subsection (2) in circumstances of aggravation.

[11] Section 97 (2) provides:

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-

- (a) under the influence of intoxicating liquor or of a drug;
- (b) at a speed dangerous to another person or persons or persons;
or
- (c) in a manner dangerous to another person or persons or persons.

[12] Section 97 (5) (a) provides:

For the purposes of this section, the circumstances in which a vehicle is involved in an impact occasioning the death of, or grievous bodily harm to, a person include if the death or harm is occasioned through any of the following -

- (a) the vehicle overturning or leaving a public street while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);

[13] Section 8 provides:

A person who commits an offence under subsection (1), (2), (3) or (4) is liable on conviction to the prescribed penalty.

[14] Section 114 is the penalty provision.

[15] The main complaint against conviction is that the appellant was charged with aggravated dangerous driving, but was convicted of a lesser offence of dangerous driving occasioning death without prior notice or an opportunity to present a defence to the lesser offence.

[16] The offence of dangerous driving occasioning death becomes aggravated dangerous driving occasioning death if it is committed in the circumstances provided by section 97 (7) of the Land Transport Act. Section 97 (7) provides:

In this section, circumstances of aggravation” means any circumstances at the time of the impact occasioning death or grievous bodily harm in which –

- (a) more, than the prescribed concentration of alcohol was present in the accused's blood; or
- (b) the accused was driving the vehicle concerned on a public street at a speed that exceeded, by more than 45 kilometres per hour, the prescribed speed limit (if any) applicable to that length of public street; or
- (c) the accused was driving the vehicle to escape pursuit by a police or authorised officer.

[17] In the present case, while the statement of offence made reference to the offence of aggravated dangerous driving occasioning death, the particulars of the offence did not provide any of the circumstances of aggravation outlined in section 97 (7). The particulars disclosed the offence of dangerous driving occasioning death and not aggravated dangerous driving occasioning death. Neither the prosecution made any attempt to amend the charge nor the defence took any objection to the defect in the charge at the trial. The defence case was presented on the basis that the charge was aggravated dangerous driving occasioning death. The learned trial magistrate did not identify the defect in the charge in his judgment. He convicted the appellant for the lesser offence of dangerous driving occasioning death without realising that the

charge was aggravated dangerous driving occasioning death. This is apparent from the reasons the learned trial magistrate gave for convicting the appellant:

19. The important question before this Court is whether the Accused drove his vehicle LT 4073 in a dangerous manner and involved in an impact and caused the death of WAISEA RAI AISO.
20. In **Archibold (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
21. In **Semisi Lasike v The State (2002) FJHC 159**; Justice Shameem 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”.
22. There is a dispute also with regard to element (iv) whether the accused drove his vehicle dangerously. The charge is one of aggravated dangerous driving occasioning death. Hence the prosecution must prove the accused was driving in a manner dangerous to a person.
23. Now I will consider the sketch plan which was marked as EX-03. The defence did not object to mark the said sketch plan. The break marks were seen 33.1m from the place of impact. The length of the break marks was 39.8m. It clearly shows that the Accused was driving at a high speed. The vehicle had even gone 15m after the impact.
24. The road has two lanes each going down and up the Hibiscus Highway. If there was a vehicle from the opposite side, the Accused had ample space to drive safely.
25. However, the expert evidence is accepted that the taxi (LT 4073) was in good condition. Also, the brake marks of such length indicate brake was working.
26. The defence tried to establish that the road condition was bad and because of the said reason, the accident took place. According to the prosecution's evidence as well as the supplied photographs, it is evident that the road condition was good. Further, the accused admitted the fact that the taxi went off road because of the speed.

Q: You went off the road due to your high speed?

A: Yes

27. I am satisfied beyond reasonable doubt that it was his dangerous manner of driving which caused the incident and the death which resulted.

[18] It is clear from the learned trial magistrate's reasons that he found the appellant to be at fault for creating a dangerous situation by over speeding. Counsel for the appellant quite properly points out that the appellant was not charged with driving at a speed dangerous to another person. Driving at a speed dangerous to another person is an offence under section 97 (2) (b) of the Land Transport Act. The appellant was specifically charged with aggravated dangerous driving occasioning death under section 97 (1) (2) (c). Counsel submits that the conviction for the lesser offence without prior notice was prejudicial to the appellant. Counsel for the State concedes that the appellant was convicted of a lesser offence without notice but submits that there was no substantial miscarriage of justice.

[19] Section 14 (2) of the Constitution states that every accused has a right to be informed of the nature of the charge. Section 15 (1) states that every accused has a right to a fair trial. The courts no doubt have discretion to convict an accused for an alternative or a lesser offence, even without a formal charge. But that discretion to convict an accused for a lesser offence must be exercised judiciously so that the trial is fair and the accused is not prejudiced. The accused should be given notice of the lesser offence and also accorded an opportunity to defend a lesser charge. As Shameem J said in *Rao v State* [2007] FJHC 81; HAA102J.07S (6 December 2007) at 7:

At the end of the prosecution case, he (the magistrate) may advise the parties that he considers there is insufficient evidence to support the charge, but there is sufficient evidence to support the lesser offence. The Accused should be given an opportunity to cross-examine any of the witnesses again on the lesser charge so he or she is not prejudiced. At the end of the trial the Magistrate may convict of the lesser offence.

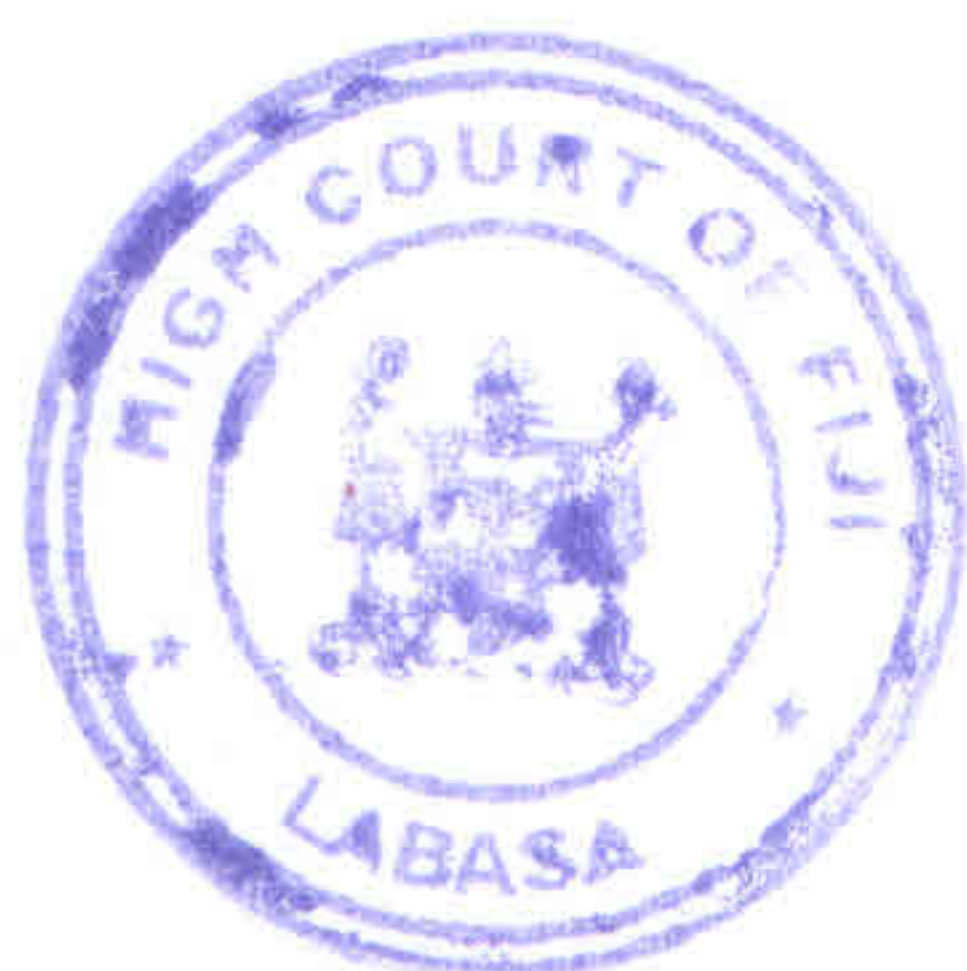
[20] Although the learned trial magistrate had the power to convict the appellant of the lesser offence of dangerous driving occasioning death, he gave no prior notice of that charge before convicting the appellant. The appellant was also not accorded

procedural fairness in presenting his defence on the lesser charge. The trial miscarried. For these reasons, the conviction cannot stand.

[21] The conviction and sentence is set aside.

[22] A retrial is ordered before another magistrate.

[23] The appellant is ordered to appear in the Magistrates' Court at Savusavu on 12 March 2018 at 9.30am for mention and to sign fresh bail.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Kohli & Singh for the Appellant

Office of the Director of Public Prosecutions for the Respondent