

Public Prosecutor

AND

Hjh Rusni Binti Hj Yusof

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 29 of 2017)**

Hjh Rusni Binti Hj Yusof

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 30 of 2017)**

Steven Chong, C.J.
29 November 2018

*Road traffic – Causing death by dangerous driving – Definition of dangerous driving – Sentence
– Principles of sentencing – Aggravating and mitigating circumstances.*

DPP Suriana Bte Radin for the Public Prosecutor.

Sheikh Noordin Bin Sheikh Mohammad (M/S Sheikh Noordin Mohammad & Associates) for the Defendant.

Cases cited:

Rahmiah v Public Prosecutor [1972] 2 MLJ 258

R v Boswell (1984) 6 Cr. Appl. R. (S.) 257

R v Guilfoyle [1973] 2 All ER 844

Yong Chun Tham v Public Prosecutor [2008] 2 JCBD 259

Public Prosecutor v Lim Jin Lee and Public Prosecutor v Salina Binti Mohd Salleh [2000] 2 JCBD 217

Steven Chong, C.J.:

Introduction

These two appeals arise from a terrible accident which occurred on the morning of 6 September 2011 at the car park of the Mabohai Primary School when the defendant, a teacher, caused her car to suddenly reverse and collide into two young school girls killing them.

On 25 July 2017 in the Magistrate's Court the defendant was convicted after a trial on two counts of causing death by dangerous driving contrary to section 27(1) of the Road Traffic Act.

In the charges it is alleged that the defendant had driven in a dangerous manner "by failing to ensure that the car was no longer in reverse gear and pressing on the accelerator pedal causing the car to immediately reverse **at high speed** (emphasis added) and thereafter knocking down the said persons . . ."

The Magistrate imposed a fine of \$3,000 or 6 weeks imprisonment in default of payment and ordered the defendant to be disqualified from driving for life.

Criminal Appeal No.29 of 2017 is the Public Prosecutor's appeal against sentence.

Criminal Appeal No.30 of 2017 is the defendant's cross appeal against conviction and sentence.

Undisputed facts

The undisputed facts have been set out concisely by the Magistrate as follows:

"In summary the incident occurred in front of Block B during recess at Mabohai Primary School. The defendant was a teacher at the said school. On the day in question the defendant was attempting to adjust her car's parking position. At some point she got out of the car to check its position but had left the car engine running with the handbrake pulled up. She had forgotten to change the gear from reverse to park or neutral. When she got back into the car to further adjust the position, she accidentally pressed on the accelerator causing the car to reverse and hit two young girls. The girls were taken to hospital but unfortunately passed away. The cause of death for Nabilah Farhanah was stated to be multiple injuries following a motor vehicle accident whereas Fatin Nabilah it was stated to be cranio-cerebral injuries following a motor vehicle accident."

Issue at trial

The sole issue at trial was the speed of the defendant's car when it reversed and hit the girls. Two witnesses gave evidence for the prosecution on this issue.

First, the investigating officer of the case opined that the car "must have reversed at high speed"; otherwise it would have stopped when it hit the kerb behind the vehicle.

Second, a colleague of the defendant said she saw the car “moving at high speed” at the material time forcing her to jump out of harm’s way.

No expert witness was called to give an opinion on the speed of the car.

Decision of the Magistrate

The Magistrate decided that the prosecution had failed to prove that the defendant’s car had reversed at high speed; he did not find the evidence of the two witnesses on this issue reliable.

On the undisputed facts the Magistrate held that: (a) the defendant created a dangerous situation; (b) a competent and experienced driver would have appreciated that as it was recess time there might be students walking near the car and would not have left the car with the engine running and in reverse gear; and (c) in “accidentally pressing the accelerator” causing the car to reverse and hit the two victims, the defendant caused their deaths by dangerous driving in the circumstances.

The Magistrate amended the charges by deleting the words “at high speed” and convicted the defendant.

Turning to sentence the Magistrate disagreed with the submission of the prosecution that the following were aggravating factors: (a) “the presence of vulnerable road users” within the school compound; (b) the incident occurred in a school area; and (c) two young children were killed. The Magistrate considered these as “facts constituting the offences.”

In the opinion of the Magistrate “the only factor that could possibly be described as aggravating in this case is that the defendant claimed trial.”

The Magistrate concluded that as the defendant had committed “a grave and unfortunate mistake and she did not drive with irreverent disregard for the safety of others”, and there was “grave delay” in the prosecution, a non-custodial sentence by way of a fine of \$3,000 was appropriate.

Grounds of appeal

I will deal with the defendant’s appeal against conviction first for obvious reasons.

Counsel for the defendant advances two grounds: (a) this is a case of careless driving and not dangerous driving; and (b) the Magistrate should not have convicted the defendant on the amended charge without adhering to the procedure set out in sections 158 and 159 of the Criminal Procedure Code.

Dangerous driving

Dangerous driving is not defined in the Road Traffic Act. Counsel for the defendant accepts that the definition of dangerous driving expounded by Raja Azlan Shah, J in *Rahmiah v Public Prosecutor* [1972] 2 MLJ 258, is correct.

Before there can be a conviction for dangerous driving the prosecution must prove, firstly, the defendant created a situation which viewed, objectively, was dangerous.

Secondly, the prosecution must prove that when creating such a situation the defendant was at fault. And fault involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and to the relevant circumstances.

Applying the above test to the undisputed facts of the case at hand, viewed objectively, the defendant, in leaving the car with the engine running with the handbrake pulled up and in reverse gear when she got out to check the parking position of the car, and then returning to the car and putting her foot on the accelerator causing it to reverse suddenly, during school recess when students would be outside the classrooms, definitely created a dangerous situation.

In creating that dangerous situation the defendant was undoubtedly at fault in departing from the standard of a competent and experienced driver. A competent and experienced driver, exercising care and skill having regard to the existing circumstances, would not have driven in such a dangerous manner.

This is certainly not a case of careless driving. Sadly, the defendant's dangerous driving claimed two young lives.

The Magistrate's decision to convict the defendant on both charges is unassailable.

Conviction on amended charge

In the absence of expert evidence on the speed of the defendant's car at the material time and in view of the unreliability of the testimony of the two witnesses on this issue, it is hardly surprising that the Magistrate was not persuaded that it had reversed "at high speed" as alleged in the charge.

It was superfluous for the prosecution to state in the charge that the car had reversed "at high speed". The case for the prosecution was not that the defendant created a dangerous situation by driving at excessive speed in the circumstances. The case for the prosecution, which the defendant addressed in her defence, was that she had created a dangerous situation by leaving the car with the engine running and in reverse and then stepping on the accelerator when she returned to it.

The speed at which the car reversed and collided into the girls was not an essential element of the offence. The Magistrate could have recorded a conviction without making any amendment to the charge.

Whilst it is true that the amendment to the charge by the Magistrate triggered the operation of sections 158 and 159 of the Criminal Procedure Code, the failure by the court to comply with the requirements therein, such as reading and explaining the alteration to the defendant, caused no prejudice to her.

There was no miscarriage of justice and the defendant was rightly convicted.

Sentence

I turn to the appeal against sentence by the Public Prosecutor.

The Deputy Public Prosecutor (“DPP”) rightly does not take issue with the comment of the Magistrate that the accident occurring within the school compound and at a time when there would be “vulnerable road users” present could not be aggravating factors as those facts related to the offence. But the DPP submits that the Magistrate was wrong in (a) deciding that causing two deaths, not just one, was not an aggravating factor; and (b) saying that “the only factor that could possibly be described as aggravating in this case is that the defendant claimed trial.”

I agree on both counts. I must deal with point (b) at once to quickly dispel the notion that the fact the defendant claimed trial can be considered an aggravating factor in determining sentence upon conviction. It cannot be so considered. A fundamental principle of our criminal justice system is that any person accused of a crime is entitled to contest the charge and require the prosecution to prove the case against him beyond reasonable doubt in a trial. If the accused is convicted after a trial he is not entitled to the usual discount in sentence afforded to someone who has pleaded guilty. But the accused must not be sentenced for claiming trial.

As to point (a) it is instructive to refer to *R v Boswell* (1984) 6 Cr. Appl. R. (S.) 257, in which the English Court of Appeal considered the following to be aggravating features in causing death by dangerous driving: (a) consumption of alcohol or drugs; (b) racing with another vehicle, driving at excessive speed or showing off; (c) the driver who disregards the warnings from his passengers; (d) prolonged, persistent and deliberate course of very bad driving such as jumping red lights, ignoring traffic signs and passing other vehicles on the wrong side; (e) other offences committed at the same time, for example, driving without a driving licence, (f) previous convictions for motoring offences, particularly offences which involve bad driving, and (g) where several people have been killed as a result of the incident.

Mitigating features include the following: (i) the accident occurred through momentary inattention or misjudgment, such as briefly dozing off at the wheel or failing to notice a pedestrian on a crossing; (ii) a good driving record; (iii) good character; (iv) a plea of guilty; and (v) genuine remorse.

On the authority of *R v Boswell* the fact that the defendant's dangerous driving caused the loss of two lives is clearly an aggravating feature of the case. The DPP submits that this aggravating factor warrants a custodial sentence.

I disagree.

In *R v Guilfoyle* [1973] 2 All ER 844, a decision of the English Court of Appeal, Lawton LJ said at p.845:

"Cases of this kind [causing death by dangerous driving] fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness.

...

In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined . . . For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence . . . may well be appropriate . . ."

On the undisputed facts it is plain that this accident arose through momentary inattention and not selfish disregard for the safety of other road users or recklessness by the defendant. This is a strong mitigating feature of the case. Also in the defendant's favour is her clear record and remorse. She contributed financially to the victims' parents for their bereavement.

Applying the principles stated in *R v Guilfoyle* I think the mitigating features outweigh the aggravating feature of the case and militate against a custodial sentence. The Magistrate was right in principle to impose a fine in the circumstances.

The question is whether the fine of \$3,000 is unduly lenient. I think it is.

Reference was made by the DPP to *Yong Chun Tham v Public Prosecutor* [2008] 2 JCB 259 in which the appellant was sentenced to 6 months' imprisonment upon conviction after trial of causing death by dangerous driving. In attempting to overtake another vehicle the appellant had collided into a police motorcyclist from the opposite direction causing fatal injuries. On

appeal Luga-Mawson JC quashed the sentence of imprisonment substituting it with a fine of \$5,000.

Notwithstanding the inordinate delay of over 5 years in the prosecution I think the fine imposed by the court below is manifestly inadequate. Of course no sentence will assuage the anguish of the family members of the victims. No parent can ever “get over” the loss of a child.

The court must attempt to impose a sentence which will adequately reflect the gravity of the offence. In all the circumstances I consider a fine of \$5,000 or 5 months’ imprisonment in default of payment on each charge to be appropriate.

A person convicted of causing death by dangerous driving must be disqualified for life from driving any motor vehicle unless the court, for special reasons, thinks fit to order otherwise.

In *Public Prosecutor v Lim Jin Lee and Public Prosecutor v Salina Binti Mohd Salleh* [2000] 2 JCB 217, the court held that in order to be a “special reason”, the reason offered must be an extenuating or mitigating circumstance relating to the offence itself and not to the offender, and it cannot amount in law to a defence.

Counsel for the defendant seems to suggest that the accident occurring in a school car park and not a public road is a special reason for not ordering disqualification. I find no merit in this argument. The Magistrate was obliged to order disqualification.

Conclusion

For the foregoing reasons I order as follows: (a) the appeal by the Public Prosecutor against sentence is allowed and the fine of \$3,000 is quashed and substituted with a fine of \$10,000 or 10 months’ imprisonment in default of payment; and (b) the appeal by the defendant against conviction and sentence is dismissed.

DATO PADUKA STEVEN CHONG
Chief Justice

