IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RROTONGA
(CRIMINAL DIVISION)

CR NO. 228/92

BETWEEN FRANCES NEALE of Avarua, Public Servant

Appellant

AND THE COOK ISLANDS POLICE DEPARTMENT

Respondent

Mr Mitchell for Appellant
Miss Maki for Respondent
Date:

JUDGMENT OF QUILLIAM J

This is an appeal against conviction and sentence on a charge that the Appellant, on 6 March 1992, drove a motor vehicle "while under the influence of drink or drug to such an extent as to be incapable of having proper control of such motor vehicle" (Transport Act 1986, Section 28).

After a defended hearing the Appellant was convicted and fined $70.00 and ordered to pay Court costs of $30.00 and was disqualified from driving for 6 months.

Because of the destruction of Court records it has been necessary to reconstruct the evidence from secondary sources, but there seems little doubt that a fairly clear account of the case has been achieved.

The Prosecution case comprised the oral evidence of two police constables, and a written report from a doctor which was presented by consent without the need for the doctor to give evidence. It is necessary to set out the main features of the Prosecution case.

Constable Ioane said that at 12.50am he was on duty outside the CITC building at Avarua. He saw a car being driven in an erratic manner and followed it. The car increased its speed to 50 to 60 kilometres per hour. It turned left at Avatiu and continued erratically. It failed to negotiate a left bend just past the Avatiu Tennis Court and crashed into a hedge, ending upside down. The driver, who was the Appellant, was sitting in the driver's seat and the Constable assisted her from the car. She was unsteady on her feet and there was a smell of alcohol on her breath. She was taken to hospital.

Constable Howard gave evidence that he also had observed the erratic driving and followed the car along the waterfront to the Avatiu turnoff to the point where it crashed into the hedge and turned upside down. After the Appellant was assisted from the car she asked to be taken home. She was bleeding from

injuries to the head and face, her speech was "slurry" and she was repeating herself. She told the Constable that she had been in Timaru [illegible] and had had drinks there.

A sketch plan prepared by Constable Lucas was put in evidence. This was not to scale, but showed the path of the Appellant's car as having swerved across the road some time before finishing up in the hedge.

At the hospital the Appellant was treated by a doctor whose written report to the Police was as follows -

> "This 29 year old female was involved in a motor vehicle accident on the 7th March 1992. She was brought in by the Police around 1.30 am 7.3.92. On examination smelled of alcohol slurred speech. Bleeding from the nose with slight tenderness. A superficial abrasion on the right elbow. Otherwise other examination findings normal. Wounds dressed and discharged. She was advised to be reviewed again for x-ray of the nose. Conclusion: A 29 year old female with evidence of alcohol intoxication. Apart from superficial abrasions and bleeding nose there is no obvious major injuries."

The argument advanced to the Justice, and repeated on the appeal, was that, even if the Appellant had been drinking, there was no evidence that her consumption of alcohol had rendered her incapable of having proper control of her car. There was no evidence from anyone with the qualifications in such matters that any alcohol which the Appellant had consumed had rendered her so incapable.

It must be said at once that the prosecution case was not presented in the way which the Courts have come to expect in such cases. The Court will normally expect to hear evidence from a doctor or an experienced police officer (whose qualifications to give such an opinion must be stated) that the defendant was, in the opinion of the witness, so affected by alcohol as to have been incapable of having proper control of a vehicle.

It was argued for the Appellant that; without such expert opinion, the Prosecution case cannot be regarded as established, and that the absence of any such evidence in this case was fatal. I am unable to accept that. It is not difficult to imagine a set of facts which ~~was~~ is so compelling as to force the Court to the only sensible conclusion, namely that the defendant was so affected by alcohol as to have been incapable of proper control. There is no doubt however, that the better form of presentation ~~if~~ in such a case is for some qualified person to give an expert opinion and this is most usually a medical witness. This has the added advantage of eliminating any medical condition which might simulate intoxication.

In the absence of such evidence in the present case the real question for determination is whether the proved facts were such as to have required the Court to draw the inference that the Appellant was not only incapable of having proper control of her car, but also that this was due to her consumption of alcohol.

There was clear evidence that the Appellant had consumed alcohol. She admitted as much and her breath smelled of alcohol. There was, however, no evidence to indicate how much she had

consumed. The doctor's comment that there was "evidence of alcohol intoxication" is equivocal. There is no indication whether the degree of intoxication was slight or gross, nor as to the way in which it manifested itself.

The evidence that the Appellant was unsteady on her feet, kept repeating herself and had slurred speech may well, in a normal case, have pointed to advanced intoxication. She had, however, been extracted from her car after it had turned upside down, causing injuries to her head and face, and there is no means of knowing to what extent that experience could have accounted for what was observed.

There is no doubt that the Appellant drove erratically with the result that she failed to take the bend. Again, that may well have been due to the consumption of alcohol, but it does not seem that other possible explanations can be excluded.

I have already observed that expert opinion was not essential, but in its absence it was necessary for the facts ~~that~~ to point only to guilt. The case as presented was, in effect, circumstantial, which meant that any other reasonable hypothesis had to be excluded.

It is undoubted that the case presented to the Justice raised grave suspicion of the Appellant's guilt, and it may well be that she is most fortunate that the usual kind of evidence was not given. It is, however, axiomatic that suspicion is not enough. The case had to be proved beyond a reasonable doubt. It was conceded on behalf of the Appellant that the submission

made on the appeal may seem unmeritorious. She is however, entitled to the benefit of any doubt.

Although with considerable reluctance I conclude that the evidence as presented fell short of what was necessary to found a conviction. Notwithstanding my sympathy for the view taken by the Justice the appeal must be allowed and the conviction quashed. In these circumstances the appeal against sentence does not require to be considered.

There will be no Order as to costs.