Elmer Endaya Passion

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Motion No. 6 OF 2024)

Muhammed Faisal bin PDJLD DSP Haji Kefli, J.C.
Date of Ruling: 5th October 2024

Headnote: *Criminal appeal – road traffic offence – causing death by dangerous driving – section 27(1) Road Traffic Act (Cap 68) – appeal against sentence*

DC Haji Ahmad Basuni bin Haji Abbas of M/S Abrahams Davidson & Co for the Appellant.
PO Syazwani binti Jumat (standing in for PO Ahmad Firdaus) for Public Prosecutor.

Cases cited:
R v Boswell [1984] 3 All ER 353
Khammuk Muangnakhrong v Public Prosecutor (Criminal Appeal No. 32 of 2010)
Public Prosecutor v Hjh Rusni Binti Hj Yusof (Criminal Appeal No. 29 of 2017/Criminal Appeal No. 30 of 2017)
Mohd Zulhelmi bin Morsedi v Public Prosecutor [2012] 1 JCBD 257
R v Guilfoyle [1973] 2 All ER 844
Lim Eng Bin v Public Prosecutor [2015] 1 JCBD 1
Shahime bin Husaini v Public Prosecutor [2003] 1 JCBD 93
Public Prosecutor v Julrani bin Awang Haji Dalus [2011] 2 JCBD 166
Abdul Wafiy Bin Haji Shawali/Timbang v Public Prosecutor [2012] 2 JCBD 52

Statute:
Section 27(1) of the Road Traffic Act, Chapter 68

RULING

Muhammed Faisal, J.C.:

I Introduction

The appellant was charged under section 27(1) of the Road Traffic Act (Cap. 68) for an offence related to dangerous driving. He pleaded guilty and was sentenced to 3 months and 2 weeks imprisonment and disqualified for driving for life. He now appeals against the sentence contending that the sentence was manifestly excessive, wrong in law and in principle. A stay of execution was granted pending appeal.

II Charge

His charge is reproduced and is as follows: -

"That you, on the 24th day of April 2019, at about 1330hrs, at the vicinity of Sebakit Bawah, Tanjong Maya, Tutong in Brunei Darussalam, being the driver of a blue-coloured Mazda 5 vehicle bearing registration number BAA 8903, did drive the said motor vehicle in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the said road and the amount of traffic which was or which might reasonably be expected to be on the road, to wit! You proceeded to make a U-turn at a location not designated for a U-turn, did cause the death of Muhammad Hariz bin Hazarin (M. 7) and that you have thereby committed an offence punishable under section 27(1) of the Road Traffic Act Chapter 68."

III Background facts

On the 24th April 2019, the appellant was driving in the area of Sebakit Bawah, Tanjong Maya, Tutong, when he made an illegal U-turn on a two-lane road. Before executing the U-turn, the appellant turned into a junction. As he re-entered the road, his vehicle (a Mazda) collided with an oncoming Subaru Imprezza driven by Hazarin bin Hj. Hussin, who was driving his son, Muhammad Hariz bin Hazarin, to school. The collision occurred at around 1:30 PM.

After the collision, Hazarin lost control of the Subaru, which then crashed into a nearby lamp post. Hazarin subsequently lost consciousness as a result of the crash. Tragically, Hazarin's son, who was seated in the front passenger seat, suffered severe head injuries and later died from the accident.

IV Grounds of appeal

The appellant raises several grounds of appeal, arguing that the magistrate:

1. Erred in not considering the lesser traffic in the village area as a mitigating factor.
2. Failed to give adequate weight to the role of the other driver, Hazarin bin Hj. Hussin, particularly the possibility that he was speeding.

3. Did not identify any aggravating factors in the appellant's case, which would justify a custodial sentence.
4. Failed to appropriately balance the mitigating factors, such as the appellant's guilty plea and clean record, against the gravity of the offense.

V Discussion

First Ground: Traffic Conditions

It is submitted that the magistrate erred by not considering the typically lighter traffic in the village area as a mitigating factor. The respondent, however, counters that the magistrate did not disregard the relevance of traffic conditions in general, but rather found that there was no specific evidence indicating that the traffic at the time of the accident was lighter than usual. The respondent points to evidence suggesting that traffic could have been heavier than usual, given the time of day and the fact that children were being driven to and from school.

The appellant's submission relies on general assumptions about village traffic, while the respondent's argument is grounded on the specific circumstances of the time of the accident.

Further Ground 1A: Role of the Other Driver

It is also submitted that the tire marks left by the Subaru Imprezza, which measured 50 feet in length, indicated that Hazarin was driving at an excessive speed, thereby contributing to the accident. It is further argued that Hazarin's loss of consciousness and the collision with the lamp post were a result of speeding.

The counter argument is that the tire marks could have *been* resulted from Hazarin losing control after the collision, rather than from speeding. Moreover, the respondent emphasized that no definitive expert evidence was presented to conclusively determine whether the Subaru driver's speed contributed to the accident. It is further argued that the appellant's illegal U-turn was the primary cause of the accident, regardless of the Subaru's speed.

Ground 1B: Aggravating Factors

The appellant contends that the learned magistrate failed to identify any aggravating factors that would justify a custodial sentence. Reference is made to *R v Boswell* [1984] 3 All ER 353, which lists aggravating factors in cases of causing death by dangerous driving, such as excessive speed, alcohol consumption, and persistent bad driving.

The respondent counters that while the magistrate may not have explicitly used the term "*aggravating factor*," she did characterize the appellant's driving as selfish and reckless.

They also pointed out that the list of aggravating factors in *R v Boswell* is non-exhaustive, allowing the magistrate to determine whether the appellant's behaviour constituted aggravation based on the facts of the case.

Ground 1C: Balancing Mitigating Factors

The appellant argues that the magistrate failed to appropriately balance the mitigating factors, such as his guilty plea and clean record, against the offense's gravity. He submits that these mitigating factors should have been sufficient to warrant a non-custodial sentence.

It was emphasised, however, that the magistrate was entitled to weigh the evidence as she saw fit. Appellate courts typically refrain from interfering with a magistrate's findings unless they are plainly wrong or reached against the weight of the evidence; the magistrate's consideration of the appellant's mitigating factors was reasonable but did not outweigh the severity of the offense, particularly the tragic death of the young boy.

Reckless vs Dangerous

Looking at both the *Statement of Facts* and the learned magistrate's *sentencing* ruling, it is apparent that the actions of the appellant were consistently described in terms of "*dangerous driving*" rather than "*reckless driving*." The *Statement of Facts* clearly outlines that the appellant's decision to make a U-turn at an undesignated area created a dangerous situation on the road, ultimately leading to the fatal accident. This would align more with the concept of "*dangerous driving*" rather than "*reckless driving*."

The distinction between the two is crucial. "*Reckless driving*" implies a conscious disregard for an obvious risk, where the driver is aware of the danger but proceeds regardless. In contrast, "*dangerous driving*" is determined by the objective standard of a reasonable driver and focuses on whether the conduct posed a danger, irrespective of the driver's state of mind.

In paragraph 8 of her sentencing remarks, the magistrate referred to the appellant's actions as demonstrating a "*reckless decision*." However, the facts do not suggest that the appellant knowingly disregarded a clear risk or acted with intent to endanger others. Rather, his decision to make a U-turn at an undesignated area was a dangerous misjudgement, but not reckless in the legal sense.

Accordingly, it would have been more accurate for the magistrate to describe the appellant's actions as "*dangerous*" rather than "*reckless*." The appellant's conduct created a hazardous situation, but there is no indication that he was consciously aware of and ignored a clear risk. Therefore, the appellant's actions should be understood as dangerous driving.

Was the Subaru Imprezza speeding?

Turning to the issue raised by the appellant concerning the possibility that the driver of the Subaru Imprezza was speeding, I refer to paragraph 14 of the learned magistrate's sentencing remarks. The magistrate rightly noted that, in the absence of expert evidence, it was not appropriate to draw conclusions regarding the speed of the Subaru at the time of the accident. The magistrate emphasised that without such evidence, determining whether the tire marks were indicative of excessive speed would be speculative, and I concur with her assessment.

In cases of this nature, particularly those involving fatalities, it is crucial to avoid guesswork and ensure that all relevant factors, including speed, are properly investigated and presented with the aid of expert evidence. The speed of a vehicle can play a significant role in the court's determination of culpability and the severity of sentencing. As such, it would be beneficial for all parties, including the court, to have certainty on this issue.

In future cases where speed may be a material factor contributing to a fatal accident, it is essential that investigators thoroughly ascertain and provide evidence regarding the speed of the vehicles involved. This will help the court make informed decisions based on clear, objective data rather than speculation, particularly when determining the outcome of cases that carry such serious consequences.

Was the deceased wearing a seat belt?

The appellant also raised the issue of whether the deceased child was wearing a seatbelt at the time of the accident, suggesting that the injuries sustained were indicative of a lack of seatbelt use, which could have contributed to the fatality. However, this argument lacks conclusive evidence. The respondent rightly pointed out that the appellant's claim rests on speculation and that there is direct evidence to the contrary. In a police statement, the father of the deceased, Hazarin bin Hj. Hussin, confirmed that both he and his child were wearing seatbelts at the time of the accident. All things being equal, I would have to accept the police statement.

While there is a medical report that details the injuries sustained by the deceased, including significant head injuries, it is not within the court's role or capability to interpret these medical findings in a manner that would determine whether the deceased was wearing a seatbelt. Such determinations require expert analysis, and in the absence of such evidence, it would be inappropriate for the court to make any conclusions contrary to the available testimony.

Therefore, I find that the appellant's argument regarding the non-use of a seatbelt is speculative and does not affect the court's decision in this matter.

Moreover, this is another area where clarity is essential in future cases. Just as with the issue of tire marks and speed, the question of whether a person involved in an accident was

wearing a seatbelt should be thoroughly investigated and clearly established. The injuries sustained should be analysed by experts to confirm whether they are consistent with seatbelt use or not. This would prevent the court from having to engage in unnecessary speculation and ensure that decisions are based on solid, objective evidence.

VI Case Law

Both parties cited case law to support their positions. The appellant cited the following cases;

R v Boswell [1984] 3 All ER 353 is cited to show the importance of identifying aggravating factors in causing death by dangerous driving, including excessive speed, alcohol consumption, and reckless behaviour. Aggravating factors are circumstances that increases the severity of the offence and justify harsher penalties. In this case, the magistrate failed to do so. The case has been mentioned earlier, above.

Khammuk Muangnakhrong v Public Prosecutor (Criminal Appeal No. 32 of 2010) emphasises the importance of considering the role of the other driver in road traffic accidents, particularly if the other driver was intoxicated or speeding. The appellant uses this case to argue that the magistrate in this case failed to consider the potential contribution of the other driver (Subaru Imprezza) who was allegedly speeding, and this should have been factored into the assessment of culpability and the severity of the sentence.

Public Prosecutor v Hjh Rusni binti Hj Yusof (Criminal Appeal No. 29 of 2017/Criminal Appeal No. 30 of 2017) involves the sentencing principles applied when mitigating factors, such as a guilty plea and a clean record, are present. In *Hjh Rusni,* the court took into account the defendant's remorse and contribution to the victim's parents for their bereavement as mitigating factors that weighed against a custodial sentence. The appellant argues that the learned magistrate should have similarly considered his guilty plea and clean record as strong mitigating factors. The appellant contends that these mitigating factors should have led to a non-custodial sentence, as in *Hjh Rusni.*

For *Mohd Zulhelmi bin Morsedi v Public Prosecutor* [2012] 1 JCBD 257, both parties cited this case. The appellant used it to argue that the absence of aggravating factors should have led to a non-custodial sentence, while the respondent highlighted that courts have imposed severe penalties, including imprisonment, for dangerous driving with aggravating factors such as racing.

Respondent cited the following cases:

Public Prosecutor v Hjh Rusni binti Hj Yusof (Criminal Appeal No. 29 of 2017/Criminal Appeal No. 30 of 2017), this case referred to *R v Guilfoyle* [1973] 2 All ER 844, where it was stated that dangerous driving cases can be categorized into two broad categories:

1. Those arising from momentary inattention or misjudgement, where a fine is typically appropriate.
2. Those involving a selfish disregard for the safety of others or reckless driving, where a custodial sentence may be appropriate.

The respondent used this case to argue that the appellant's conduct fell within the latter category, justifying a custodial sentence.

In *Lim Eng Bin v Public Prosecutor* [2015] 1 JCBD 1, the High Court upheld a sentence of 5 months imprisonment and lifetime disqualification from driving. The principle here is that reckless behaviour, such as driving at excessive speed under dangerous conditions (e.g. a wet road at dusk), justifies a custodial sentence.

This case upholds a custodial sentence for reckless driving that endangered the safety of road users, supporting the respondent's argument that the appellant's behaviour warranted imprisonment.

Shahime bin Husaini v Public Prosecutor [2003] 1 JCBD 93 involved a $3,000 fine or in default 4 months of imprisonment for causing death by dangerous driving. The High Court elected not to interfere with the sentence, considering the significant delay in charging the appellant. However, the court remarked that, but for the delay, the sentence imposed by the Magistrate would have been considered exceedingly lenient.

In *Public Prosecutor v Julrani bin Awang Haji Dalus* [2011] 2 JCBD 166 the High Court upheld a custodial sentence of 2 years and 6 months causing death by dangerous driving, reinforcing the principle that imprisonment is appropriate in such cases. Similarly, in *Abdul Wafiy bin Haji Shawali/Timbang v Public Prosecutor* [2012] 2 JCBD 52 the High Court found the sentence of 4 months' imprisonment was appropriate for causing death by dangerous driving. This case underscores that even where there is no extreme recklessness, the loss of life resulting from dangerous driving justifies imprisonment.

VII Findings

Having considered the submissions, evidence, and relevant case law, I find that the appellant's arguments are not as compelling as those of the respondent. The appellant's focus on the possibility of the other driver speeding and the alleged lesser traffic in the village area does not sufficiently mitigate the severity of his own actions. The illegal U-turn, which directly led to the accident, was a significant lapse in judgment that had fatal consequences.

The magistrate reasonably balanced the seriousness of the offense, particularly the loss of a young life, with the mitigating factors presented by the appellant. Notwithstanding these mitigating factors, a custodial sentence, no matter how short, is not only necessary but inevitable. The appellant's actions, though unintentional, had tragic repercussions that affected multiple lives, including his own.

VIII Conclusion

This was a tragic accident in which a young life was taken away. The appellant's moment of miscalculation has deeply impacted many lives. The magistrate's sentence reflects a balanced consideration of the offense's gravity and the appellant's mitigating circumstances. Accordingly, I find no reason to disturb the sentence imposed by the learned magistrate.

The appeal is dismissed, and the sentence is upheld.

MUHAMMED FAISAL BIN PDJLD DSP HAJI KEFLI
Judicial Commissioner