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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NEIAFU REGISTRY

AM 12 of 2020

BETWEEN:

SEPASTIANO MIKAELE Appellant

-and-

POLICE Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr S. T. Taufaeteau for the appellant
Mr I. Finau for the respondent
Date of hearing: 9 October 2020
Date of judgment: 10 November 2020

Introduction

1. On 20 July 2019, the Appellant was driving with his wife in Neiafu. Around 1 am, in Kameli, their vehicle swayed onto the right hand side of the road and collided with a parked vehicle owned by Lupeni Tupou, causing damage to the alleged value of $15,000. The appellant was subsequently charged with reckless driving contrary to s.25 (1) of the (former) *Traffic Act* to which he pleaded not guilty.

2. On 19 February 2020, after a two day trial, Principal Magistrate Mafi convicted the appellant and fined him $200.

3. By Notice of Appeal dated 12 March 2020, the appellant appeals the decision on the grounds that:

   (a) the evidence adduced was insufficient; and

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(b) the Magistrate erred in requiring the appellant's wife to have reported to the police that the appellant was sick at the time of the accident.

4. A further ground of appeal against sentence was not pressed at the hearing.

The evidence below

5. The complainant gave evidence that at the time of the accident he was sleeping in his house with his wife and children. He heard the collision and ran outside. He saw the appellant's wife pulling the appellant out of the car. The complainant led them to the veranda of his house and offered the appellant water. The complainant's wife contacted the police who attended the scene. The complainant said he smelled alcohol on the appellant who he considered was intoxicated. The police officer took the appellant to the police vehicle to rest. The appellant's wife took a plastic bag from their vehicle which contained food and beer. The next day, the appellant attended the property and removed his vehicle. The complainant said that the appellant did not apologise.

6. Under cross examination, the complainant said that he considered the appellant "was intoxicated, not sick" because when he was trying to help the appellant, the apartment was "swaying around and smelled of alcohol". In re-examination, the complainant said that his vehicle was on the grass in front of his house and that as a result of the appellant's vehicle colliding with it, the complainant's vehicle hit another vehicle parked in front of his home.

7. The next witness was Lupeni Tupou, the complainant's wife. She corroborated her husband's evidence. For reasons not explained, she was not interviewed by police.

8. Katalina Kolomaile was one of the complainant's neighbours. On the evening in question, she was sewing pillow covers. She gave evidence that she heard "a vehicle speeding" and then she heard the sound of two vehicles colliding. She also confirmed seeing the appellant's wife take a plastic bag from their vehicle containing food and beer.

9. Police officer Mo'unga Koluse attended the scene of the accident. He saw the appellant sitting with the complainant at the house. He gave evidence of his conversation with the appellant as follows:

> *"So I called the Defendant over and according to him they were on the way back from the nightclub and stopped by a restaurant to get food then proceeded to go home.*
>
> *According to the Defendant, when they were near the graveyard he started coughing but he thought to continue on driving.*
>
> *His coughing continued on and they swayed to the side hitting the complainant's vehicle, it was clear and that it was just parked at their home.*
>
> *He continued on saying that his chest hit the stirring [sic] wheel and fainted and he was later conscious to see his vehicle smashed into the complainant's vehicle.*
>
> *He apologized for what had happened and said that they will later talk with the complainant."*

10. When the appellant was later interviewed, he said that he would only give evidence in court. Officer Koluse described the appellant as "not behaving irrationally".

11. During cross examination, the police officer said that he did not measure the scene on the night but that the complainant's vehicle was parked approximately five metres from the main road. He reiterated that the appellant had told him that he fainted and also that he had apologised although the officer said he was not there if and when that occurred.

12. The appellant gave evidence. He was 51 years of age and employed as a clerk by the Ministry of Finance. He described the evening in question as a "really rainy day". He and his wife had taken their daughter to a dance at the Talisola Motel. They then went to a restaurant where they ate. He then gave the following evidence:

> *"We drove on the Tafengatoto Road and as we were driving nearby Waterloo.*
>
> *I started coughing and I thought it would be alright and we just continued on going and the coughing just escalated.*
>
> *I did not catch my breath and resumed conscious after the accident*

And I asked my wife and she said we got into an accident.

My legs and body were shaking so I set down so it will stop.

The Complaint's vehicle was parked vertically on the Tafengatoto Road facing east towards his house.

I got off the car and apologized and told him I will pay for the damages to his vehicle.

Then we walked to his verandah and talked and I knew how sad he was and how upset he was and that he wanted a new vehicle.

Then I told him I did not think anything like this would happen.

Officer Mo'unga came and we talked."

13. When cross-examined, the appellant denied being intoxicated that night. He said that the coughing fit he suffered had "only recently been happening" although he then went on to say that it had occurred "since he quit smoking in 2003". He added, however, that nothing like that had ever happened before when he was driving. In re-examination, the appellant told the court that both he and his wife apologised to the complainant.

14. The appellant's wife, Siutaisa Mikaele, also gave evidence. She corroborated her husband's account and added:

"He continued on coughing and eventually stopped breathing and he stopped talking.

At the time he had closed his eyes and I tried to grab the stirring wheel but he had leaned on the stirring [sic] wheel.

It was hard to try and reach the stirring [sic] wheel because he was leaning against it.

The vehicle was parked on the Tafengatoto Road in front of their house.

When our vehicle hit theirs we then slid to their front yard and our car horn was honking.

I then went around to the driver's door and my husband got off and asked what happened and I told him we were in an accident."

15. Under cross-examination, the appellant's wife confirmed that he had consumed alcohol that evening, that he usually coughed like that at home and usually "until he nearly passes out". She also recalled that "the vehicle" (presumably meaning the

complainant's vehicle) "was parked in the middle of the Tafengatoto Road at their front yard". She confirmed that the police did not ask her to provide a statement.

16. At the close of the evidence, the learned Magistrate directed that a site visit be conducted. Although the transcript of the proceedings below is not entirely clear, it appears that either before or after the site inspection, the Magistrate requested evidence about the scene of the accident from a lands and surveys officer and whether the road in question was just the road in front of the complainant's premises or whether it was a main road. 'Alekisio Pongi gave evidence about various dimensions of the road and the area in question and stated that "it was clear that the vehicle was actually parked on the road" although "that part of the road is not really used by the people".

17. During his closing submissions, Mr Taufateau noted that the survey officer had proved that the complainant's vehicle was parked inside the road. The thrust of his main submission was that the appellant had suffered from a coughing fit whilst driving and therefore could not be guilty of reckless driving as he did not expect anything like that to happen.

18. The police prosecutor submitted that the appellant was driving recklessly by reference to the evidence that he was drunk and driving at speed.

The Magistrate's decision

19. The learned Magistrate recounted the basic facts which were relatively uncontroversial. He concluded, by reference to the evidence from the lands and survey officer, that the accident took place on part of a Government road. He summarised the prosecution case as being that there was evidence that the appellant smelt of alcohol. The Magistrate stated that "the wife of the accused also gave evidence that the accused was drunk...". The Magistrate also recounted what he considered to be part of the prosecution submissions which was that the appellant was reckless in that once he started coughing, he should have parked the vehicle and let his wife drive. It is unclear from the transcript whether that was

ever put to the appellant. The Magistrate summarised the appellant's case as that he fainted and "couldn't control the wheel".

20. The learned Magistrate's reasoning process and decision is then found in the following passage:

> *"Sadly I cannot accept this defence. It is clear from the victim's evidence that there was* ***no remorse*** *from the day of the incident up until yesterday. I questioned the wife whether the police recorded her statement regarding the coughing and fainting of his husband. The wife replied by saying no. I clarified to them that they are free to say whatever they want or not yet if anything unexpected has taken place, one would wish to talk about it and also inform those whom was affected, however what occurred was unexpected.* ***The reason of defence is basically relying on the fact that this was an accident.*** *The court is now balancing the evidence to whether it is admissible and thus* ***the court uses common sense as measurement according to what usually happens daily.***
>
> *If one is feeling sad, then that person would naturally cry. If one has found something to be funny, then that person would laugh, whereas* ***for one to have anything unexpected happen to them where damage has been caused or injury, one would have to talk about it and explain to those who have been affected that you couldn't do anything about it, that it was involuntary or automatism. This is a legal defence in which one must explain to the victim in which that could trigger them to forgive you.***
>
> ***If the accused experienced a black out at this time, this is basically upon the accused's driving. Common sense would suggest that the accused will explain to the victim what happened to him which will surely get forgiveness from the victim.*** *However this silence in all this time up until this proceeding began really expresses that there was no sign of any remorse or anything to be told to those who were affected.*
>
> ***Based on that background I do not agree with the fainting and black out.*** *I agree with Prosecution that he is drunk and that he was driving very fast, thus the accused was driving recklessly. Therefore I find the accused Guilty."*
>
> [emphasis added]

Submissions on appeal

21. Mr Taufateau's submissions on this appeal largely mirrored his submissions below. However, he also sought to raise issue with the Magistrates request for evidence from the lands and survey officer. That was part of a collateral attack on the decision below based on the assertion that the driving in question did not occur on a main road and therefore could not fall within the terms of s.25.

22. Beyond that, the appellant's main submission was that the Magistrate ought to have accepted his and his wife's version of the events leading to the collision. The coughing fit he suffered affected his ability to control the vehicle such that the resulting collision was involuntary.

23. The respondent submitted that there was sufficient evidence for the learned Magistrate to convict the appellant. The learned Magistrate was entitled to not accept the appellant's evidence and prefer instead the evidence on behalf of the police to the effect that the appellant was intoxicated and driving at speed. The Magistrate's reference to the appellant's wife not mentioning anything about the coughing fit was merely part of his weighing up of the wife's credibility in the sense that if their account was true, she would have told the police.

Consideration

24. The additional ground sought to be raised by Mr Taufateau on this appeal, to the effect that the collision did not take place on a main road, was not an argument that was run below. As a general rule, a new ground cannot be permitted to be raised for the first time on appeal: *Tauniuvalu v Kaufusi* [2002] Tonga LR 198. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. In any event, the submission is not supported by the evidence at trial. I see no error in the Magistrate calling for evidence from the lands and survey officer, no doubt, to better understand the evidence of the various witnesses and that observed at the site inspection, and to which, no objection was taken at the time.

25. The permissible grounds of appeal seek to have this court interfere with the lower court's findings of fact. An appellate court should not interfere with findings of fact of a court of first instance unless they are shown to be plainly wrong: *Tapueluelu v Vaipulu* [2015] TOSC 29 at [38].[1] An appellate Court should be slow to differ from a finding of fact which was made by the judge at first instance who had the

[1] Referring to *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477.

opportunity to see and hear the witnesses, particularly, when the finding of fact turned solely on the credibility of the witnesses. However, when there is no real question of the credibility or reliability of the witnesses or in cases where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position as the judge of first instance to evaluate the evidence: *Tauheluhelu v 'Aloua* [2017] TOSC 30 at [3]. The findings below, dependent as they are on the oral evidence, are entitled to be accorded the greatest weight: *Polynesian Airlines (Investments) Ltd v Kingdom of Tonga* [2000] TOCA 3. An appellate Court is under the disadvantage of not having seen or heard the witnesses. In a case which depends on an opinion as to conflicting testimony, an appellate Court will not interfere unless it can be shown that the trial judge has *failed to use or has palpably misused his advantage.* The Court ought not reverse the conclusions at which he has arrived merely from its own comparison and criticisms of the witnesses and its own view of the probabilities of the case: *To'ofohe v Minister of Lands* [2004] TOCA 12 at [9].[2]

26. In the instant case, the learned Magistrate's reasoning, leading to his rejection of the appellant's defence, was based solely on what might be regarded as akin to a 'fresh complaint' analysis. That is, because he considered that the appellant and his wife did not say anything to the complainant or the police at the time of the accident about the appellant's asserted coughing fit being the cause of the accident, that evidence was not to be accepted.

27. As Paulsen LCJ stated in *Pohiva v Magistrates' Court* [2015] TLR 275 at [7]:

> *"... A Judge's (including a Magistrate) duty to give reasons is a requirement of due process and therefore of justice. The parties are entitled to know why the Judge arrived at the result that he did. In the case of the losing party, the reasons of the Judge allow him to assess the merits of an appeal. It is also important to a Court hearing the case on appeal that reasons are given. It is from those reasons that it will usually make its assessment of whether the Judge fell into error. Finally, the requirement to give reasons concentrates the mind*

[2] Referring to *Polynesian Airlines (Investments) Ltd v Kingdom of Tonga*, ibid; *Watt or Thomas v Thomas* [1947] AC 484 and "the powerful recent statements of principle" in the decisions of the New Zealand Court of Appeal in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 199 and *Hutton v Palmer* [1990] 2 NZLR 260 at 268.

of the Judge and a decision is much more likely to be soundly based than if no reasons are given."

28. Unfortunately, in this case, the Magistrate's reasons reveal a circumscribed view of the evidence and reasoning which failed to take into account not only the appellant's own evidence about the events leading to the collision but, more importantly, the police officer's account of the appellant having told him about the coughing fit leading to the collision when the police officer first spoke with the appellant at the scene. Further, the reasons do not disclose any consideration of that evidence or any assessment of it. On one view, any rejection of that evidence based on the approach taken by the Magistrate, is likely to necessarily require the rejection of the police officer's evidence about what the appellant told him at the time. The reasons are silent on that.

29. On that basis, I consider that the learned Magistrate misdirected himself on the evidence before him.

30. Further, the Magistrate's rejection of the appellant's case on involuntariness necessarily meant that he accepted the evidence on behalf of the prosecution to the effect that the appellant was intoxicated and driving at speed. Notwithstanding the rejection of the appellant's defence, the onus remained on the prosecution at all times to provide the charge beyond reasonable doubt.

31. The only evidence of speed was from the neighbour who said she heard the car travelling quickly. It is difficult to understand what is meant by hearing a vehicle moving quickly. For instance, a car engine may be heard revving at high speed and therefore loudly, but the vehicle itself may be in neutral and not travelling at any speed. Conversely, a vehicle could be travelling at very high speed but if it is in top gear and/or its exhaust components ('muffler) quieten the engine noise, it may be doing so at a relatively low volume. At the very least, the evidence was subjective and equivocal. It was also not explored in cross examination.

32. On the issue of intoxication, it was effectively common ground through the evidence of the appellant's wife that the appellant had consumed alcohol earlier

form the basis for a finding that he was intoxicated at the time of the driving. The Magistrate's record of the appellant's wife also giving evidence that the appellant was "drunk" is not to be found in the summary transcript of her evidence. The evidence that she was seen taking beer out of the appellant's vehicle was uncontradicted but said nothing of his consumption before the collision. The evidence of the complainant that the appellant was "swaying around" was in the context of him having just been involved in a significant vehicle collision and may therefore have been unsurprising. Moreover, there was no evidence from the police officer that he observed any indicia of intoxication or he considered it necessary to subject the appellant to any breath testing at the time.

33. Those observations on the prosecution evidence, none of which were addressed by the Magistrate in his reasons, compound the patent error by the learned Magistrate in failing to take into consideration relevant and probative evidence from the appellant and the police officer about his account of the coughing fit, which was corroborated by the appellant's wife and untouched in cross-examination.

Result

34. For those reasons, the conviction must be quashed and the sentence set aside.

35. The matter is remitted to the Magistrates Court for a retrial before a different Magistrate.

36. As no application for costs of the appeal was included in the Notice of Appeal, no order will be made.

NUKU'ALOFA
10 November 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE