SHIU DASS *v.* THE POLICE

[Appellate Jurisdiction (Hyne, C.J.) February 23rd, 1956]

The appellant was convicted by the Magistrate at Nadi of the offence of being in charge of a motor vehicle when under the influence of drink, contrary to section 59 (1)* of the Traffic Ordinance, 1946.

The facts proved were that the appellant was slightly drunk and therefore allowed his friend to drive him in his car home. On the way a slight accident occurred and the friend ran away leaving the appellant leaning against the door of the car. The police then arrived.

On appeal against the conviction—

HELD.—(1) In these circumstances the appellant was in charge of the vehicle.

(2) That the circumstance amounted to "special reasons" for not disqualifying the appellant.

Cases referred to:—

Duck v. Peacock [1949] 1 A.E.R. 318.
Jowett-Shooter v. Franklin [1949] 2 A.E.R. 730.
Leach v. Evans [1952] 2 A.E.R. 264.
Roberts v. Haines (1953) 1 W.L.R. 309.

D. S. Sharma for the appellant.

Justin Lewis, Acting Solicitor-General for the respondent.

HYNE, C. J.—In his judgment the learned Magistrate said:—

> "The facts I find against him amount to this. He got rather drunk, he allowed his friends to drive his car away, the car had a slight accident, his friends fled and he was left still intoxicated, leaning on his car. There is no direct evidence as to the whereabouts of the ignition key but I think it is clear that it must have been still in the car."

The question for determination is:—On these facts, can the appellant be said to have been in charge of the car?

It is submitted by learned counsel for appellant that by his conduct appellant had put his car in charge of the constable. The learned Magistrate said there was no evidence before him that appellant had put his car in charge of anyone.

The learned Magistrate relied on the case of *Roberts v. Haines* (1953), 1 W.L.R. 309.

In this case—

> "The defendant was found by the police in an intoxicated condition in the rear yard of a motor garage within about five feet of a motor-cycle. The defendant was charged with being in charge of the motor-cycle when under the influence of drink. The justices found that his presence near the motor-cycle was involuntary, as he was brought there by friends to get water, and that the friends intended and would have been able to stop him from riding the cycle. The justices were not satisfied that he really intended to ride it, and found him not guilty."

* S. 33 of *Traffic Ordinance*, 1954.

Lord Goddard, C.J., at page 311 said as follows:—

"How can it be said under these circumstances that the defendant was not in charge of the motor-cycle? He had not put it into anybody else's charge. It may be that, if a man goes to a public house and leaves his car outside or in the car park and, getting drunk, asks a friend to look after the car for him or to take it home, he has put it in charge of somebody else; but if he has not put it in charge of somebody else he is in charge until he does. His car is out on the road or in the car park—it matters not which—and he is in charge."

There are numerous other cases dealing with the question as to when a person is "in charge" of a motor vehicle.

In *Duck v. Peacock* [1949] 1 A.E.R. 318, it was held that a driver who was drunk and asleep in his car, was in charge of the car. The motorist entered his car after taking liquor. He started driving, felt dizzy and stopped the car and fell asleep. He was convicted of being in charge of a car while under the influence of drink.

In *Jowett-Shooter v. Franklin* [1949] 2 A.E.R. 730, a driver realizing he was drunk, sat in the passenger's seat with the ignition key in his pocket. He had no intention of driving. He was convicted of being in charge of the vehicle.

In *Leach v. Evans* [1952] 2 A.E.R. 264, respondent approached a motor van.

"The respondent approached a motor van which was stationary at the side of a road, and, when he was about three yards from it, he informed a police officer that he was looking for his van, that the van in question was his, and that he was going home. Observing that he was under the influence of drink, the police officer arrested him. On a charge against the respondent of being in charge of a motor vehicle on a road while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, S. 15 (1). Held.—There was evidence that the respondent was 'in charge' of the van at the material time, within S. 15 (1) of the Act of 1930."

Section 59 (1) of Ordinance No. 2 of 1946 uses the words "in charge" as does S. 15 (1) of the Road Traffic Act, 1930.

The learned Magistrate held as a fact, that the appellant had not given the charge of the car to anyone else, and I think he was justified in so holding. On the authorities cited it is immaterial whether he was driving the car, or in the driver's seat. If he had been asleep in the car, or was only standing near the car, he could still be in charge of the car.

It has also been urged that it is necessary to show that the key was there, so that the car could be driven.

The learned Solicitor-General rightly says that there can be no presumption about this at all, but there is evidence that the car was not totally incapacitated for at page 12 of his judgment the learned Magistrate says:—

"If the accident had been such as to totally incapacitate the vehicle it may be that the necessary power of control would be absent but the photographic exhibits clearly show the vehicle with its driving wheels on the tar-sealed road and there has been no suggestion of its being immovable."

I agree with the Solicitor-General when he says *Jowett-Shooter v. Franklin* applies insofar as in that case, too, the driver had no intention of moving the car.

Whatever the position may have been about the key, the real question is—Had appellant put the car in anybody else's charge? There is no evidence that he had.

This being so, he must be held to have been in charge, and the appeal against conviction fails.

The appellant has, as I have said, also appealed against sentence. He was fined £20, and he was disqualified from holding a driving licence for six months.

The appellant was charged under Ordinance No. 2 of 1946. Section 87 of this Ordinance gives the Court a discretion in the matter of disqualification.

Section 87 makes no reference to "special reasons" for not disqualifying a driver convicted of an offence under S. 59 (1). The present Ordinance No. 16 of 1954, does make such provision in S. 33 (2) which follows precisely the wording of S. 15 (2) of the Traffic Act, 1930.

Inasmuch as under the Ordinance under which appellant was charged, the Magistrate has a discretion, it is I think permissible to consider whether the facts in this case disclose any special reason why the Court should not have disqualified the appellant.

The learned Solicitor-General admitted the facts might disclose special reasons.

What constitutes "special reasons" is to be found in *Jowett-Shooter v. Franklin* in the judgment of *Lord Goddard* at page 731, where he says:—

> "This Court has laid it down authoritatively in *Whittall v. Kirby* (1) that to find special reasons for not disqualifying a convicted person for holding a driving licence the facts said to constitute special reasons must be special to the offence and not to the offender. In other words, the mere fact that it would cause great hardship to the offender—financial hardship or business hardship, whatever it might be—or the fact that he has never been convicted before, or that he has just begun to drive, or some matter of that sort, is not a ground which can be regarded as affording 'special reasons'."

The learned Magistrate found that appellant did not drive the car, and when the police arrived he was leaning on the door of the car. I think these can be regarded as special reasons justifying non-disqualification.

I therefore set aside the order of disqualification. The fine imposed is not set aside and must be paid.