

[3] I have now confirmed that that is so. Section 75 was so amended by Act no. 19/2020 and that the Royal Assent thereto was given on 26 November 2020. The Magistrate's decision was made in the present case on 25 August 2021 and the notice of appeal was filed in the Magistrate's Court on 6 October 2021.

[4] The notice of appeal was properly filed in time.

The appeal

[5] The appellant (the Police) has appealed that the Learned Magistrate has erred in dismissing the charge against the respondent.

[6] The charge against the respondent is that:

On 8 January 2021 at Kolofo'ou you drove without due care and attention contrary to section 27 (1) of the Traffic Act in that you drove motor vehicle L24859 southward on Tu'i Road to its intersection with Wellington Road without due care and attention and collided with motor vehicle C17254 which was travelling westward and damaged it.

[7] The appellant says that the Learned Magistrate erred because:

- (a) he acquitted the respondent on the ground that there was no give way sign on Tu'i Road requiring him to give way or stop;
- (b) the relevant regulation of the Traffic Regulations, regulation 20 (4), provides that where there is no traffic sign at the intersection, the driver is required to give way to any other vehicle approaching from any direction; and
- (c) despite that regulation being drawn to his attention, the Learned Magistrate disregarded it.

The response

[8] The respondent says that the Magistrate was correct to have found that the appellant had not proved its case beyond doubt because:

- (a) he was not satisfied with the evidence of the eye witness, who was a police officer, and did not believe him;
- (b) he believed the evidence of the respondent that he looked to the right and to the left and saw no vehicle coming and so proceeded across the intersection;
- (c) he had doubts about the truth of the confession of the respondent when interviewed by the police; and
- (d) regulation 20 (4) did not require the respondent to stop.

The Magistrate's decision

- [9] I briefly set out the decision of the Learned Magistrate.
- [10] He asks himself whether or not the prosecution has proved the elements of the offence beyond doubt or uncertainty.
- [11] He says that the disputed element is that the accused did not take reasonable care and attention.
- [12] The prosecution called 3 witnesses.
- [13] The complainant clearly proved that the accused did not stop. When the accused was asked in cross-examination why he did not stop, the accused said that it was because there was not STOP sign there. When asked if he had heard the tooting of her horn, he said he did but he had already got to the intersection and so did not stop and the collision occurred.
- [14] The police witness Kaloni said he saw from inside the shop that the accused double cab vehicle did not stop and that it ran into the complainant's car. The Court does not find his evidence reliable because:
 - (a) he could not have seen it because the walls of the shop to Tu'i Road and to Wellington Road were fully walled off with high iron sheets;

- (b) he maintained he could and did see what happened;
- (c) his written statement was only done on 31 May 2021;
- (d) the prosecution was wrong to have submitted in his closing submissions that the witness was standing outside the shop.

[15] The prosecution submit that if there is voluntary confession by an accused, no corroboration is required, and relied on the Court of Appeal decision in ***Fa'aoso Case***, and that the accused has made such a voluntary confession in respect of this offence.

[16] But upon re-examination of the accused whilst giving evidence, he said that the police officer had asked him whether the collision was caused by his fault and that he made no reply to it, and that the police officer then put to him that Wellington Road was the controlling road and that he then said to him that he was the one in the wrong.

[17] There is doubt and uncertainty on the evidence of the prosecution. The evidence of police witness Kaloni is not accepted.

[18] The confession stated in the record (of interview) cannot be relied on if the accused was asked a leading question or was given a stated fact to confess as is shown in his answer to questions 22 and 23. The accused stated on re-examination: "The police asked me and I did not answer and he put to me that Wellington Road was the controlling road. And I answered: I am the one in the wrong."

[19] Because the accused did not stop at the intersection of Wellington and Tu'i Roads because there was no traffic sign there, he is innocent. And it is not his fault that the collision occurred. The collision occurred because of the failure of the persons responsible for the erecting of traffic signs to erect a traffic sign at this intersection. Any foreigner who comes and uses this road will do the same thing that the accused did because there is no traffic sign there to warn him to stop.

[20] The accused is acquitted.

[21] That decision of the Learned Magistrate as I have outlined in the foregoing paragraphs raises the issues in this appeal as well as others and I will attempt to deal with each of them.

Standard of proof

[22] The first is the standard of proof required in a criminal trial such as the present case. The required standard of proof is that the prosecution must prove its case, that is, that the accused committed the offence, beyond reasonable doubt, but the Learned Magistrate appears to have believed that he instead needed to be satisfied beyond any doubt or uncertainty instead. That is not correct. If the Magistrate, or Judge, after considering the evidence has a doubt but the doubt is not a reasonable doubt, then the prosecution has proved its case beyond a reasonable doubt. The Learned Magistrate in the present case was therefore wrong to have asked himself, as I have stated in paragraph 10 above, whether or not the prosecution had proved the elements of the offence "beyond doubt or uncertainty", or to say, as I have stated in paragraph 17 above, "that there is doubt and uncertainty on the evidence of the prosecution, because that is a much higher standard of proof.

[23] I therefore find that the Learned Magistrate erred in requiring a much higher standard of proof than is required by law in criminal trials, such as this case.

Regulation 20 (4)

[24] The appellant says that despite the provisions of Regulation 20 (4) of the Traffic Regulations, the Learned Magistrate disregarded it.

[25] Regulation 20 (4) provides as follows:

"(4) Every driver when approaching or crossing any intersection which any other vehicle is approaching or crossing, shall unless the intersection is controlled by a police officer, any person authorised by the Principal Licensing Authority, or by a traffic sign, give way to such other vehicle and allow the same to pass before him, and if

necessary for that purpose, stop his vehicle in the following circumstances:

- (a) if such vehicle is approaching from his right;
- (b) if such other vehicle is approaching in any direction;
- (c) if he is turning his vehicle in any direction."

[26] Appellant counsel, Mr. Samani, states in his notice of appeal, after quoting Regulation (20) (4) as above –

"It is clear from the regulation that any vehicle approaching an intersection, in the absence of a traffic sign, should give way to confirm traffic approaching the intersection ... the respondent must give way at the intersection because there was no give way traffic sign, and the absence of a traffic sign did not give the respondent right of way at the intersection."

[27] I agree with Mr. Samani. The regulation expressly requires the driver who approaches an intersection which has no traffic sign (or an authorised controlling officer) or police officer, to give way to any vehicle approaching from his right or from "any direction". The regulation covers and it was intended to cover, any and every vehicle approaching an intersection. It does not grant to any vehicle approaching an intersection which has no traffic sign any right of way" over any other vehicle approaching the same intersection.

[28] That regulation removed and replaced what was formerly known as the "right-hand rule". That rule was that any vehicle approaching the intersection from the driver's right had the right of way and the driver had to give way to that vehicle approaching from his right. But that rule has now been replaced by Regulation 20 (4) since 1 July 2015. And I note that both the complainant, who has been licenced to drive in the last 2 years, and the accused, who has been licenced to drive in the last

4 years, would have been taught and would have both passed the driving test that included knowledge of Regulation 20 (4).

[29] That regulation requires the driver to slow down when approaching an intersection that has no officer or traffic sign and ascertain that no vehicle was approaching from either his right or his left or from any direction.

[30] Any driver who comes from overseas and is not familiar with that regulation has the responsibility to acquaint himself with all the laws of the Kingdom relating to driving on any road in the Kingdom. It is not an excuse or defence for him to say that he did not know that the right-hand rule no longer applies in Tonga.

[31] And more importantly, it is not a defence or an excuse, for a driver to say, and it is not proper for the Court to say, that the collision which was caused by the driver who did not stop and give way as required by Regulation 20 (4), was caused by failure of the persons responsible for erecting traffic signs to erect an appropriate traffic sign at a particular intersection. That is because Regulation 20 (4) has already properly directed what every driver must do when he approaches an intersection which has no traffic sign.

[32] I therefore agree with Mr. Samani that the Learned Magistrate erred in failing to consider and to apply the provisions of Regulation 20 (4).

Duty of care

[33] Every driver is required by law to take due care and attention whilst he is driving. Section 27 (1) of the Traffic Act provides for that, as follows:

“(1) Every person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for the persons using the road is guilty of the offence of driving without due care and attention, and is liable to a fine not exceeding \$800 or to imprisonment not exceeding 4 months or to both such fine and imprisonment, and the

Court may order that the convicted person be disqualified from holding or obtaining a driver's licence for a period not exceeding 3 years."

[34] That provision imposes on every driver a duty of care and attention towards any other person using the road. He must not do anything or fail to do anything which would cause or result in injury or damage to any other person. Any driver has a duty to the public to drive in such a way that he is ready to deal with any situation that may reasonably be expected to occur: ***R v Lutu*** [2002] Tonga LR 300 at 302 L.12 per Ward CJ.

[35] The Learned Magistrate did not consider this aspect at all. Yet, there were undisputed evidence of the following:

(a) **Faulty brake**

The accused admitted in cross-examination that his brakes were faulty and that his brakes did not work because his van was an old 1995 or 1996 model and that its brake piston rubber ring was worn out and needed a new one, and that when he pressed the brake pedal, the van did not stop.

(b) **Excessive speed**

Knowing that his brake was faulty and knowing that his van would not stop if he had to stop suddenly, he chose to travel at a speed on a road towards an intersection he knew that it would be likely to have vehicles approaching it either from his right or from his left and would be such that he would need to stop but that the van would not stop.

(c) **Breach of duty of care**

And that was exactly what happened. He suddenly heard the tooting of the complainant car and saw it coming from his left and he could not stop, because his brakes did not work at all.

As a result, his van hit the car, and because the front wheel was not locked and stopped by any brake pad from rotating, it continued to rotate and it climbed up the front right of the car and then squashed down the bonnet of the car, I would imagine, and then come to rest in the depressed hollow in the bonnet of the car.

A “controlling road”

[36] There were statements made by the witnesses that Wellington Road was the controlling Road when it met Tu’i Road, that the Wellington Road had the right of way. I wish to set that matter straight once and for all.

[37] No road, anywhere, has a right of way, or is to be said to be the controlling road, because Regulation 20 (4), as quoted above, requires every driver, including a driver on the supposed “controlling road” to slow down and give way to any other vehicle approaching the same intersection, even though there is no traffic sign there as far as the driver on the “controlling road” is concerned, and even if there are give way or stop signs facing the drivers on the intersecting roads. The reason for that is to ensure that every driver takes due care and attention at every intersection, irrespective of the presence or absence of a traffic sign. If a traffic sign is there, the driver must comply with it. If there is none there, the driver must comply with Regulation 20 (4). There is therefore no such thing as a “controlling road” and it is not an excuse or defence for a driver to say that he was on the controlling road or thought that he was.

Confession of the accused

[38] The confession of the accused, that the collision was due to his fault, had already become evidence as a matter of record when the defence agreed that the record of interview be admitted as evidence without further reading of it in Court by the counter-signing police officer. The confession was thereby exhibited as documentary evidence of that confession and the counter-signing police officer left the Court and Prosecution then closed its case.

[39] It was therefore wrong of the defence, and for the Learned Magistrate to allow the defence, to give evidence that the confession was made in consequence of "a leading question" made by the questioning police officer, when there was no such evidence when the confession was admitted as evidence. Also, the Learned Magistrate was wrong to have concluded in his decision that the confession could not be relied upon because of that leading question when he had not heard the evidence of the questioning officer or the evidence of the counter-signing officer who would have been present at the time as to whether or not there was any such leading question.

[40] Furthermore, the accused signed the questions and answers individually himself and he is deemed to have agreed to each such question and answer written on the record of the interview and it is evidence in accordance with the exceptions to the hearsay rule. It is therefore admissible and was accordingly admitted. It was also admitted with the express consent of the accused as conveyed to the Learned Magistrate by the accused's counsel. That was why the counter-signing officer left without giving further evidence.

[41] I therefore find that the Learned Magistrate erred in reopening the confession for the accused to give evidence concerning it.

Conclusion

[42] I have therefore come to the conclusion that the Learned Magistrate erred in his decision in the present case. I consider that had he considered the several matters which I have outlined above, as he ought to have done, he would have properly come to the conclusion that he was satisfied beyond reasonable doubt, which is the only standard he needed, that the respondent accused was guilty of the charge against him.

[43] The appellant has asked in his notice of appeal that the accused be ordered to be re-tried before another Magistrate, but I do not think that that is necessary. I have studied the transcript of the trial and I do not consider that there is any point in repeating those evidence in a re-trial.

[44] Section 80 (1) of the Magistrate’s Court Act grants the Supreme the power to “affirm, reverse or amend the decision of the Magistrate”. I consider that in the circumstances, I should reverse the decision of the Learned Magistrate and to find the respondent accused guilty as charged in the Magistrate Court and to convict him.

Orders

[45] For the foregoing reasons, I make the following orders:

- (a) The appeal is allowed.
- (b) The decision of the Magistrate Court is quashed and is replaced with the decision that the accused, who is the respondent, Motesio Vaioleti, is guilty of the offence with which he was charged in the Magistrate’s Court and is convicted accordingly.
- (c) both counsel and the accused are directed to attend in Court at **9:00 am Friday 3 December 2021** for submissions in respect of sentence to be imposed.



Niu J

NUKU’ALOFA: 30 November 2021.

J U D G E