MANI LAL

A

v.

REGINAM

[SUPREME COURT, 1978 (Grant C J.), 10th November]

B *Criminal law—practice and procedure—traffic offences—notice of intended prosecution —whether necessary to serve notice when charge laid within* 14 *days of the alleged offence —Traffic Ordinance (Cap.* 152*) ss.* 38(1), 41.

The appellant was charged in the Magistrate's Court with dangerous driving. Although the charge had been laid the day after the incident complained of, the Court acquitted the appellant on the ground that no notice of intended prosecution C had been served upon him as was required by the Ordinance.

Held: Allowing the Respondent's cross-appeal: Section 41 of the Traffic Ordinance has no application where the driver is charged within 14 days with an offence to which Section 41 applies.

Cases referred to:

D *Heydon* (1584) 76 E.R. 637

R. v. Bilton (1964) 108 S.J. 880

Appeal against conviction and sentence for driving under the influence of drink in the Magistrate's Court; cross-appeal by the Director of Public Prosecutions against acquittal on a charge of dangerous driving.

E GRANT C.J.:

On the 15th of August 1978 at Suva Magistrates Court the appellant was convicted after trial of driving under the influence of drink contrary to section 39(1) of the Traffic Ordinance and was fined $350 and disqualified from holding a driving licence for two years.

F The appellant was originally charged with an additional offence of dangerous driving contrary to section 38(1) of the Traffic Ordinance but at his trial the prosecution conceded that in regard thereto the appellant had not been served with a notice of intended prosecution under section 41 of the Traffic Ordinance and in consequence he was acquitted.

The appellant has appealed against the conviction and sentence and the Crown G which for convenience I shall continue to refer to as the respondent has appealed against the acquittal of the appellant in respect of the charge of dangerous driving.

The prosecution evidence established that on the evening of the 16th July 1978 the appellant was driving a truck along Kings Road in the direction of Suva in a zig-zag manner, on and off the footpath, and other road users had to take avoiding H action. The truck ultimately stopped obliquely across the road, causing an obstruction, and a police officer apprehended the appellant. He smelled strongly of liquor,

his speech was slurred, he was unsteady on his feet and had to be assisted into the police vehicle. At the police station the appellant refused to be examined by a doctor but agreed to carry out some tests in the presence of the detective senior inspector on duty. On standing up he nearly fell over and had to grasp the table for support. He was unable to walk straight, and on being asked to turn round he lost his balance and had to hold on to the wall. With his eyes closed he was unable to touch his nose with his fingers or to place his fingertips together. He admitted having taken gin but could not remember how much he had drunk. The detective senior inspector was of the opinion that the appellant was drunk, and he was detained overnight and on the following morning he was charged by the police with drunken driving and with dangerous driving. On the same morning he was taken before Suva Magistrates Court on a charge of drunken driving and dangerous driving to which he pleaded not guilty.

A

B

At his trial the appellant admitted having drunk three or four "nips" of gin but denied that he was drunk and called a witness to that effect who had been drinking with him. The appellant also claimed that the reason he was unable to walk in a straight line at the police station was a leg injury.

C

The trial Magistrate did not believe the defence and accepted the prosecution evidence, which was sufficient to ground a conviction not only for drunken driving but also for dangerous driving.

D

In his petition of appeal the appellant claims that there was a conflict between the evidence of some of the prosecution witnesses, but having perused the record I am satisfied that there was no material discrepancy. The appellant also maintains that the detective senior inspector, not being an expert witness, was not entitled to say that the appellant was so drunk as to be unfit to drive. That is so, but the detective senior inspector did not presume to testify that the appellant was so drunk as to be unfit to drive. What he did say was that after examining the apellant at Central Police Station he informed him that in his opinion he was drunk to such an extent as to be incapable of having proper control of a motor vehicle, which was simply a recital of a conversation that had taken place between him and the appellant, not evidence of the appellant's incapacity. The appellant also claims that he was not involved in an accident which is irrelevant; and that there was insufficient evidence to convict him of drunken driving—a submission which cannot be sustained.

E

F

As to sentence, this was not harsh and excessive as the appellant maintains but was fully justified in the circumstances of the case. His appeal is accordingly dismissed.

As to the cross appeal of the respondent, at the close of the prosecution case, the prosecution having conceded that the appellant was not served with a notice of intended prosecution under section 41 of the Traffic Ordinance, defence counsel submitted that the appellant could not be convicted of dangerous driving and the trial Magistrate upheld that submission for the following reasons:-

G

> "In my view the provisions of section 41 Cap. 152 not complied with. None of the three ways of advising the accused of the charge against him was followed. He was not warned at the time, he did not receive notice of intended prosecution within 14 days, he did not have summons served on him within 14 days.
>
> This technicality is a strict one. It is ridiculous in the extreme but it is the law.

H

None of those courses open to the police was followed. It is, in my view, ludicrous to be able to shelter under such a technicality but put simply it has not been complied with. The police could easily have served accused with notice of intended prosecution before he came to Court that day. I regret that the law is such an ass in this case but it is the law and this Court cannot legislate. Accused is entitled to the full protection of the law and I give it to him. He is acquitted on Count 2."

I intend no disrespect to the trial Magistrate when I say that the law is not an ass. Certainly there are occasions maily due to unfortunate drafting of legislation, when the law appears to be an ass; but it is for the Courts, so far as they are able, to ensure that the appearance does not become the reality.

The classic approach to the construction of legislation was laid down in *Heydon's* case (1584) 76 E.R. 637 at 638 as follows:

"For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) What was the common law before the making of the Act (2) What was the mischief and defect for which the common law did not provide (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth (4) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

Section 41 of the Traffic Ordinance reads:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Ordinance relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—

(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or

(b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence:

Provided that—

(a) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—

(i) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable

diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or

(ii) the accused by his own conduct contributed to the failure; and

(b) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

Under the common law there is no comparable provision, and the purpose of the enactment is to ensure that a driver is not taken by surprise long after the commission of a driving offence by being charged with it when his recollection is dull witnesses may be difficult to trace *(R. v. Bilton* (1964) 108 S.J. 880). If a person is driving regularly it may be very difficult for him, on being charged with speeding, or careless or dangerous driving long after the event, to pinpoint in his memory the precise incident which have rise to the charge, and even if he is able to recall it the lapse of time may render it difficult or impossible for him to prepare a proper defence. This is the defect for which the common law did not provide, and for which Parliament, in the interests of the proper administration of justice, has provided a remedy by section 41. Once the reason for section 41 is appreciated it is clear that if a driver has been charged with the offence within fourteen days section 41 has no application. Any other construction would be manifestly absurd and could entail, for example, having to serve an offender with a notice of intended prosecution or a summons after he has appeared before a court on the charge. The sole purpose of the section is to put the driver on notice and chaging him with the offence puts him on notice in a more forcible manner than the procedures laid down by section 41. In accordance with the proper cannons of construction I hold, therefore, that section 41 applies only when a driver has not been charged within fourteen days with the offence or offences to which the section relates.

Consequently the trial Magistrate should have found that there was a case for the appellant to answer in respect of Count 2. However, as the appellant's defence was not directed to the charge of dangerous driving, if this Court were to set aside the acquittal it would be necessary to remit the case to the trial Magistrate for him to proceed with the trial of the appellant on that charge. As the trial Magistrate is not at present in Fiji and as the sentence imposed by him is adequate in all the circumstances, the respondent is not asking for this course of action to be taken. Accordingly, while the cross appeal of the respondent succeeds in law, I make no order in furtherance thereof.

Appeal dismissed; cross appeal allowed without further order.